Digitisation : The role of employment and impact on labour law – The Hungarian, Italian, and Spanish solutions, comparison, and criticism[1]

István Horváth, Head of Department, Associate Professor of Labour Law, ELTE University

Daniel Pérez del Prado, Associate Professor of Labour Law, Carlos III University

Zoltán Petrovics, Assistant Professor of Labour Law, ELTE University

Andrea Sitzia, Associate Professor, Labour Law, University of Padova

I. Overall context. Manifestations of digitisation in labour matters.

We hear and use the word daily: digitisation. What is the background of this expression? Digitisation is the process of making a physical quantity computerable in some way[2].

Digitisation is not just about using digital devices. This is all the more complex, with a change in mindset behind it. We achieve new results with new tools and new procedures.

Digitized information has become a strategic resource, with the network becoming the main organizing principle both in the economy and in society. However, digitalisation means something different in everyday life and something different for small and medium-sized employers. And another thing for a large company. 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 digitisation could be a big winner for the coronavirus[3].

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

a) partially changes the working conditions in the employment relationship (eg widespread use of telework and home office),

(b) 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 online space offers a wide range of options to the users.

I.1. Manifestations in 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 digitalisation-automation-robotisation on employment. Previously, employment problems accompanying the introduction of new techniques were temporary, short-term adaptation difficulties. However, after the turn of the millennium, with the spread of digitalisation, we can witness again - in general terms - the so-called resurrection of views representing “automation anxiety” (Brynjolfsson and McAfee, 2014). 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 (Chui, Manyika, Miremadi, 2016).

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[1] The paper is the result of the joint work of the Authors ; however, I. Horváth personally drafted chapter I, I. Horváth and Z. Petrovics III; A. Sitzia chapters II and IV ; D. Pérez del Prado chapter V.

[2] https://hu.wiktionary.org/wiki/digitaliz%C3%A1l%C3%A1s

[3] https://www.portfolio.hu/bank/20200506/a-digitalizacio-lehet-a-koronavirus-nagy-nyertese-a-penzintezeteknel-430266#

Because the processes created by digitisation are international, they have roots, so the set of concepts is mostly coming from the English language.

I.1.1. 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 (eg 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 and still applies today (Gyulavári T, 2014).

And on the other hand, those who are otherwise unable to find employment due to a health problem (eg a disabled persons) may have access to employment.

The fact of globalisation and the opportunities provided by technological advances have created a global computer network (the Internet) that allows certain jobs to be carried out wherever computer and telecommunications conditions are available. The results of the work can be sent almost immediately to the employer or customer.[4]

There are three generations of telework.

The first is the appearance of it 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 information communication 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) have 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 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 is concluded in 2002 (Messenger, 2019).

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 practically means that the workplace becomes virtual (Messenger, 2019).

a) Telework – How can it be defined?

Although there are several definitions of telework, we use the definition of the 2002 European Framework Agreement on Telework 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 (Bankó, 2019)[5].

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[4] *Minden, amit a távmunkáról tudni szeretnél (Everything you want to know about telecommuting)* http://users.atw.hu/tavmunkas/index.html

[5] According to Paragraph 2 of the Framework Agreement on Telework: 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 employers premises, is carried out away from those premises on a regular basis.

The ILO's "Telework in the 21st Century" series aims to compare the characteristics of teleworking with computing tools across continents and countries. Therefore, two aspects of the definition of telework have been uniformly applied to the whole world, primarily from a practical point of view:

- the work is carried out using computer equipment and away from the employer's premises,
- but regularity as a conceptual element does not appear in the ILO publication (Messenger, 2019).

b) Home office – separation from telework

We need to dogmatically separate "home office" from certain atypical forms of work, especially 'telework' (Pál, 2018).

A "home office" is a situation where, in a traditional (full-time, indefinite-term) employment relationship, the employee is temporarily allowed by the employer to work in a place other than the permanent place of work. This is typically the employee's place of residence. This type of work therefore differs from telework in that a teleworker concludes his/her employment contract in advance. That it is not an option but an expectation to work in a place other than the employer's premises. In the case of telework the place of employment is indicated by the parties in the contract in the same way as in the case of a typical employment relationship. But this is never the employer's place of business, typically the employee's place of residence. Also, in the case of the "home office" a place of performance is presumed to be the employee's place of residence, but in this case this it is chosen by the employee himself/herself, while in the case of a telework the contract is designated by the parties in the contract (Bankó, 2019).

