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The Role of Digitisation in Employment and Its New Challenges for Labour Law Regulation

The Hungarian, Italian and Spanish Solutions, Comparison, and Criticism*****

Abstract

The study comprehensively presents the main effects of digitisation. Due to its complexity, digitisation affects the employment and labour markets in different ways. It partially changes working conditions, brings to life new forms of employment and, as a result of the development of technology, professions disappear. Thus, all this necessarily poses different challenges to the legislation. The forms of work in the gig economy – which was brought to life by the online space – cannot be classified as a traditional legal framework. Teleworking has been absolutely valorised by the coronavirus pandemic. Looking to the near future, after the end of the pandemic, teleworking is expected to play a much more significant role in the labour market. The study presents the marked forms of digitisation that have emerged in employment and summarises its supranational legal issues. It also presents the digitisation characteristics of Hungary, Italy and Spain. It examines how legislation and the judiciary have provided answers to the issues of digitisation. Consequently, the study

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analyses three main trends: the impact of digitalisation in general, telework, and the gig economy, with special regard to the categorisation of workers (employees, self-employed and possible third categories in between). The study argues that the concept of 'employment relationship' has to be interpreted in a much broader way; general guarantees must be valid for all forms of work performed by people in economic dependence and in a state of economic weakness.

Keywords: digitisation, telework, crowdwork, application-based work, automation, robotics, classification of employment

I Overall Context: Manifestations of Digitisation in Labour Matters

'*Digitisation* is the process of converting information from a physical format into a digital one.'[1] Digitisation is not just about using digital devices. This is even more complex, with a change in mindset behind it. We achieve new results with new tools and new procedures.

Digitised information has become a *strategic resource*, with the network becoming the main organising principle, both in the economy and in society. In the spring of 2020, the *epidemic* also boosted corporate digitisation a lot. This could be perceived during everyday administration or work. More and more processes had to be carried out using digital tools. Experts also say that digitisation could be a big winner of the coronavirus.[2]

According to our assessment, to summarise the impact of digitisation:

a) it partially changes the *working conditions* in the *employment relationship* (e.g. widespread use of telework),

b) it makes certain jobs redundant due to *automation* and *robotics*, and

c) there are forms of *dependent employment*, which do not form part of the employment relationship.

The study focuses on the labour law aspects of the phenomena of digitisation listed above and analyses them at both international and national legal levels. The article presents – among other things – the legislative achievements and the loopholes.

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1 David Burkett, 'Digitisation and Digitalisation: What Means What?' <https://workingmouse.com.au/innovation/digitisation-digitalisation-digital-transformation/> accessed 10 November 2021.

2 'A digitalizáció lehet a koronavírus nagy nyertese a pénzintézeteknél' [Digitization could be the big winner of the coronavirus in financial institutions] Portfolio. <https://www.portfolio.hu/bank/20200506/a-digitalizacio-lehet-a-koronavirus-nagy-nyertese-a-penzintezeteknel-430266#> accessed 10 August 2021.

1 Forms and Conditions of Employment

The European economy, in addition to well-known problems such as aging, depopulation, migration and the declining number of newly established, dynamic businesses are increasingly exposed to the adverse effects of digitisation, automation and robotisation on employment. Previously, employment problems accompanying the introduction of new technologies were temporary, short-term adaptation difficulties. However, after the turn of the millennium, with the spread of digitisation, we can witness again – in general terms – the so-called resurrection of views representing *automation anxiety*. According to some literature, this is a comprehensive transformation which may affect all occupations to a greater or lesser extent, depending on the content of the task.[3]

Volumes could be written about the employment consequences of digitisation. The study – subject to the nature of such a publication – summarises the forms of digitisation to which at least one of the 'country reports' or parts of international law (Supranational Context) is linked.

a) The impact of telecommunications – changes over three generations

We are witnessing and participating in the rapid expansion and interconnection of *computing* and *telecommunications*. In the case of an employment relationship – if the work tool is only a computer – a work organisation solution offers an alternative: the *traditional workplace* (e.g. the company office) or *teleworking*. Or a hybrid version of the two: the home office. These work organisation methods quickly became popular. On the one hand, they are favourable for employers. The basic premise is that if the parties can *reduce costs* by choosing the type of contract, it is the normal and rational behaviour of labour market actors to orient themselves towards the cheapest type of contract. This aspect is perhaps the most obvious in the case of telework.[4] On the other hand, those who are otherwise unable to find employment due to a *health problem* may have access to employment.

There are *three generations of telework*. The first is its appearance in the 1970s. The place of work is *separated from the employer's area of operation* but is still fixed for work due to the limitations of the available IT technology.

The second generation is the era of the *mobile office*. IT devices spread rapidly, a technological feature of the era: new devices (mobile phones, tablets, laptops) made it possible to work without being tied to a place. However, communication technology can still be separated from information storage. The storage of information is tied to the

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[3] Erik Brynjolfsson, Andrew McAffe, *The Second Machine Age. Work, Progress, and Prosperity in a Time of Brilliant Technologies* (W.W. Norton & Company 2016, New York, London) 8.

[4] Gyulavári Tamás, *A szürke állomány. A gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán [The grey matter. Economically dependent work on the border of employment and self-employment]* (Pázmány Press 2014, Budapest) 110.

device carrying it; there is no permanent connection between the device for work and the employer's information storage system. Telework is so widespread that the social partners in the EU consider it necessary to regulate. The *European Telework Framework Agreement* (abbreviated ETFA) is concluded (signed and entered into force 16 July 2002).

The third generation is the *virtual office*, which is technologically linked to the permanent networking of the computing device. Mobile Internet allows continuous connectivity, resulting in 'cloud-based' data storage for real-time access to data. The work can be done from anywhere and anytime; the results of the work are available to the employer without delay. A virtual office means that the workplace in practice becomes virtual.[5]

b) Definition of telework

Although there are several definitions of telework, we use the definition of the ETFA in our paper. According to this, telework is a form of *organising and/or performing work*, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis. There are *three essential content elements* in the definition that can be used to describe all forms of telework:

– the *regular form* of work organisation,
– *separation* of the place of work from the employer's premises,
– use of *computer equipment* in the course of work.[6]

2 Impact of Automation and Robotics – Change Working Conditions or Eliminate Jobs?

Automation is fundamentally transforming the world economy and the labour market, because almost 49% of work tasks can already be *automated technically*. According to forecasts, automation is projected to transform rather than replace human work. As a first step in automation, the employer usually needs to invest in education about the new technology. This is essential to remain competitive and to ensure a workforce that adapts to change. One example of automation is building automation, the area of providing a comfortable built environment for people and optimising operating expenses (Building

[5] Jon C. Messenger, *Telework in the 21st century: An evolutionary perspective* (The ILO Future of Work series, International Labour Organization 2019, Geneva) 5–8. DOI: 10.4337/9781789903751.00005

[6] Bankó Zoltán, *A távmunka szabályozásának dilemmái, Ünnepi tanulmányok Lőrincz György 70. születésnapja tiszteletére [Dilemmas in the regulation of telework, Festive studies in honor of György Lőrincz's 70th birthday]* (HVG-ORAC 2019, Budapest) 20–23.

Management System – BMS). Their task is to control and automatically control mechanical, safety, fire and flood protection and lighting equipment with digital devices.[7]

Robotics – partly unlike automation, but not necessarily – can *replace human labour*. A good example is *Robotic Process Automation* (RPA). This means implementing standardisable processes with software robots. These *software robots* replace people in *administrative jobs*. As more and more repetitive, monotonous activities are performed by physical robots in the industry, software robots take over such routine tasks in office work. In the United States and Europe, 1.7 million banking jobs were expected to be lost in the 2020s due to the rise of software robots. At the same time, the RPA does not only eliminate but *transforms jobs*. It does not act by terminating the work of 40 out of 100 employees, but by taking over 40% of the tasks of each employee. Undoubtedly, this will ultimately lead to the elimination of jobs, offering individuals the opportunity to take on more creative, more value-added tasks instead of their previously tedious, monotonous tasks.

The RPA is expected to halt or reverse the process by which multinational companies outsource standardisable, administrative work to low-cost countries. Instead, they set up software robots close to the company headquarters. Over the past decade the proportion of *'Taylor workers'* has increased significantly in Central and Eastern Europe countries. These are the jobs that are most easily triggered with machines and robots. Today, it is perhaps even cheaper to carry out these activities in the *low-labour-cost countries* of this region. However, it is a realistic scenario that, with technological advances, they will be taken back to the parent company, where computers or robots will do this work instead of Eastern European workers.[8] At the same time, the more developed a country is in terms of digitalisation (e.g. use of broadband technologies, IT skills of employees, e-government), the less exposed it is to similarly drastic changes.[9] According to experts, the spread of RPA solves the problem of advanced economies in having more people exit the labour market than in those societies.[10]

7 Fine, David, Havas András, Hieronimus, Solveigh, Jánoskúti Levente, Kadocsa András Péter, *Átalakuló munkahelyek: az automatizálás hatása Magyarországon [Transforming jobs: the impact of automation in Hungary].* (McKinsey & Company 2018) 7–8, <https://www.mckinsey.com/~/media/McKinsey/Locations/Europe%20and%20Middle%20East/Hungary/Our%20Insights/Transforming%20our%20jobs%20automation%20in%20Hungary/Automation-report-on-Hungary-HU-May24.ashx> accessed 10 August 2021.

8 Makó Csaba, Illéssy Miklós, Borbély András, 'A digitalizáció és a munkavégzési formák' [Digitalization and types of work] (2018) 179 (1) Magyar Tudomány, 61–68. DOI: 10.1556/2065.179.2018.1.7.