I.1.2. 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 (McKinsey and Company, 2017). One example of automation is building automation: the area of providing a comfortable built environment for people and optimising operating expenses (Building Management System - BMS). Their task is to control and automatically control mechanical, safety, fire and flood protection and lighting equipment with digital devices[6].

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 (eg. reading e-mail or a form, opening an attachment, inserting data from an attachment into a target application, checking it, whether a form has been completed in full, sending a reply message, performing calculations). 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 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

[6] *https://hu.wikipedia.org/wiki/%C3%89p%C3%BCletautomatiz%C3%A1l%C3%A1s*.

with machines and robots. Today, it is perhaps even cheaper to carry out these activities in the low-labour-cost countries of this region. But 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 (Makó, Illéssy and Borbély, 2018). At the same time, the more developed a country is in terms of digitalisation (eg. use of broadband technologies, IT skills of employees, e-government), the less exposed it is to similarly drastic changes (Degryse, 2016).

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[7].

During the 2008-2009 global economic crisis, the digital age has 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 organized 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 (Makó, Illéssy and Borbély, 2018).

Significant differences in digitalisation of work across countries do not only result in occupational versus job-centric approaches. The role of technological possibilities cannot be highlighted as the only factor in the replacement of work tasks by automation. Instead, there are a number of interacting factors in it. The role of macroeconomic and social regulators, such as the moral-legal acceptance and regulation of automation, furthermore the relationship between supply and demand in the labour market are important. It is clear, for example, that the impact of automation is quite different in a country where an employer will still have to pay social security contributions after using robots than where it is not (Arntz, Gregory, and Zierahn, 2016).

I.1.3. 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 differs from 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, the 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 fast providing services at low cost based on a large number of available standing staff (Prassl, 2018). The central question of gig economy: (re)making work a commodity (De Stefano, 2016).

The gig economy is giving new answers to the challenges of the labour market. These forms of employment are primarily in 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: 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 gig economy conists on the one hand the so-called crowd work, and the other hand the application-based work (Rácz, 2017).

a) The crowdwork – the digital outsourcing

[7] The impact of RPA ont he Changing Global Labour Market; https://www.cigen.com.au/cigenblog/impact-of-rpa-on-changing-global-labour-market

"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 much more group work is more common. In this solution, the work processes throughout take place online, 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 of them and necessary to exceed the local level. Typically, jobs can be performed in the context of crowdwork that involve intellectual and creative activities (eg. translation) (Mélypataki, 2019).

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 (eg. UBER taxi, food delivery). The novelty: on-line platforms on the application-based work connect supply and demand. It brings market players closer together. Application-based work helps integrate people into the labour market who might not otherwise get a job. The downside: wages are very low, in most cases not even reaching the minimum wage (Mélypataki, 2019).

I.2. The impact of the pandemic on the spread of digitisation in the world of work - Impacts on employers

Right now, it is clear, 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: without the ongoing digital revolution, COVID-19 would have made life impossible. The whole economy, the production, the education, the production, everything that requires a physical presence, life would have stopped there. If there is no alternative than digitised solutions. 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 within the employer and with clients was eliminated (Géró, 2020).

With 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: digitisation has changed as much in five months as it has in five years[8].

According to a survey, post-epidemic plans for digitisation: 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% reorganize 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.

[8] *A koronavírus 10 fontos világgazdasági hatása (Coronavirus has 10 important global economic impacts);* https://novekedes.hu/elemzesek/a-koronavirus-10-fontos-vilaggazdasagi-hatasa

- 7% agree to provide financial support to staff working in the endangered area[9].

And perhaps what the research has not examined at all or very little: How would employees decide? Can those who "fell in love" with telework during Covid 19 still work like this after the end of the coronavirus?! If so, this would further increase digitalisation. Or with the wider spread of home office means the transition to hybrid employment. Working days in the office and at home. If it is worthwhile for an employer to operate their offices in this way?!

II. The Supranational Context : the ILO and EU perspective

II.1. Foreword : research lines

The problem of the « platformisation of the economy » (see Casilli, 2019 and Arfaoui, Losada, 2020 ; Donini, 2019 ; Dagnino, 2019) relapses on the qualification of the labor relationship is currently the focus of attention in most European legal systems.

The comparison between Italy, Spain, and Hungary is particularly fruitful because the analysis of the different legal formants (legislation, case law, and doctrine) of the three countries shows a clear tendency to extend the protection of subordinate labor to an intermediate zone, at fairly close borders, mobile, formally independent workers, but characterised on the one hand by a state of economic weakness compared to the contractual counterpart, on the other by a certain degree of integration into the organisation of the (client) company.

The Hungarian Labour Code (Act I of 2012), in particular, opens Section 1 pointing out that « this act lays down the fundamental rules for decent work according to the principle of free enterprise and freedom of employment, taking into account the economic and social interests of employees alike ». This statement, which is clearly linked to the ILO general line, stimulates research into how this can be achieved in practice, also in relation to the scope of labour law. This must be done in a comparative way.

The Italian labor law can be defined as a « binary system », in the sense that it contains -stricto iure- only two types of reference contracts : subordination and autonomy. The distinction between these two legal typologies is clear, as well as demonstrated by art. 2222 of the Italian Civil Code, according to which the worker is self-employed if he works « without any relationship of subordination ». Among these two different legal types, there is a large grey slice of workers - without adjectives - whom common sentiment deems worthy of protection anyway.

In the absence of a normative formalisation of an intermediary type of contractual relationship (this is the actual state of Italian legal system), legislators and domestic case law tend to qualify labor relations using symptomatic cues. Symptomatic cues are functional for identifying subordination, but are then borrowed to identify which forms of grey work deserve enhanced protection. Among these, economic dependence, as well as the integration of the service into the company, is becoming increasingly important. The use of this index achieves an expansive trend in the protection of subordinate labor.

Finally, Spain's regulation has set the limits of the employment relationship through three different notions which have emerged successively with the evolution of the labour market. As a consequence, Spanish legal framework for the employment relationship could be described as an "obtuse triangle" because it is formed by three elements but they do not have the same importance (Pérez del Prado, 2021). As in this type of triangle in which one of its angles is bigger than the others, here the importance of the employment relationship, from a legal point of view, is not comparable to the others.

Actually, the biggest angle would be represented, logically and as in other countries, by the employment relationship. In contrast to other legal systems (i.e. Anglo-Saxon), this is a single concept

[9] *A COVID-19 vírus hatása a digitalizációra ((Effect of COVID-19 virus on digitisation); PwC COVID*-19 CFO Pulse Survey, 2020.; http://hirek.prim.hu/cikk/139491/.

which defines it as someone who « voluntarily renders their services for compensation on behalf of another party within the scope of the organisation and management of another, physical or legal person, called the employer or entrepreneur» (Article 1, Workers' Statute - Estatuto de los Trabajadores).

The second element in appearing has been the concept of "self-employment".

This is delimited as the obverse side of the coin, being the influence of the notion of employee crystalclear. According to the Self-Employment's Statute -even in the name of the Law it observes the weight of the traditional regulation, despite it has the merit of being the pioneer in Europe (López I., Mora, F. 2008)-, self-employee is defined as «a natural person who regularly, personally, directly, on their own account and outside the scope of management and organisation of another person, carry out an economic or professional activity for profit, whether or not they give employment to workers employed by someone else».

The last notion is the so-called economically dependent self-employment -TRADE as per the Spanish acronym (Trabajador Autónomo Económicamente Dependiente)-. TRADEs are understood as those who usually, personally and directly carry out an economic or professional activity for lucrative purposes and for one client, from whom they receive at least 75% of their income. Among the measures, these self-employed workers have the right to enjoy 18 days of holiday per year, the right of affiliation to trade unions or employer's associations, or to create specific professional associations and a sort of collective bargaining, whose result, named "agreements of professional interest", can benefit the associates of the signatory organisations. The emergence of this notion has aroused great interest in light of its potential impact on traditional industrial relations and of the consequences for the design of social policies (Williams, C. C. & Lapeyre, F. 2017; Williams, C. C. & Horodnic, I. A. 2018; Román, Congregado, & Millán 2011; Eichhorst, W. et al. 2013).