9 Chrystophe Degryse, 'Digitalisation of the economy and its impact on labour markets' (European Trade Union Institute, ETUI Research Paper, Working Paper, 2016) 18, DOI: 10.2139/ssrn.2730550; About the topic see I. Daugareilh, C. Degryse, P. Pochet (eds), 'The platform economy and social law: Key issues in comparative perspective' (ETUI Working Paper, 2019/10) DOI: 10.2139/ssrn.3432441; A. Piasna, J. Drahokoupil, 'Digital Labour in Central and Eastern Europe: Evidence from the ETUI Internet and Platform Work' (ETUI Working Paper, 2019/12) DOI: 10.2139/ssrn.3500717; Janine Berg, Uma Rani, Marianne Furrer, Ellie Harmon, M. Six Silberman, *Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World* (Geneva 2018, ILO).

10 'The impact of RPA ont the Changing Global Labour Market' (2018) <https://www.cigen.com.au/cigenblog/impact-of-rpa-on-changing-global-labour-market> accessed 10 August 2021.

During the 2008–2009 global economic crisis, the digital age emerged as a breakthrough point among developed European countries. Based on the *European Working Conditions Survey*, we highlight two key factors for automation. Neither work tasks that require complex *cognitive skills* are suitable for automation, nor those in which employees have a high degree of autonomy. At the end of the cluster analysis, three major groups of workers could be distinguished:

– *creative employees*, who have to use their cognitive skills to a large extent in their work and enjoy a high degree of autonomy,

– *jobs organised according to Taylor principles* represented the other end of the scale, the use of cognitive abilities and autonomy being the least characteristic,

– between the two groups, but closer to the creative workers, there is a group of so-called *constrained problem solvers* who do creative work but have significantly less autonomy in their work.[11]

3 The Gig Economy

A steady increase experienced in employment segments related to digitisation. In the changed environment, the conditions of classical work cannot be enforced. In its most important characteristics, it *differentiates the so-called gig economy* from classic labour market solutions. There are mostly differences in the equipment used, working hours and regularity. The term gig economy focuses on *innovative forms of work*, expressing that they are in most cases short-lived, but several times, alternating consist of repetitive work, for example, *self-employed freelancer contracts* for a specific task. Many times, they are specialists who take jobs in these ways. The product of the gig economy is work, and its basic promise is *providing services* rapidly at *low cost* based on a large number of available standing staff. The central question of the gig economy is (*re)making work a commodity*.[12]

The gig economy has both advantages and downsides. On the one hand, there are some *positive aspects*. Employers have a *wider range of applicants* to choose from because they do not have to hire someone based on their proximity. Additionally, computers have developed to the point that they can either take *the place of the jobs* people previously had or allow people to work just as efficiently from home as they could in person. However, people who do not use *technological services* such as the Internet may be *left behind by the benefits* of the gig economy.

Some features of the *downsides*: a gig economy undermines the *traditional economy of full-time employees* who often focus on their career development. The gig economy trend

[11] Makó, Illéssy, Borbély (n 8) 61–68.

[12] Valerio de Stefano, *The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the «gig-economy»* (Conditions of Work and Employment Series No. 71, ILO 2016, Geneva) 8. DOI: 10.2139/ssrn.2682602

can make it *harder* for full-time employees to *develop in their careers,* since temporary employees are often cheaper to hire and more flexible in their availability. Employees who prefer a traditional career path and the stability and security that come with it are being crowded out in some industries. For some workers, the flexibility of working gigs can actually disrupt the *work-life balance*. Flexibility in a gig economy often means that workers have to make themselves available any time gigs come up. In effect, workers in a gig economy are more like *entrepreneurs* than traditional employees. While this may mean *greater freedom* of choice, it also means that the workers lose security, especially of a steady job with regular pay and benefits.[13]

Overall, the *disadvantages* – on the employee side – are *more significant* than the positives. As technical progress is unstoppable, *legislation must respond* to this trend.

The gig economy is giving new answers to the challenges of the labour market. These forms of employment are primarily amongst the members of *Generation Y* become very popular. They spend a significant part of their days online. One of the key moments of the gig economy is *sharing*. The point is that unused resources need to be used in a new way, and this new way is realised through the provision of a service that is sold in the *online marketplace*. The services of the gig economy consist on the one hand of so-called *crowd work*, and the other hand *application-based work*.[14]

a) Crowdwork – digital outsourcing

'Crowdwork' means the work that is done in the context of *crowdsourcing*. What does crowdsource mean? The activity of an enterprise outsourcing a function previously performed by its employees to a pre-defined (typically large) group in the form of an open call. In this form, there is no obstacle to individual work either, but *group work* is much more common. In this solution, the work processes take place online throughout, including the transfer of the result. In this case, sharing means *sharing workflows* with people the customer will never meet, but the established system of relations does not even justify this. The goal is to perform the tasks quickly and efficiently. In addition, the parties will move out of their own local zone into the virtual space, thus *expanding the labour market* in front

[13] Ben Gitis, Douglas Holtz-Eakin, Will Rinehart, *'The Gig Economy' – Research and Policy Implications of Regional, Economic, and Demographic Trends* (The Aspen Institute Future of Work Initiative 2017) 2–4. About the topic see Sarah Kaine, Emmanuel Josserand 'The organisation and experience of work in the gig economy' (20 August 2019) Journal of Industrial Relations, DOI: 10.1177/0022185619865480#; Jamie Woodcock, Mark Graham, 'The Gig Economy: A Critical Introduction' (January 2020) Polity, DOI: 10.1080/00130095.2020.1831908; Joshua Healy, Icon, Daniel Nicholson, Andreas Pekarek, 'Should we take the gig economy seriously?' (2017) 27 (3) Labour & Industry: a journal of the social and economic relations of work, DOI: 10.1080/10301763.2017.1377048.

[14] Rácz Ildikó, 'Munkavállaló vagy nem munkavállaló? A gig-economy főbb munkajogi dilemmái' [Employee or non-employee? The main labour law dilemmas of the gig-economy] (2017) 10 (1) Pécsi Munkajogi Közlemények, 31.

of them and as necessary to exceed the local level. Typically, jobs can be performed in the context of crowdwork that involve intellectual and creative activities.[15]

b) Application-based work – the digital platform

Another major employment platform in the gig economy is application-based work. In this case, the work is usually done in the *traditional sense*. The *digital marketplace* plays a significant role in the conduct of the business between the customer and the service provider. Numerous services can be ordered through the applications (e.g. Uber taxi, food delivery). The novelty is that *online platforms* on the application-based work connect supply and demand. It brings market players closer together. Application-based work helps integrate into the labour market people who might not otherwise get a job. The downside is that wages are very low, in most cases not even reaching the minimum wage.[16]

4 The Impact of the Pandemic on the Spread of Digitisation in the World of Work

Right now, it is clear that, observing the predictions so far, only scenarios exist; no one can provide an *accurate forecast*. One of the key lessons of COVID-19 – even before the end of the epidemic is that, without the ongoing *digital revolution*, COVID-19 would have made life impossible. The whole economy, production, education, everything that requires a physical presence would have stopped, if there was no digital alternative to the activity. In many places, COVID-19 has either accelerated or forced digitisation. This emergency created an opportunity for as many things and processes as possible to have a digital alternative or solution. Changes in *information and communication technology* have made it possible for employers who already have sufficient training and experience in this field. These employers were able to respond relatively easily to overcoming the difficulties. Where work organisation allowed, direct face-to-face contact with the employer and with clients was eliminated.[17]

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15 Mélypataki Gábor, 'Az új foglalkoztatási formák és a társadalmi innováció hatása a szociális biztonságra' [The impact of new forms of employment and social innovation on social security] (2019) 6 (1) Magyar Munkajog E-folyóirat, 17–18. <hllj.hu/letolt/2019_1/M_02_MelypatakiG_hllj_2019_1.pdf> accessed 10 August 2021.

16 Ibid 18–19.

17 Géró Imre, Polacsik Gabriella, 'Karantén tanulságok: Hogyan alakítja át a felgyorsuló digitális forradalom gazdaságainkat' [Quarantine Lessons: How to Transform the Accelerating Digital Revolution Economies] (2020) 21 Acta Periodica; Journal of the University of Edutus, 4–28. DOI: 10.47273/AP.2020.21.4-28

The outside world could only be maintained by information and communication techniques a relationship. Therefore, companies in the economy that were already technically and humanly prepared were given an advantage. The impact of COVID-19 on the world is that *digitisation has changed as much in five months as it had in five years.*[18]

According to a survey of post-epidemic plans for digitisation among employers:

– 64% are transforming their organisation to *support telecommuting;*

– 55% define the roles required for *telework;*

– 47% believe that *automation* needs to be accelerated and new ways of working developed;

– 46% reorganise shifts and develop *alternative solutions* to operate customer services;

– It reduces the number of its existing properties, such as offices and retail space, by 44%;

– 22% use *digital devices* to communicate;

– 21% provide other *non–financial support* (such as childcare or transport) for staff working in vulnerable areas;

– 7% agree to provide *financial support* to staff working in the endangered area.[19]

II The Supranational Context – The ILO and EU Perspective of Employment and Self-employment

The problem of the *'platformisation of the economy'*[20] affects the qualification of the labour relationship.

The comparison between Italy, Spain and Hungary shows a tendency to extend the protection of subordinate labour to an intermediate area of workers, formally independent, but characterised by a state of economic weakness and by degree of integration into the contractors' organisation.

Our peculiar focus is to examine how this element emerges as a symptomatic subordination index.

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[18] 'A koronavírus 10 fontos világgazdasági hatása' [Coronavirus has 10 important global economic impacts] Növekedés.hu, online journal <https://novekedes.hu/elemzesek/a-koronavirus-10-fontos-vilaggazdasagi-hatasa> accessed 10 August 2021.