This « trilogy » not only bases the technical debate, but it shows their effect beyond the Spanish borders. Can the solution for the platform economy problem as be found in the traditional binary system or a third category must be introduced ?

In the following pages, we intend to:

1. Briefly, describe the benchmark supranational trends;
2. Compare the mechanisms of qualification by symptomatic indices in the Italian, Spanish, and Hungarian legal systems;
3. Examine the dogmatic repercussions of the platformization of the economy on the qualification models of the employment relationship in the three legal systems;
4. Check how the inclusion of the worker in the organisation of the company emerges in the three legal systems as a symptomatic index (of subordination), which requires the application of a reinforced protection, similar or assimilated to that specific to the subordinate work ;
5. Check whether there are lines of convergence with European Union law.

However, it must be considered that national legal systems, when defining the scope of subordinate employment, cannot exceed the threshold of protection of competition.

The terms and limits with which the definitions of "worker" elaborated in the legal system of the European Union exert their conforming effect on the notions of subordination belonging to the different national laws change, physiologically, because of the structural characteristics of each ones (Perulli, 2020 ; Waas and Heerma van Voss, 2017).

II.2. General context : the integration in the clients' enterprise as a supranational parameter of qualification of the employment relationship

It is necessary to postulate, regarding the examination of national legal systems, that at the supranational level, a clear trend emerges to strengthen « integration in the client's company » as a qualification criterion for beneficiaries of legal social protection.

II.3. The ILO point of view : dependent and independent workers

The ILO Recommendation R198 adopted on June 15, 2006, first of all, highlights a series of indicators of subordination, among which a central importance is attributed to the integration of the worker in the organisation of the enterprise (paragraph 13, letter a).

An important aspect is given by the declaration contained in the Recommendation, in the spirit of which, inter alia, the possibility of introducing a presumption on the existence of a (subordinate) employment relationship is envisaged in the event of presence of one or more relevant indicators.

The preamble of the R198 underlines the importance that Member States intervene where is difficult to establish whether or not an employment relationship exists: there may be situations in which qualification difficulties can have the effect of depriving workers of the protection to which they are entitled. This protection should be accessible to all especially vulnerable workers, and should be based on legislation that is efficient, effective, and comprehensive, with expedition outcomes, and that encourages voluntary compliance.

An intervention of the Member States is not always required [10]; the first paragraph of the Recommendation, , specifies that "if necessary" the States must clarify and adapt the scope of relevant laws and regulations, to guarantee effective protection for workers who perform in the context of an employment relationship. In this perspective, the guidelines set out in paragraph 4 require "at least" measures that effectively establish the existence of an employment relationship and on the distinction between employed and self-employed (letter a), fighting the disguised forms of employment relationship (letter b).

Regarding the determination of the existence of an employment relationship, the Recommendation underlines the relevance of factors relating to the performance of work and the remuneration of the worker, evaluating the opportunity to intervene through a broad range of means for determining the existence of an employment relationship, providing legal presumptions and determining, that workers with certain caracteristics, in general or in particular sector, must be deemed to be either employed or self-employed.

The basic question, of course, concerns the position of the boundary between the employment contract and the enterprise and the Recommendation, is not directly involved in the grey area between the one and the other form. This approach is consistent with the traditional principle according to which legally independent work is not the subject of labor law, which is "développé pour offrir une protection aux salariés" (Servais, 2015 ; Trebilcock, 2013 ; Davidov and Langille, 2006).

The 2006 Recommendation became necessary due to the difficulty of discernment achieved by changes in the organisation of work and the labor market, especially in the context of globalisation and developments in technology and communication, with particular attention to the issue of supply and production chains and to outsourcing, of which also the work platform is on expression.