[19] 'A COVID-19 vírus hatása a digitalizációra' [Effect of COVID-19 virus on digitization] PwC COVID-19 CFO Pulse Survey, 20.04.2020. <http://hirek.prim.hu/cikk/139491/> accessed 10 August 2021.

[20] Antonio Casilli, *En attendant les robots* (Seuil 2019, Paris); M. Arfaoui, N. Losada, *Nouvelles formes d'emploi et syndicalisme: quels moyens d'actions et quelles protections pour les travailleurs de plateforme?* (CFTC 2020); A. Donini, *Il lavoro attraverso le piattaforme digitali* (BUP 2019, Bologna); E. Dagnino, *Dalla fisica all'algoritmo: una prospettiva di analisi giuslavoristica* (AdaptUP 2019).

1 The ILO: Criteria to Ensure Decent Work on Digital Work Platforms

Starting with the ILO perspective, it is necessary to consider that the ILO Recommendation R198 (abbreviated Recommendation) adopted on June 15, 2006,[21] points out a series of subordination indicators, and a particular relevance is attributed to the integration of workers in the contractors' organisation (para 13, letter a).

The essential question, of course, concerns the boundary between the employment contract and the enterprise and the legal concept of enterprise.

The Recommendation's annotated guide states that it is increasingly complex in most countries to establish whether or not a working relationship exists where:

1. the rights and obligations of the parties concerned are unclear, or
2. when there is an attempt to mask the relationship of work, or
3. when the legislation, its interpretation or its application are insufficient or limited (ILO, 2008).

The Recommendation sets out, in paragraph 13, a series of specific clues on the existence of an employment relationship.

However, the ILO instruments do not claim that the traditional categorisation should be overcome, or that it is necessary or advisable to introduce intermediate types of employment and self-employment.

Moreover, according to the Recommendation, an intervention of the Member States is not always required. Labour protection should be guaranteed for workers, including those nominally self-employed, against subcontracting and exploitation. With reference to the platforms, the 2018 ILO Survey (conducted between 2015 and 2017) shows that most platform workers are financially dependent on the income they earn from their microactivities.

The point is that some platforms decide when and where to work, penalise workers if they refuse a task, and set non-negotiable prices and quality standards.

The Report identifies eighteen criteria to ensure decent work on digital work platforms. We can point out just three of them:

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[21] About this complex topic see J.M. Thouvenin, A. Trebilcock, *Droit international social* (Tome 2, Bruylant 2013, Bruxelles) 903–913; J.M. Servais, *International Labour Law* (Kluwer 2020); A. Perulli, 'The legal and jurisprudential evolution of the notion of employee' (2020) 11 (2) European Labour Law Journal, 1, DOI: 10.1177/2031952520905145; B. Waas, G. Heerma van Voss (dir.), *Restatement of Labour Law in Europe* (Vol. I, The Concept of Employee, Bloomsbury 2017, Oxford). The Preamble of the Recommendation emphasises (considering the scope of the employment relationship) that « protection should be accessible to all, particularly vulnerable workers ». Particular attention to these issues can be found in the Analytical document of the Commission Staff Working Document on a possible action addressing the challenges related to working conditions in platform work, European Commission, Brussels, 15 June 2021, SWD(2021)143 final, especially on pages 35 and ff., where the document points out the risk of misclassification of the employment status.

1. Counteract the misclassification of work;
2. Apply the minimum wage current in the region where the workers are located;
3. Ensure transparency of payments and tariffs set by the platform.

Clearly, the first point is the key one.

The question of the criteria for qualifying and establishing subordination is taken up also by the 2021 ILO Report,[22] and the same 2019 ILO Centenary Declaration highlights the importance of the employment relationship (and its qualification) as a gateway to employment, labour and social protection.

It shows that the organisation and management of digital labour platforms is generally unilateral.

Moreover, the term 'worker' has different legal meanings in different jurisdictions. The 2021 Report schematically catalogues the approaches of the different national legislations regarding the employment relationship in four cases:

i) classification as employees, often on the basis of the control exerted by the platform,

ii) adoption of an intermediate category,

iii) setting of a *de facto* intermediate category,

iv) categorisation as freelancers on the basis of flexibility and autonomy.

The ILO also notes that some countries have introduced presumptions of subordination related to limited factual clues.

2 The EU: The Message of the CJEU Case Law

The integration of workers into the contractors' organisation gains particular attention in the European Union Law perspective as well.

A 2017 European Parliament Resolution [2016/2221 (INI)] on working conditions and precarious employment, in particular, expressly calls on the Member States to take into account the ILO indicators for determining the existence of an employment relationship.

The European Parliament emphasises the idea that (subordinate) employment implies workers' integration into the organisation of the undertaking.

[22] ILO, 2021, 'The role of digital labour platforms in transforming the world of work' <https://www.ilo.org/global/research/global-reports/weso/2021/WCMS_771749/lang--en/index.htm> accessed 10 August 2021. See also V. De Stefano, I. Durri, C. Stylogiannis, M. Wouters, 'Platform work and the employment relationship' (ILO Working Paper, 27, March 2021); N. Countouris, *Defining and regulating work relations for the future of work* (ILO 2019, Geneva); ILO, *Non-standard employment around the world: Understanding challenges, shaping prospects* (2016 Geneva).

The regulatory outcome of this conceptual development is Directive 2019/1152/EU[23] on transparent and predictable working conditions applicable

> to all workers in the Union who have a contract of employment or an employment relationship within the meaning of the law, collective agreements or practice in force in each Member State, taking account of the case law of the Court of Justice [art 1(2)].

In this 2019 Directive, the binary perspective (subordination and independent contract) is reiterated: 'genuine self-employed workers should not fall within the scope of this Directive, as they do not satisfy' the criteria established by the case law of the Court of Justice for determining worker status.

The framework of rights set by the Directive is limited to subordinate workers only, but the broader scope follows the development of the Court of Justice case law about the integration of the 'employed' worker into the undertaking of the others.

The seminal 1986 *Lawrie-Blum* judgment identifies as structural elements of the employment relationship 'the circumstance that a person provides, for a certain period of time, services for and under the direction of another person in return for which he receives remuneration' (CJEU, 3 July 1986, C-66/85, *Lawrie-Blum*, § 17).[24]

There are therefore three objective criteria to qualify the employment relationship:

1. the real and effective nature of the service personally provided by the worker;
2. the existence of a directive power;
3. the onerous nature of the service.

However, crucial differences emerge with respect to the dogma commonly accepted in national legal systems.

First of all, the Court reconstructs the structural elements of 'hetero-dependence' in a much more flexible manner (CJEU, 10 September 2014, C-270/13, *Haralambidis v. Casilli*).

In European case law, the notion of hierarchical 'direction' has been blurred by the less stringent concept of 'hetero-organisation', and therefore the assessment of the 'non-marginal', 'non-significant' and 'non-useless' economic nature of the service that plays a decisive qualifying role.

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[23] Also V. De Stefano, I. Durri, C. Stylogiannis, M. Wouters, *Platform work and the employment relationship*, quoted, 27, recognise that the EU Directive 2019/1152 'is a step forward in ensuring some minimum predictability for workers with unpredictable work schedules'.

[24] See, for all, Martin Risak, Thomas Dullinger, *The concept of 'worker' in EU law* (Report 140, European Trade Union Institute 2018) <https://www.etui.org/sites/default/files/18%20Concept%20of%20worker%20Risak%20Dullinger%20R140%20web%20version.pdf> accessed 10 August 2021; C. Barnard, *EU Employment Law* (2012 Oxford); T. Jaspers, F. Pennings, S. Peters (eds), *European Labour Law* (2019 Intersentia); E. Menegatti, 'The Evolving Concept of "worker" in EU law' (2019) 12 (1) Italian Labour Law e-Journal, DOI: 10.6092/issn.1561-8048/9699; Jeremias Prassl, *The Concept of the Employer* (Oxford University Press 2015, New York). DOI: 10.1093/acprof:oso/9780198735533.001.0001

Second, in the European perspective, the element of direction, once integrated, assumes a substantially recessive character.

It is thanks to this lighter notion of subordination, together with the appreciation of its economic utility, that the CJEU has included within the uniform concept of workers a heterogeneous group of flexible, atypical and nonstandard jobs.

In the framework briefly outlined above, the introduction of the Charter of Fundamental Rights of the European Union plays a decisive historical role, sanctioning the recognition of new rights, many of which have direct relevance to employment (arts 15, 27, 28, 30, 31, 32, 34).

In line with the case law of the CJEU, there has been a recent tendency to extend the uniform concept of workers to all areas where a fundamental right of the Union is involved, and thus beyond the field of anti-discrimination protection.[25]

This is a large area of EU Law, the teleological orientation of which is aimed at the constitution, in a cohesive form, of a protective statute of individual worker's rights. In any case, as the European Commission points out in the 2021 Analytical document on a possible action addressing the challenges related to working conditions in platform work [SWD(2021)143final], 'only an EU initiative can set common minimum standards that apply to all platforms operating in the EU' (page 77 of the document).

3 Teleworking, Valued by the Pandemic

Two decades ago, the EU did not consider it necessary to adopt a directive on telework. The ETFA – concluded by the European social partners – has provided adequate guarantees. Telework, which has become the focus of the pandemic, already requires a different level and content of European legislation. On 21 January 2021, the European Parliament adopted a Resolution inviting the European Commission to suggest a Directive guaranteeing workers the right to disconnect from the information technology tools used to carry out their work. The Directive should be addressed to private or public workers, regardless of the working method and employment sector. The draft Directive defines the right to disconnect, as the 'right of workers not to engage in work-related tasks or communications outside working hours by means of digital media, such as phone calls, emails or other messages'.

III Hungary: Widespread Digitalisation Loophole in Labour Law Regulations

As in several other Central and Eastern European countries, Hungary has a unified Labour Code, the *2012. évi I. törvény a munka törvénykönyvéről* (Act I of 2012 on the Labour Code, abbreviated LC) as a *post-socialist codification legacy*. In this respect, it does not carry

[25] See, for example, CJEU, 12 October 2004, C-313/02, *Wippel*; CJEU, 26 March 2015, C-316/13, *Fenoll*.

a pejorative meaning. On the contrary! In terms of the structure of the regulation, this is positive because, with a few exceptions all institutions of *individual and collective labour law* are regulated by one act. This is also important because labour law is that branch of law which many non-lawyers must apply in their work.

The Hungarian codification follows the *trend of traditional labour law* – but with many *concessions* and *flexibility*.[26] The LC defines the main qualifying criteria of the employment relationship in the regulation of the *employment contract*. Under this contract:

a) the *employee* is required to *work as instructed by the employer*,

b) the *employer* is required to *provide work* for the employee and to *pay wages* [LC pt II ch VII. s para 42 (2)].

Flexibility within the employment relationship means that the LC regulates a number of *atypical employment relationships*, such as the fixed-term employment relationships, call for work, job sharing, employee sharing, teleworking, outworkers and temporary agency work.

1 Labour Protection in Digitisation – Only for Telework

The provisions of the ETFA were introduced into the former Code, into *1992. évi XXII. törvény a Munka Törvénykönyvéről* (Act XXII. of 1992 on the Labour Code) and apply since 2004. The Hungarian regulations comply with the requirements of the ETFA. The teleworker's employment relationship is usually governed by the rules of the LC. The special rules relate only to the specifics of telework (e.g. the workplace is usually the employee's home, but the teleworker can enter the employer's territory at any time). The LC – in line with a number of national regulations – is also not in line with the legislative initiative voted by the European Parliament in January 2021. Hungarian law does not contain the right to disconnect a teleworker.

2 The Role of Teleworking in the Labour Market

The *pandemic* is a sharp dividing line in the spread of teleworking in Hungary. In 2018, *3.7 percent of employees* in Hungary, 144.000 employees, worked as teleworkers. At that time, the number of teleworkers was lower in only four other Member States compared to Hungary.[27] The epidemic and the restrictions imposed as a result forced employers to react quickly in the spring of 2020. In order for economic processes to function normally, more and more employers have made it possible to work from home. In May 2020, nearly 760,000

[26] Kiss György, *A foglalkoztatás rugalmassága és a munkavállalói jogállás védelme [Flexibility of employment and protection of the status of employee]* (Wolters Kluwer Hungary 2020, Budapest) 37.

[27] 'Telework in the EU before and after the COVID-19: where we were' Science for policy brief (European Commission, 2020) <https://ec.europa.eu/jrc/sites/default/files/jrc120945_policy_brief_-_covid_and_telework_final.pdf> accessed on 10 August 2021.

people, *17% of all employees* worked as teleworkers or in home offices.[28] That number had dropped by February 2021. Telework and home office affected 482,000 people, 11% of employees, in February 2021, approximately 3.5 times more than in 2018.

Teleworkers are *over-represented* among those *aged 25-44* and those living in the cities. The vast majority (77%) are *graduates*. The main activity of the employer basically limits the possibility of teleworking. There are big differences between *sectors*. For 2020 as a whole, the share of teleworkers in the fields of *information, communication* (39%), *scientific and technical activities* (33%), *financial services* (30%) and *education* (21%) was outstanding. In contrast, due to the nature of these areas, it has hardly occurred in *agriculture, health and social care*.

Teleworking has become one of the most commonly used methods of dealing with the changed labour market situation during an epidemic. Therefore, its wider spread is likely to have an impact on future labour market processes.[29]

3 In the Wake of a Lost Legislative Opportunity – A Person with a Similar Legal Status to the Employee

The Bill of the LC (hereinafter Bill) – as an absolute novelty – included a *rule for a person with a similar legal status to an employee* (person similar to the employee). This was consistent with the *Green Paper – Modernising labour law to meet the challenges of the 21st century COM (2006) 708 final*. Labour law focusing on the requirements of *modernisation* in the 21st century: the task of legislation is to *create flexible employment* – with *social security* for workers. According to the Bill, a person similar to the employee would normally have been the same as an *economically dependent self-employed worker (trabajador autónomo económicamente dependiente – TRADE)* under Spanish law. Under German law, this is the *'arbeitnehmerähnliche Person'*, under English law, this is a '*worker*'. This person is not a fictitious entrepreneur. Mostly he/she works under a contract of services or business. And he or she is as economically dependent on the recipient of their service as the employee. The Bill was similar to Spanish regulation.

One of the legislative goals was to provide the same *social protection* to curb illegal employment. According to the Bill, a person similar to an employee, in view of all the circumstances of the case, who does not perform work for another part on the basis of an employment contract, if

a) he/she *carries out work* for the same person in person, for *remuneration*, on a *regular* and *continuous basis*, and

b) no other regular *gainful activity* is expected in addition to the performance of the contract.

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[28] Nagy Attila, 'Távmunkában Magyarország' [Hungary in teleworking] (2020) <https://epale.ec.europa.eu/hu/blog/tavmunkaban-magyarorszag-0> accessed on 10 August 2021.

[29] Központi Statisztikai Hivatal (Hungarian Central Statistical Office), 2021 <https://www.ksh.hu/docs/hun/xftp/idoszaki/munkerohelyz/tavmunka/index.html> accessed on 10 August 2021.

An additional condition was that the amount of regular monthly *income* from this contract should not exceed five times the mandatory minimum wage. According to the Bill, the provisions of the LC on *leave, notice, severance pay* and *employees' liability for damages* should have been applied in this case. Furthermore, the monthly income of a person similar to the employee could not have been lower than the minimum wage. Finally, this rule was omitted from the text of the law passed by Parliament. In the last decade, the legislation has not repaid this debt.[30]

According to the authors' assessment, the Hungarian legislation must act. The lack of legislation could be a particular problem in *application-based work* (platform-based work). There is usually no reliable data on its size. Together, the lack of accurate statistics and the diversity of digital platforms make it significantly more difficult for legislation to respond appropriately to this phenomenon.[31] Although internet work websites are mostly not in *Eastern and Central Europe* (except Estonia), legislation should prevent problems in Hungary, and not to react when the problem – in the absence of legislation – becomes huge.

The existence of the following of the indicators of the existence of an employment relationship in the Recommendation may form the basis of a person with a *similar legal status to the employee's legal regulation:*

a) the work

aa) is *performed solely* or mainly for the *benefit* of another person,

ab) must be carried out *personally* by the worker,

b) periodic payment of *remuneration* to the worker, and

c) the fact that such remuneration constitutes the worker's sole or principal source of *income* (see point 13.).

These are such decisive qualifying criteria for the status of employee that their existence justifies the *creation of a third status* between the *employee* of the labour law and the *contractor/agent* of civil law. The introduction of such a status would be justified if, for example, the conditions of the platform-based work and the situation of the person performing the work correspond to the conditions quoted in the Recommendation.

Moreover, it is quite interesting that disputes over the issue of qualification in the context of platform work avoid the Hungarian courts. The Hungarian labour law is not fully prepared to accept forms of work via apps.

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[30] See also György Kiss, 'The Concept of 'Employee': The Position in Hungary' in Waas, van Voss (ed), *Restatement of Labour Law in Europe* (Vol. I, The Concept of Employee, Bloomsbury, Hart 2017) 306–307.

[31] Gyulavári Tamás, 'Hakni gazdaság a láthatáron: az internetes munka fogalma és sajátosságai' [Gig economy on the horizon: the concept and peculiarities of Internet work]; (2019) 15 (1) Iustum Aequum Salutare, 42–43. <ias.jak.ppke.hu/hir/ias/20191sz/02_Gyulavari_IAS_2019_1.pdf> accessed 10 August 2021.

4 Automation and Robotics – Proposal to Rescue Workers

According to the Digital Economy and Society Index of the European Commission Hungary's DESI index was 47.5 in 2020.[32] Hungary was one of the worst performing EU countries in the Integration of digital technology in businesses (e.g. the use of enterprise resource planning software packages). Fifty-seven percent of companies in Hungary have a very low level of digitisation (the average 39% in the EU) and only 15% are highly digitised (26% in the EU).[33]

There are approximately 730,000 employees in Hungary whose work could be performed entirely or predominantly by robots. That's about a fifth of all employees. Occupations that do not require *skills* can easily be automated. At least two-thirds of the jobs in this group can be performed by robots. More than half of the industrial and construction professions, mechanical engineering occupations, and office, mainly administrative, tasks can be fully or predominantly automated. The *automation potential* in Hungary even exceeds that of Western European countries. Presumably, because most companies moved production from Western European states abroad due to expensive labour force. Labour is relatively cheap in Hungary. Still, it would be worthwhile for companies to automate because robots, especially their types that work with humans, are the so-called *cobots (collaborative robot)* that increase corporate productivity. Therefore, the role of *re-education training* is particularly important. The *digital generation of employees* will only replace the entire workforce in decades.[34]

Legislation must also respond to this process. The LC does not contain a rule at all on the *employer's training task*. Automation and robotisation can result in *termination of employment relationship* by the employer. According to the LC, an employee may be dismissed – among other reasons – in *connection with the employer's operations* [LC pt II ch X. s para 62 (2)] The reason for robotisation is the employer's operations. In addition, the reason for termination in the case of automation may also be the employee's professional ability, precisely its absence.

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

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32 Digital Economy and Society Index (DESI) 2020 – Hungary 3.

33 Ibid 10.

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

IV Italy: Moving Away from Binary Code

1 Juridical Subordination and Symptomatic Indices

The Italian labour law can be defined as a *'binary system'*[35], in the sense that it contains only two types of reference labour contracts: subordination and autonomy. The distinction between these two legal types is quite clear. Tele-work, home-work and the new type of *agile-work*,[36] are all subordinate contracts.