ILO conventions and recommendations are not uniform in scope: certain provisions apply only to employees (and this emerges especially when obligations are imposed on an « employer ») and other instruments that are, on the other hand, of broader application (think, for example, of Convention 156 of 1981 on Workers with Family Responsibilities, which applies to all categories of workers).

In addition, the R198 is supplemented by an annotated guide that provides examples of national legislation and other measures taken by the ILO Member States.

The guide states that the question of knowing who is in an employment relationship and what rights and protections this statute entails has become particularly problematic over the past few decades due to major changes in the organisation of work and new legislative efforts to respond to these changes. It is increasingly difficult in most countries to establish whether or not a working relationship exists when: 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

[10] The issue is debated in literature. The idea that the current legal and conceptual tools are nowadays universally obsolete and inadequate (Sundarajan, 2016) is not shared. See, for instance, De Stefano, 2017, p. 8.

its application are insufficient or limited (ILO, 2008).

The Recommendation sets out, in paragraph 13, a series of specific indices of the existence of an employment relationship that can be used by states in the definition of the employment relationship given by internal law.

Although, therefore, the question of the classification of the activity is certainly not new, the use of different methods of contrast and initiative for the reduction of unemployment can make the status of the persons concerned even less clear (Trebilcock, 2013). This problem applies to the issue of work in the practices of multinational companies and which use production chains and subcontracts for manufacturing or services, but it has a more general relevance.

The search for appropriate solutions in the perspective of the distinction between subordinate and independent workers is a complex problem that requires on the one hand, a weighted identification of the minimum protection to be granted to all workers and requires, on the other hand, extreme attention to the clarity and good workmanship of normative formulations.

Chasing organisational changes in non-impartial terms and without paying attention to the comprehensibility and transparency of the rules is likely to cause serious problems with legal certainty. This is felt above all in cases where legislators introduce intermediate cases with opaque and uncertain boundaries compared to neighboring cases, giving rise to regulatory labyrinths where judges, lawyers, and professors wander with great effort (Vallebona, 2020), to the benefit of potentially elusive practices.

In essence, the ILO relevant instruments do not provide precise and binding guidelines regarding a generalised redefinition of the area of enforcement of labour law, but leave it to the legislators of the Member States to define the areas of application, while maintaining the difference between subordinate and self-employed work.

In other words, there does not seem to be any general indication that the traditional categorisation should be overcome, or that it is necessary or advisable to introduce intermediate types of employment and self-employment.

The International Conference dealt with the subject in Report VII of 1990, which concluded that protection should be guaranteed for workers, including nominally self-employed workers, against sous-traitance arrangements (i.e. subcontracting) and labour contracts leading to their exploitation. This protection should be established and put in place where it is not yet the case.

The perspective revealed by the analysis of outsourcing practices also concerns platform work and digitalisation.

The World Commission on the Future of Work's 2019 Report (Working to Build a Better Future) dedicates two pages to this topic (pp. 45-46, French edition), where it proposes an approach based on human control of technology.

One relevant passage states that digital technology poses new challenges for the effective application of labour protection. Digital work platforms provide new sources of income for many workers in different parts of the world, but the fragmented nature of work in different international jurisdictions makes it difficult to monitor compliance with applicable labour law. Work is sometimes poorly paid, often below the applicable minimum wage, and there is no formal mechanism to combat unfair treatment. As this form of work is expected to grow in the future, the development of an international governance system for digital work platforms that establishes a basis of rights and protection and requires platforms (and their clients) to respect them is recommended. The Maritime Labour Convention (MLC, 2006), is cited as a source of inspiration for addressing the issues of workers, employers, platforms, and customers operating in different jurisdictions (p. 46).

This specific aspect appears in the 2018 ILO publication on digital work platforms and the future of work (Berg, Furrer, Harmon, Rani and Six Silberman, 2018).

This Report pays specific attention to the issue of working through digital platforms and, even more specifically, to the search for the meaning of the concept of crowdwork.

A micro-work platform is a type of Internet-based work platform that allows companies and other clients to have access to a large and flexible workforce (crowd) that will perform small tasks that can

be done remotely by means of a computer and an Internet connection. These tasks are diverse. Contractors use platforms to publish large amounts of work to be done; workers choose the latter and are paid for the task or the work done. Platforms pay workers the price quoted by the client from which they deduct their commission.