According to the Italian Civil Code, the worker is self-employed if he/she works *'without any relationship of subordination'*.

Among these two different legal types, there is a large grey slice of workers whom common sentiment considers worthy of protection anyway.

In the absence of a normative formalisation of an intermediary type of contractual relationship, legislators and domestic case law tend to qualify labour relations using symptomatic clues.

In this scenario, digital platforms challenge labour law, mainly because they represent a 'deconstruction factor outside the traditional jurisprudential indexes'[37] on the qualification of employment relationships. Within digital platforms, the relationships established between operator and platform can be traced back to a multiplicity of legal contracts. It has been emphasised that this new form of economic organisation leads to the establishment of relationships that are difficult to classify as subordinate or self-employed work, and that work on the platform actually has characteristics that can be classified as both of these categories.[38] Among these clues, economic dependence, as well as the integration of the service into the company, is becoming increasingly important.

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[35] See also, in English, Pierluigi Digennaro, 'Subordination or subjection? A study about the dividing line between subordinate work and self-employment in six European legal system' (2020) 6 (1) LaBoUR&Law, DOI: 10.6092/issn.2421-2695/11254, and in particular pages 31–36, related to the Italian legal system.

[36] According to the law (art 18–24, Law n. 81 of 2017), *agile-work* is a particular method of execution of the subordinate employment relationship, performed partly inside the company premises and partly outside without a fixed location. See, in literature, Luigi Fiorillo, Adalberto Perulli (a cura di), *Jobs Act del lavoro autonomo e del lavoro agile* (Giappichelli 2018, Torino); Adalberto Perulli, *Oltre la subordinazione: la nuova tendenza espansiva del diritto del lavoro* (Giappichelli 2021, Torino). The literature on the concept of 'subordination' in the Italian legal framework is very extensive. For an effective general analysis see Pietro Ichino, *Il lavoro subordinato: definizione e inquadramento* (Giuffrè 1992, Milano); in English see Tiziano Treu, *Labour Law in Italy* (6th edn, Wolters Kluwer 2020, Milano); Franco Carinci, Emanuele Menegatti, *Labour Law and Industrial Relations in Italy* (Wolters Kluwer 2015, Milano).

[37] Francesco Bano, 'Il lavoro povero nell'economia digitale' (2019) 1 Lavoro e Diritto, 129 ss.

[38] Eurofound, Employment and working conditions of selected types of platform work, 2018, <https://www.eurofound.europa.eu/it/publications/report/2018> accessed 10 August 2021. The European Commission itself, moreover, considers that the collaborative economy is bringing about a structural change, characterised, among other things, by the fact that the boundaries between self-employed and subordinate workers are increasingly blurred. It also states that for the subordination requirement to be met, the service provider must act under the direction of the collaborative platform, which determines the choice of activity, remuneration

The use of this index achieves an expansive trend in the protection of subordinate labour.

In the Italian legal system, this approach is today particularly revitalised, in view of the need to distinguish the traditional concept of subordination from the new normative subtypes, progressively introduced or revised by the legislators such as *'coordinated collaboration'* (art 409, § 1, n. 3 of the *codice di procedura civile*, modified by art 15, § 1, a) of Law 81/2017), the *'organised collaboration [...] also by a digital platform'* (art 2 of Legislative Decree n° 81/2015, modified by art 1, §1, lett. a) of the Law decree n° 101/2019, converted in Law n° 128/2019) and the contract of the *'worker by bike'* for the delivery of goods in urban areas (art 47 bis of Legislative Decree n° 81/2015,[39] introduced by the art 1, § 2 of the Law Decree n° 101/2019, converted in Law n° 128/2019).

However, the legislator has introduced rules that identify median concepts situated between subordination and independence (autonomy): Art. 2 of the Legislative Decree no. 81 of 2015 provides that in the presence of *'hetero-organisation'*, the autonomous worker benefits from the extension of the protection regime typical of subordinate work.

It must be specified that this effect is excluded by the rule when

> national collective agreements entered into by comparatively more representative trade union associations at national level provide for specific disciplines concerning economic and regulatory treatment, due to the particular production and organisational needs of the relevant sector [Article 2(2) of the cited 2015 Legislative Decree].

This aspect is particularly relevant because, with this rule, the Italian legal system opens up collective bargaining for parasubordinate self-employed workers (who are not false self-employed people). It should be remembered that many legal systems do not allow workers who do not have a (subordinate) employment relationship to benefit from collective bargaining.[40] The explicit recognition of the relevance of ad hoc collective bargaining, including self-employed persons under the scope of collective bargaining agreements, is therefore particularly interesting. However, the problem of the subjective effectiveness of these collective agreements remains unresolved in the Italian legal system, as well as the problem of measuring the representativeness of the stipulating collective actors. In Italy,

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and working conditions. See European Commission, *A European agenda for the collaborative economy*, 2 June 2016, COM(2016) 356 final.

[39] About this point see, in English, A. Aloisi, V. De Stefano, *Delivering employment rights to platform workers* (Il Mulino 2020, Bologna) <https://www.rivistailmulino.it/a/delivering-employment-rights-to-platform-workers> accessed 10 August 2021. See also the Analytical document of the Commission Staff Working Document, European Commission, Brussels, 15 June 2021, SWD(2021)143 final, page 62.

[40] Xavier Beaudonnet, *Le droit de négociation collective des travailleurs considérés comme indépendants au regard des normes de l'organisation internationale du travail*, in *Le droit de négociation collective des travailleurs indépendants: Cadrages théoriques et études de cas*, edited by Daniel Dumont, Auriane Lamine and Jean Benoît Maisin, 2020, 55–79, Droit Social, Larcier.

there have been spontaneous non-union forms of rider aggregation (e.g. the case of Riders Union Bologna, defined as a new form of informal metropolitan trade unionism and the «Bologna Charter»[41]).

Italian legislation also includes a particular option, highlighted by the European Commission document of 2021, of voluntary 'certification' of the authenticity of employment contracts, which produces a sort of presumption for labour, social protection and tax authorities, which only a court could reverse.[42]

The resulting system is difficult to understand. The actual model can be described as follows.

Table 1.

Definitions	**Subordinazione (dependent workers)**	**Autonomia (indepen-dent workers)**	**'Para-subordinazione' (semi-dependent workers)**	**'Etero-organizzazione' (quasi-dependant workers)**	**Riders**
Law references	Art 2094 c.c.	Art 2222 c.c.	Art 409 c.p.c.	Art 2 d.lgs. 81/2015	Art 47-bis d.lgs. 81/2015 (introduced by art 1, co. 1, lett. c) d.l. 101/2019, conv. in l. 128/2019
Essential points	Employers' directive power	Absence of directive power	Coordination and continuity	Etero-organisation	Absence of directive power, particular types of means of transports', delivery of goods in urban areas
Rules and guaranties	Entire labour law	Outside labour law	Some guarantees, very general (law 81/2017)	Entire labour law	Some specific guarantees

The point is that *'subordination'* characterises *only* the first legal kind (art 2094), while the other forms remain structurally autonomous.

[41] See here: <http://www.comune.bologna.it/archivio-notizie/firmata-bologna-la-carta-dei-diritti-fondamentali-dei-lavoratori-digitali-nel-contesto-urbano> accessed 10 August 2021. About Riders Union Bologna cf. Riccardo Mancuso, *La voce di Riders Union Bologna*, (2021) Lavoro Diritti Europa <https://www.lavorodirittieuropa.it/dottrina/lavori-atipici/616-la-voce-di-riders-union-bologna> accessed 10 August 2021.

[42] See the Analytical document of the Commission Staff Working Document, European Commission, Brussels, 15 June 2021, SWD(2021)143 final, page 82.

That is, technically, not a question of contract types in their own right, but of sub-categories of autonomous work, to whom the law recognises some or all guarantees of the *'subordinate'* (employment) work in different ways.[43]

The first judgment of the Italian Supreme Court on the concept of *'hetero-organisation'* (*Corte di Cassazione*, 24 January 2020, n° 1663) concerns the qualification of the employment relationship of modern platform deliverers.[44]

Therefore, the Italian model shows a tendency to extend the protective network of labour law to forms of collaboration that do not have the rigorous characteristics of legal subordination.

Such a perspective seems to be consistent with the teleological approach put forward by the European Commission in the Agenda for a Collaborative Economy of 2 June 2016 [Com (2016) 356 Final], which calls on Member States to ensure fair work and adequate and sustainable social protection.

The Italian Supreme Court recognises *'equivalent protection and, consequently, recourse to the full application of the discipline of subordinate labour'.*

This extension of the gateway to labour law protection finds its parallel in the tendency of the case law of the Court of Justice of the European Union to reconstruct the concept of *'worker'* to achieve the objective of *'EU employment protection'.*

The most emblematic passage of the 2020 judgment is where the Italian Court states, regarding *'hetero-organised'* collaboration, that

> it makes no sense to ask whether these forms of collaboration, so characteristic and time to time offered by the rapidly and constantly changing economic reality can be placed in the realm of subordination or autonomy, because what matters for them is that, for them, in a common ground with fleeting borders, the legal system has expressly established the application of the rules on subordinate work, by establishing a disciplinary rule.[45]

[43] The Analytical document of the Commission Staff Working Document, European Commission, Brussels, 15 June 2021, SWD(2021)143 final, affirms that the Italian legal system 'have created a third/intermediate category of employment, usually for self-employed individuals depicting a degree of economic dependency towards a quasi-employer' (page 38 of the document). This statement is not entirely accurate from a technical legal point of view.

[44] The judgment cited in the text has been the subject of numerous analyses in doctrine. For a series of open-access comments, see the dedicated issue of the journal Lavoro Diritti Europa on the web site <https://www.lavorodirittieuropa.it/archivio-rivista-lavoro-diritti-europa/419-indice-del-numero-1-2020-della-rivista> accessed 10 August 2021. Something about this judgment in V. De Stefano, I. Durri, C. Stylogiannis, M. Wouters (n 23) 22.

[45] About this topic see F. Perrone, A. Sitzia, 'Lavoro autonomo e indicatori di subordinazione nel diritto europeo: l'integrazione del lavoratore nell'organizzazione dell'impresa' in F. Basenghi, L. Di Stefano, A. Russo, I Senatori (a cura di), *Le politiche del lavoro della XVIII Legislatura: dal Decreto Dignità alla gestione dell'emergenza Covid-19*, (Giappichelli 2020, Torino) 147 ff.

The Court attempts to identify a systemic key to the Italian model, which is based on a *choice of a legislative policy which aims to ensure the same protection for the worker as for subordinate labour, to protect riders who are clearly considered in a state of economic weakness, operating in a grey area between autonomy and subordination.*

The *'economic weakness'*, is related to *'hetero-organisation'* which is characterised as an *'element of a functional relationship of collaboration with the contractors' organisation'.*

It remains to be defined what *'functional integration into the contractors' organisation'* consists of. The *'Foodora'* case provides a clear example: the *'rider'* is inserted in a very widespread computer system, which allows him or her to be subjected not only to organisational indications regarding delivery time and location, but also to their communication in real time, delivery by delivery, as well as their constant control by the *'App'* and the fundamental relevance of the working activity set in the contract for the needs of the contractors' activity.

2 Telework in the Framework of Agile-work

In Italy there is no official statistics which provide the total number of teleworkers in the private sector. It also worth noting that telework is more widespread in large companies.[46]

Regarding private employment relationships, there is no legal regulation of telework.[47] The legislator merely encourages the use of this method of working, without giving it a general definition. ETFA was transposed by the *'interconfederale'* agreement of 9 June 2004 within Confindustria (this is, however, a collective agreement, not binding *erga omnes*).

There is another intermediate mode, the so-called *agile-work* (smart working),[48] which is not a new type of employment contract, but a special way of performing work within a normal employment relationship: in particular, it allows workers to organise their work activities with greater flexibility, as there are no specific constraints on working time or place of performance.

In fact, art 18 of Law no. 81 of 2017 clarified that *agile-work* is characterised by the following peculiarities: work can be carried out in phases, cycles and objectives; there are no constraints on working hours or place of work; it is possible to use technological tools to carry out the work activity and, in this case, it is the employer him/herself who is responsible for their proper functioning and safety; work can be carried out inside or outside

[46] Michele Tiraboschi, 'Telework in Italy: The Legal Framework and the Reality' ADAPT – DEAL, University of Modena and Reggio Emilia (Italy) <www.bollettinoadapt.it/wp-content/uploads/2016/02/TELELAVORO-tiraboschi.pdf> accessed 12 August 2021. See also L. Gaeta, P. Pascucci (a cura di), *Telelavoro e diritto* (Giappichelli 1998, Torino).

[47] Telework (or, more precisely, 'remote working') in public administrations is regulated by the Presidential Decree no. 70 of 1999. In literature see L. Gaeta, P. Pascucci, U. Poti (a cura di), *Il telelavoro nelle pubbliche amministrazioni* (Il Sole 24 Ore ed, 1999, Milano).

[48] For an overall perspective see, for all, G. Zilio Grandi, M. Biasi (a cura di), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile* (Cedam 2018, Milano, Padova).

company premises. Until the outbreak of the pandemic, *agile-work* had been limited mostly to multinational companies, but it has undergone significant changes with the impact of the emergency legislation.[49]

3 Automation and Robotisation: Risk of Manual Tasks

According to the Digital Economy and Society Index of the European Commission, Italy's DESI index was 43.6 in 2020.[50] In 2019, it dropped two places and ranked last in 2020 in the EU on the Human Capital dimension: only 42% of people aged 16–74 years have at least basic digital skills (58% in the EU) and 22% have above basic digital skills (33% in the EU).[51] The percentage of enterprises using social media increased to 22% (close to the EU average of 25%).[52]

According to the OECD skills Outlook 2019, 13.8% of Italian workers are in occupations at high risk of automation and would need moderate training (up to one year) to move to safer jobs, with a low or medium risk of automation, while another 4.2% would need an intensive training course (up to 3 years). About 4 million workers who mainly carry out manual tasks may appear more at risk than those who perform cognitive tasks.[53]

V Spain: Pioneering out of the Binary System

1 A Third Status or the Classical Solution – Academic and Judicial Debate

As in other countries, in Spain the debate on platform work has been focused on transport platforms and, more specifically, on delivery services and the possible existence of an employment relationship as the door to entry under the protection of labour law. Aside from the legal changes which are right now being developed, the first impact of the platform economy has been taken by both the academia and the courts.

[49] See Arianna Castelli, Caterina Camposano, 'Lavoro agile – Smart working' <https://www.wikilabour.it/dizionario/tipologie-contrattuali/lavoro-agile-smart-working/> accessed on 12 August 2021.

[50] 'Digital Economy and Society Index (DESI) 2020 – Italy' 3.

[51] Ibid 7.

[52] Ibid 10.

[53] OECD, 'OECD Skills Outlook 2019. Thriving in a Digital World' 2021 <https://www.oecd-ilibrary.org/sites/df80bc12-en/index.html?itemId=/content/publication/df80bc12-en> accessed 13 August 2021; 'Lavori a rischio automazione dopo la crisi Covid-19: il punto' [Jobs at risk of automation after the Covid-19 crisis: the point] Network Digital 360 <https://www.agendadigitale.eu/industry-4-0/lavori-a-rischio-automazione-dopo-la-crisi-covid-19-previsioni-e-contromisure/> accessed 13 August 2021.

Regarding the first one, the debate has been highly intense and could be summarised from three different perspectives:[54]

First, the position of the companies, supported by some economists and lawyers, which requires specific regulation for platform work, which would be outside the archetypical confrontation between employment and self-employment and suggests the existence of a *tertium genus* which needs its own regulatory framework. In other words, from this point of view, the solution would crystalise in the creation of a fourth new category to be added to the three (employee, self-employee or TRADE).[55]

Second, the perspective close to trade unions' point of view, supported by most of academia, which highlights that the business model of platforms would be based on a strategy focused on saving costs by avoiding (fraudulently) the application of labour and social security law. From this perspective, the solution would be the same, revealing the abuse and applying the correct legal framework; that is, labour law.[56]

[54] Diego Álvarez Alonso, 'Plataformas Digitales y Relación de Trabajo' [Digital Platforms and Employment Relationship] in Joaquín García Murcia (ed), *Nuevas tecnologías y protección de datos de carácter personal enlas relaciones de trabajo* (Gobierno de Asturias – Universidad de Oviedo 2019).

[55] Jesús Rafael Mercader Uguina, 'La prestación de servicios en plataformas digitales: nuevos indicios para una nueva realidad' [Delivering service by platforms: new evidences for a new reality] in Adrián Todolí Signes and Macarena Hernández-Bejarano (eds), *Trabajo en plataformas digitales: innovación, derecho y mercado [Working at digital platforms: innovation, law and market]* (Aranzadi 2018); Alfonso Martínez Escribano, '¿Nuevos trabajadores? Economía colaborativa y Derecho del Trabajo. Repensando el Derecho del Trabajo: el impacto de la economía colaborativa' [New Workers? Collaborative Economy and Labour Law. Rethinking Labour Law] [2018] Derecho de las relaciones laborales, 48; César Otero Gurruchaga, 'El complicado encaje de los trabajadores de la economía colaborativa en el Derecho Laboral: Nuevos retos para las fronteras de la laboralidad' [The complicated fit of collaborative economy workers in Labor Law: New challenges for the borders of employment] [2018] Derecho de las relaciones laborales, 61; Francisco Pérez de los Cobos y Orihuel, CEl trabajo en plataformas digitales' [Work at digital platforms] in Yolanda Sánchez-Urán Azaña, and María Amparo Grau Ruiz (eds), *Nuevas tecnologías y derecho: retos y oportunidades planteadas por la inteligencia artificial y la robótica [New technologies and law: challenges and opportunities posed by artificial intelligence and robotics]* (Juruá Editorial 2019); María Luz Rodríguez Fernández (ed), *Plataformas digitales y mercado de trabajo [Digital Platforms and Labour Market]* (Ministerio del Trabajo, Migraciones y Seguridad Social, Subdirección General de Información Administrativa y Publicaciones 2019).

[56] Cristóbal Molina Navarrete, 'Derecho y trabajo en la era digital: ¿"revolución industrial 4.0" o "economía sumergida 3.0"?' [Law and work in the digital age: "industrial revolution 4.0" or "underground economy 3.0"?], *El futuro del trabajo que queremos [The Future of Work that We Want]*, (vol II, OIT 2017); Adrián Todoli Signes, *El Trabajo En La Era de La Economía Colaborativ*a [Work in the Age of the Sharing Economy] (Tirant lo Blanch 2017); Anna Ginès Fabrellas, 'Diez retos del trabajo en plataformas digitales para el ordenamiento jurídico-laboral español' [Ten challenges of working on digital platforms for the Spanish legal-labour system] [2018] Estudios financieros. Revista de trabajo y seguridad social: Comentarios, casos prácticos : recursos humanos, 89; Francisco Trillo Párraga, 'El trabajo en plataformas virtuales: a propósito del caso Uber' [Work on virtual platforms: about the Uber Case] in Adrián Todolí Signes and Hernández-Bejarano, Macarena (eds), *Trabajo en plataformas digitales: innovación, derecho y mercado [Working at digital platforms: innovation, law and market]* (Aranzadi 2018); Antonio Pedro Baylos Grau, 'Los derechos digitales y la negociación colectiva' [Digital rights and collective bargaining] [2019] Diario La Ley, 2.