The platform economy imposes a distinction between hypotheses in which work is distributed on online platforms that allow customers to outsource any kind of task that can be carried out remotely to a crowd of workers potentially connected from all over the world, and hypotheses in which the activity is carried out in the material world and the platform intervenes to match customer demand with the offer of a work service. Furthermore in this case, platforms can intervene to set minimum standards of service by workers and guarantee their respect also based on customers' opinions.

Generally, it is a work organised through contacts and exchanges that occur online, to the point that Eurofound has defined platform work as « an employment form that uses a platform to enable organisations or individuals to access other organisations or individuals to solve specific problems or to provide specific services in excange for payment » (Eurofound, 2018).

a) Labour force survey 2018

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.

There also emerges a strong flexibilisation of working hours: workers said they appreciated the possibility of setting their own hours and being able to work from home. Many microworkers worked non-standard hours: 36% worked regularly 7 days a week; 43% said they worked at night and 68% in the evening (between 18:00 and 22:00), either because of the demands of the job (or because of jet lag) or because they had other obligations. Many women reconcile microwork with their family responsibilities. One in five women in the sample had young children (between 0 and 5 years old). These women still spent 20 hours per week on the platform, only 5 hours less than in the overall sample; many worked evenings and nights.

What emerges is a general inadequacy of tasks and lack of career prospects, as well as a lack of social protection.

What is most interesting, within the perspective we have chosen to investigate in this paper, is that the Report identifies eighteen criteria to ensure decent work on digital work platforms, namely:

1. Combat misclassification of work ;
2. Allow platform workers to exercise their rights to freedom of association and collective bargaining; enable platform workers to exercise their rights to freedom of association and collective bargaining;
3. Apply the minimum wage in force in the region where the workers are located;
4. Ensure transparency of payments and tariffs set by the platform;
5. Ensure that independent platform workers have the possibility to refuse tasks;
6. Compensate for work lost in the event of technical problems related to the task or the platform;
7. Establish strict and fair rules for nonpayment;
8. Ensure that the conditions of service are presented in a legible, explicit, and concise manner;
9. Inform workers of the reasons why they receive unfavourable evaluations;
10. Establish and enforce clear codes of conduct for all platform users;
11. Ensure that workers are able to challenge nonpayment, negative evaluations, qualification test results, allegations of code of conduct violations, and account closure;
12. Establish a client review system that is as comprehensive as the worker review;
13. Ensure that task instructions are clearly defined and validated before a job is posted;
14. Allow workers to view and export a complete human- and machine-readable file of their career and reputation data at any time;

15. Allow workers to continue a working relationship with a client outside the platform without having to pay an excessive fee;
16. Ensure that clients and platform operators respond to worker messages in a timely, polite, and substantive manner;
17. Inform workers of the identity of their clients and the purpose of the work;
18. Ensure that platform operators clearly and systematically indicate tasks that may be stressful and psychologically damaging.

Clearly, the first point is the key one.

The Report itself, moreover, recognises that the first recommendation is perhaps in many ways the most important and the most urgent of all. On p. 113, the Report points out that recognising platform workers as employees would automatically and immediately allow them to benefit from the advantages and rights indicated in the subsequent recommendations (first and foremost, that relating to freedom of association and collective bargaining).

In this perspective, the passage in the report where it is stated that most platform workers are required to « recognise » that they are self-employed or « independent contractors » and not employees is clearly relevant. 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: « It therefore happens that they are, in practice, employees of the platform ».

b) World Employment and Social Outlook - The role of digital labour platforms in transforming the world of work 2021

Thus, the question of the criteria for qualifying and establishing subordination returns, and is also taken up by the 2021 ILO Report (ILO, 2021), which takes into account the fallout from the pandemic emergency and the fact that there has been an increase in telework since March 2020, boosting the growth and impact of the digital economy.