Finally, there is still room for a third intermediate position, which is based on the idea that it is not new categories that are needed, but simply the adaptation of the three that already exist. This point of view does not prejudice the classification as employee, self-employee or economically dependent self-employee but suggests that, depending on the final accommodation according to the particular circumstances of the case, specific rules should be considered.[57] This would be the option chosen by the 'Riders' Law' (see below) but keeping in mind that this proposal selects one alternative, the employment relationship, as the most appropriate one to regulate the professional activities concerning delivering platforms, setting adaptations in different areas and keeping aside any other alternatives. It must be warned that this Law is applicable to this type of platform exclusively, so cases placed on other platform sectors should be analysed, as is being done so far. However, the introduction of this new element in the debate is not without risk. There is a possibility of creating another friction point if courts extend its application to other sectors, by analogy, even when the rule is circumscribed to delivery.

The courts have been the precise pillar of debate in Spain. Since 2018, several rulings analysed Deliveroo's, Take Eat Easy's and Glovo's models, to determine if riders who work for them (and who had usually been terminated previously) should be considered as employees, as self-employees or as TRADEs. According to the courts' resolutions, delivered from 2018 to October 2020, the following elements must be highlighted: *i)* the discussion is monopolised by delivery platforms, *ii)* despite the Supreme Court having the final word before its resolution, the debate was clearly inclined in favour of the existence of an employment relationship, and *iii)* this would not preclude other solutions for other types of platforms.[58]

If focused on the details, the discussion was more open at the first instance level, despite most of the resolutions pointing to the employment relationship direction, than upon appeal, where the discussion clearly drove to this solution. The only judgement in favour of the existence of self-employment, Judgment of the Supreme Court of the Region of Madrid 19–9–2019, was corrected by the following ones delivered by the same court and this position has been kept since then. Accordingly, it is possible to say that the appellate level's opinion is practically unanimous.

The reasons provided by the courts for mostly adopting this option can be summarised according to the main factors that support the notion of an employment relationship.[59] On the one hand, the existence of subordination is justified, because the company obtains the profits of the riders' activity and assumes the risks of that task. Additionally, the rider cannot

[57] Alonso (n 54).

[58] A summary of these judgments can be found: <https://ignasibeltran.com/employment-status-of-platform-workers-national-courts-decisions-overview-argentina-australia-belgium-brazil-canada-chile-france-germany-italy-nederland-new-zealand-panama-spain-switzerl/> accessed 10 August 2021.

[59] COGENS Project, *Collective Bargaining in the Gig Economy – Who and for Whom* (COGENS – Collective Bargaining and Gig Economy: New Perspective 2020) Spain's preliminary results of the project. More info: www.cogens2019.eu.

lend his activity disconnected from the platform, owing to the platform being the essential intermediary between the rider and the client. Furthermore, the ownership of the vehicle and mobile phone cannot be considered as an evidence of non-subordination.

The rider could not lend his work outside the digital platform in which it is integrated. If he/she decided to undertake this type of activity by himself as a true self-employed person, he/she would be doomed to fail and his chances of growing as an entrepreneur would be non-existent, because 'the success of these platforms is due to the technical support provided by ICT, which they use for their development and exploitation of a brand' [Judgment of the Court of Madrid (nº 33) 11/02/2019]. In other words, the platforms business model uses the app as a technological tool, to interconnect subjects, so whoever is its owner determines the relationship, and, as a consequence, can be considered as evidence in favour of the existence of an employment relationship.

On the other hand, the existence of dependence can be affirmed on the base of several factors. It is true that, as companies usually highlight, riders enjoy a considerable margin of flexibility. For example, regarding working time, riders can choose the schedules and days on which they want to work, as well as the route or the number of orders they want to deliver, without the company being able to impose any of these requirements. Nevertheless, riders do not have absolute freedom when rejecting or accepting the service. The rider enjoys some flexibility, but this is the obvious result of the platforms' business model.

As the Judgment of the Court of Madrid (nº 33) 11/02/2019 explains, 'the assertive faculty in the choice of each microtask is the logical consequence of the atomisation of working time, because if the employer could always avail of the dealer at his will, this would place him in a situation of permanent availability, which would constitute a state of personal servitude, which would be contrary to the constitutional and EU conceptualisation of work as a right'. Furthermore, these rooms of freedom do not provide any power to negotiate their working conditions, since companies have an enormous number of distributors willing to work.

Consequently, when any rider refuses to undertake an assignment, he/she can automatically be substituted by another one.

The result is that the basic elements of the relationship, such as remuneration, are entirely determined according to parameters that the company establishes for each service.

Regarding judgments excluding the existence of an employment relationship, it is interesting to highlight that five 5 out of eight rulings established that these riders are TRADEs because they would not have the two main features of an employment relationship and, additionally, they would incorporate the main elements of an economic dependent self-employee.

Hence, according to this minority position, there is no employment relationship for two main reasons. On the one hand, there is no subordination because the rider would have almost absolute freedom to choose their working time, place, and route tasks, the rider has a direct relationship with the final clients if he or she accepts the task, and the rider provides their own bike and phone as the worker's tools. On the other hand, there would

not be dependence, because the company does not have any disciplinary tools to force riders to work if one of them refuses tasks, besides being the only case in which the rider doesn't perform his duty.

Nevertheless, once the employment relationship has been excluded, the most common situation is being under the TRADE's coverage. It must be kept in mind that TRADEs develop economic or professional activities for one client, from whom they receive at least 75% of their income and that, in Spain, around half of the platform employees work in this sector as a main or secondary activity.

Within these two positions, Spain's Supreme Court has inclined toward the existence of an employment relationship for the platform called Glovo. In its Resolution of 25 September 2020 (ECLI: ES:TS:2020:2924), it sets that a rider is not completely free to decide when she/he works owing to the point system conditions of his activity; it is controlled by geolocation; his activity is determined by precise instruction on how to do the tasks, waiting time is paid; and the most important tool to develop the activity, the platform, belongs to the company. As was mentioned above, this resolution closes the judicial debate for the delivery sector, but not for others, nor even for other platforms.

2 The Emergence of 'Riders' Law'

Spain passed the first European law on platform work. The so-called 'Riders' Law' (Law no 12 of 2021[60]), which was agreed with social partners, focused on two main issues. On the one hand, it sets a rebuttable presumption on the existence of an employment relationship for this type of workers.[61] On the other hand, it regulates the use of algorithms for all kinds of workers. This is another type of protection which emerges in the platform work debate but extends its influence over all employees.

According to the text of the legislation, the new law includes the following reforms.

First of all, it presumes, unless proven otherwise, the existence of an employment relationship for those who provide services, in exchange for remuneration for delivering and distributing products for employers who exercise the business powers of the organisation, direction and control, indirectly or implicitly, through a digital platform, or through the algorithmic management of the service or conditions of work. This means the explicit translation of the general presumption of Spanish Employment Law to this activity.

Secondly, art 64 of the Workers' Statute (Spanish Employment Law) establishes that employees' representatives have the right, among others, 'to issue a report, prior to the implementation by the employer of the decisions adopted by him, on [...] the implementation

[60] Pérez del Prado, D., 'The Legal Framework of Platform Work in Spain: The New Spanish "Riders" Law' [2021] Comparative Labor Law & Policy Journal.

[61] Before this law, only one collective agreement tried to regulate the employment relationship by introducing riders in its subjective scope. It was the collective agreement of the sector of hospitality (convenio colectivo del sector de al hostelería).

and review of work organisation and control systems, time studies, establishment of bonus and incentive systems and job evaluation'. The new proposed wording adds a brief paragraph of special relevance at the end, which is 'included when they derive from mathematical calculations or algorithms'. Therefore, workers' representatives will have the right not only to be informed, but consulted concerning this issue, as they can deliver a report on it.

This was a quite controversial issue, which was included and excluded from the negotiations owing to the strong opposition of employer's representatives to regulating it.

Although the Trade Unions' proposals were more detailed, it is a great advance, as it not only extends information and consultation on this issue but establishes collective bargaining to negotiate the details. In order words, it puts the algorithm into the object of negotiation.[62]

3 Telework: A New Law Improving the Regulatory Framework

Before COVID-19, teleworking had been scarcely developed in Spain. According to Bank of Spain's calculations, only 7,5% of workers were involved in telework, 6 percentage points below the European average (13.5%) and clearly some way off from the figures of other large countries, such as France (20.8%) or Germany (11.6%).[63]

The pandemic has trigged the use of telework and some new legislative proposals. The emerging of the pandemic and the confinement obliged companies to adopt telework without having a complete regulatory framework, what has been a source of disputes. In order to prevent it and support telework, the government has launched Law no. 10 of 2021 on telework.[64] Compared to previous reforms, the current one is much deeper. It is a complete law, separated from the Workers' Statute and regulating the most important aspects concerning the practical application of telework, such as minimum working conditions, data protection, cost coverage, health and safety, learning and training, and the right to disconnect outside working hours.

4 Automation and Robotization: Top Performer in the Roll-out of Very-high-capacity Networks

Spain addresses the challenge of digitalisation and robotization with very good data in some crucial points. In this regard, according to the European Economy and Society Index (DESI), Spain ranks 11th out of 28 EU Member States, obtaining a position better than Germany, Austria or France, and being above the European average in most analysed factors. The country ranks 2nd in the EU on digital public services, thanks to its well-timed implementation of a digital-by-default strategy throughout its central public administration.

62 Mercader Uguina, J. R., 'Algoritmos y Derecho Del Trabajo' (2019) 52 Actualidad Jurídica Uría, 63; Pérez del Prado, D., 'Representación de los trabajadores y protección de datos de carácter personal como fuente de poder' [2020] Documentación Laboral, 57.

63 Banco de España, 'El Teletrabajo En España' [Telework in Spain] [2020] Boletín Económico.

64 M. Godino Reyes, *La nueva regulación del trabajo a distancia y el teletrabajo* (Francis Lefebvre 2020).

Additionally, it achieves 5th 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 the take-up of ultrafast broadband connections. Spain is one of the first countries in deploying a 5G network which covered 75% of the population at the end of 2020. 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.[65]

VI Conclusions

1 The Gig Economy and the Changing World of Work

It is a commonplace that virtual, internet-based, digitised forms of work are less stable than traditional employment relationships. A fairly thin segment of the gig workers earn a regular income from working on the internet. Platform workers in several cases do not earn all their income through a single platform.[66] A few make a living from these kind of jobs, despite the relatively high proportion of people trying to work online.[67] More interestingly, the status of platform workers in most cases remains unclear.[68]

Richard Sennett explains that in our globalised world, people's lives have become increasingly fragmented. The new 'icon' has become perpetual 'wandering', and the need to move, and to 'move on'. Today's workers have increasingly few stable and secure social relations and therefore they are in a perpetual struggle with time; how to manage short-term relationships while moving from one task, job or place of residence to another. Most people, however, are not like that by nature. The new cultural ideal is therefore harmful to the majority of people, because it demands standards that are contrary to basic human nature. Most of the people find it difficult to cope in the absence of lasting relationships

65 'Digital Economy and Society Index (DESI) 2020 – Spain' 3.

66 Janine Berg, *Income security in the on-demand economy: findings and policy lessons from a survey of crowdworkers* (Conditions of work and employment series, No. 74 International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, 2016, Geneva) 10, <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_479693.pdf> accessed 10 August 2021.

67 Agnieszka Piasna, Jan Drahokoupil, 'Digital labour in central and eastern Europe: evidence from the ETUI Internet and Platform Work Survey' (Working Paper 2019/12, European Trade Union Institute 2019, Brussels) 25, 32. <https://www.etui.org/sites/default/files/WP%202019%2012%20%20Digital%20Labour%20Web%20version.pdf> accessed 10 August 2021. See to the contrary Mariya Aleksynska, 'Digital Work in Eastern Europe: Overview of Trends, Outcomes and Policy Responses' (ILO Working Paper 32, 2021, Geneva) 26. <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_794543.pdf> accessed on 13 August 2021.

68 Annarosa Pesole, Maria Cesira Urzí Brancati, Enrique Fernández-Macías, Federico Biagi, Ignacio González Vázquez, *Platform Workers in Europe Evidence from the COLLEEM Survey* (EUR 29275 EN, Publications Office of the European Union 2018, Luxembourg) 4.

and stability, as they have *an inherent need for relative security and stability*.[69] A very fine example for these thoughts the platformisation of the economy. As our study pointed out, the problem of the 'platformisation of the economy' raises the issue of the classification of the employment relationship.

2 Personal Scope of Legal Protection – Change in the Traditional Concept of Subordination

The analysis of the three countries shows a clear tendency to extend the protection of subordinate labour to an intermediate zone, to those workers whose lives are fragmented, characterised on the one hand by a state of economic weakness compared to the contractual counterpart, on the other hand by a certain degree of integration into the organisation of the company.

Both the Hungarian and the Italian labour law systems can be defined as *binary*, in the sense that they contain only two types of reference contracts: subordination and autonomy. However, in reality, among these two different legal types, there is a large grey territory of workers who deserve protection anyway. In the absence of an intermediary type of contractual relationship, legislators and domestic case law tend to qualify labour relations using symptomatic cues or qualifying marks.

The Italian solution is a kind of hybrid system: it does not let go the code of binarity of the classic labour law, but at the same time it opens up new *'intermediate solutions'*. The Spanish courts made several rulings in order to determine the status of riders and the vast majority of these decisions pointed out that these legal relationships are actually employment relationships.

a) Italian and Spanish regulations – 'One Step Ahead' of the Hungarian

Based on all this, it can be stated that the Italian and Spanish regulations are more 'modern' or ahead of the Hungarian counterpart. This is not surprising, as the necessities of economic life expose the legislature to more powerful effects in these countries. The attempt to introduce the economically dependent workers in the 2011 Draft of the Hungarian Labour Code was not successful; however, this could have been the solution regarding the platform-based work.

b) Moving away from binary code – the Italian judiciary and the pioneering Spanish legislation

The three legal systems are located on *three different points on a linear scale*. While the Hungarian uses a purely binary code, the Italian is also on this path, but at the same time

[69] Richard Sennet, *The Culture of the New Capitalism* (Yale University Press 2006, New Haven and London) 3–5.

the legislature and the judiciary have advanced and moved from a stalemate to make several efforts to recognise the third category of workers.

This shows that the extension of labour law protection tends towards any person who, for a certain period of time, provides services 'for and under the direction of another person', 'in return for which he receives remuneration', and is engaged in 'effective and genuine activities'. The Italian approach focuses on economic dependence and economic weakness as a distinctive gateway in order to protect people who perform work, but it is still an *ad hoc* protection without the notion of universality. Spanish law has already pioneered out of the binary system with the notion of trichotomy and is just passed the Rider's Law, which is a great step forward.

However, the creation of new legal relationships with certain levels of protection raises new demarcation issues. The states may recognise different legal relationships and this kind of diversity only complicates the situation and obscures the very essence: certain protection must be available to all workers. While it is a forward-looking development to recognise new legal relationships as worthy of labour law or 'kind of' protection, the ultimate solution may be to protect all the situations of subordinate labour by provisions on *fundamental labour guarantees* (e.g. prohibition of forced labour, ensuring equal treatment, employment protection, fair working conditions, protection against arbitrary termination of employment).

c) A broader interpretation of the employment relationship – guaranteeing 'decent working conditions'

It is often difficult to define accurately what an employment relationship is. However, the question is not 'what constitutes an employment relationship?' but 'Who needs protection? In our view, there is no need to reinterpret the notion of work performed in subordination, but it is necessary to *rethink the distribution of guarantees of protection*.[70] This can be achieved by agreeing on the recognition of universal labour law safeguards and guarantees. The general guarantees must be valid for all forms of work performed by people in economic dependence and in a state of economic weakness, regardless of any other qualification or classification.

A significant need for core labour law protection for a loose unity of relationships of personal work is needed. The concept of 'employment relationship' has to be interpreted in a much broader way than in the past – any form of human income-generating activity (even in the gig economy) means work. It is high of importance: *guaranteeing 'decent working conditions'* – regardless of the type of employment relationship, and a person cannot be deprived of basic human rights, for example those in the ILO Declaration of 1998.[71]

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[70] Emanuele Menegatti, 'On-demand Workers by Application – Autonomia o Subordinazione?' in Gaetano Zilio Grandi, Marco Biasi (eds), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile [Short Commentary on the statute of self-employment and mart working]* (Wolters Kluwer Italia 2018, Milano) 109.

[71] Kun Attila, 'Munkajogviszony és a digitalizáció – rendszerszintű kihívások és a kezdetleges európai uniós reakciók' [Employment relationship and digitalisation – systemic challenges and rudimentary responses of

However, the problem of platform workers is not only a major challenge for the present, either in the context of qualification marks of the employment relationship or in the context of extending labour law protection. Given that these relationships are typically short, occasional, irregular and low-paid, this raises the question of the viability of pay-as-you-go pension systems. In a few decades, not only population ageing but also income security could become a serious problem among a significant portion of society.

3 COVID-19 – New Era in Teleworking and the Impact of Automation and Robotisation

Telework has become one of the most commonly used methods of dealing with the changed labour market situation during the COVID-19 crisis. Therefore, its wider spread is likely to have an impact on future labour market processes. In all countries, the COVID-19 pandemic has been a sharp dividing line in the spread of teleworking and home office. These institutions could prevent employees from becoming infected with the coronavirus in the workplace and can be a successful tool for employees to manage their personal obligations.

However, it must be noted that telework, which bloomed on the battlefield of the pandemic, has increased teleworkers' domestic expenses. Although, in theory, teleworkers can also be protected by trade unions, the distance may keep them far away from the sight and protection of the union. The *'Big Brother effect'* can also be a real danger: a closely guarded part of the employee's private life becomes visible to the employer, and data protection issues can test the interests of both parties.

The pandemic has accelerated the structural trends in the world of work.[72] Digital platforms are being massively deployed to ensure that businesses remain continuous. To this end, the automation of production processes has also accelerated. In the midst of digital switchovers, low-skilled workers and those who perform routine tasks are at risk the most. The solution therefore lies in the need to change training and retraining structures in order to train workers who are capable of filling the jobs of the future. That is why it is so important to introduce active labour policies, especially in Italy and Hungary, of up-skilling and re-skilling the workforce, in order to protect employment levels,[73] with the resources for training them to be supported through fiscal leverage.

the European Union] in Pál Lajos, Petrovics Zoltán (eds), Visegrád 15.0. *A XV. Magyar Munkajogi Konferencia szerkesztett előadásai [Visegrád 15.0. Edited presentations of the 15th Hungarian Labour Law Conference]* (Wolters Kluwer 2018, Budapest, 389–416) 405–406.

[72] Jan Maarten de Vet, Daniel Nigohosyan, Jorge Núñez Ferrer, Ann-KristinGross, Silvia Kuehl, Michael Flickenschild, *Impacts of the COVID-19 pandemic on EU industries*, Publication for the committee on Industry, Research and Energy, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament (2021, Luxembourg) 8. <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662903/IPOL_STU(2021)662903_EN.pdf> accessed 13 August 2021.

[73] 'Lavori a rischio automazione...' (n 53).