The 2021 Report shows that in web-based platforms, there has been an increase in both supply and demand trends for self-employment and microjobs since 2017. And it is noted that the organisation and management of digital work platforms is generally unilateral, as workers, clients and enterprises have to accept the contractual terms of the platform to gain access to it and exercise considerable power over the freedom of workers to accept or not accept an assignment and can determine how and on what terms clients and companies engage platform workers.

The essential point is the outsourcing of business processes and certain tasks by different technology companies: this concerns in particular digital labour platforms mediating work (online web-based labour platforms) and location-based labour platforms.

The Report points out that « although platform workers are usually classified as independent contractors, they often do not have the freedom and autonomy to organize their work. Moreover, innovative platform practices such as algorithmic management are used to allocate, work, and manage, supervise, and reward workers » (see Section 4.3.1). Digital labour platforms have tremendous control over the organisation of work and workers' compensation, while "still claiming to be the only intermediary" (Kenney and Zysman, 2016, 62).

Such outcomes of technological advances represent a return to the past as workers are engaged as casual labour and paid on a piece-rate basis, which adds to the growing informal or nonstandard workforce in developing and developed countries alike. This situation presents new challenges to traditional work arrangements and the standard employment relationship (see Section 5.3.10), as well as exacerbating existing challenges, notably the use of nonstandard forms of work. A number of digital labour platforms compete with businesses in traditional sectors, relying on data and competitive pricing. Location-based platforms, such as taxi platforms, have disrupted established transportation business models by harnessing data and algorithms to match passengers to drivers in real time (Clewlow and Mishra 2017).

Platform work is often associated by its pro-points with greater worker autonomy and control

over how work is performed (Mulcahy 2016, MGI 2016). Concerns are being raised, however, regarding new forms of worker control resulting in loss of autonomy, facilitated by the design of platforms and their algorithms (Pichault and McKeown, 2019; Wood et al. 2019b; Schorpf, Flecker and Schonauer 2017). These algorithms rely on data generated by workers on various aspects of the work undertaken, and often workers lack any access to or control over their data (see Section 1.4). This results in information asymmetry wherein the platform has large amounts of data on the workers, and the work is undertaken by the worker, while the worker has little information about how that data is being utilized by the platform (page 177).

The term "worker" has different legal meanings in different jurisdictions. As mentioned in Chapter 1 of the Report, the term is used in the broad sense contemplated by the ILO instruments discussed, in light of comments of the ILO supervisory bodies. Unless otherwise specified, the term includes both the employed and self-employed (including independent contractors).

Worker is defined in accordance with the ILO's international labour standards, which include both employees and self-employed (or independent contractors). Workers on digital labour platforms are also called "gig workers", "crowdworkers" or "platform workers" in the literature. A taxonomy of how these workers are described by different platforms in their terms of service agreements is presented in Appendix 2, Table A2.3.

The 2021 Report schematically catalogues the approach of the different national legislations regarding the qualification of the employment relationship in four cases: i) classification as employees, often on the basis of the control exercised by the platform, ii) recourse to the adoption of an intermediate category, iii) creation of a de facto intermediate category, iv) categorisation as freelancers on the basis of flexibility and autonomy.

The stated aim is to ensure the application to all workers, including those on digital platforms of national legislation, applying fundamental principles and rights at work, as well as other essential legal provisions such as those relating to health and safety at work and social security; transparent and clear rules and contracts for workers and businesses, including under labour and consumer law; ensuring that workers are correctly classified on the basis of the national occupational classification system; guaranteeing the transparency of algorithms, the protection of personal data and ensuring that self-employed platform workers enjoy the right to collective bargaining through greater harmonisation between competition and labour law.

The ILO also notes that some countries have introduced presumptions of subordination linked to the presence of limited factual indices characteristic of the social type of employment or general relative presumptions of subordination in the presence of a personal service (ILO, 2016).

This brings us back to ILO Recommendation 198 of 2006 and to the question of the presumption of subordination.

II.4. EU point of view : the presumption of dependency/integration in the clients' organisation

The subject of the presumption is also included in the Directive 2019/1152/EU[11] in Art. 15(1)(a).

The integration of the workers into the organisation of the undertaking is given particular attention by the European Parliament Resolution of 4 July 2017 (2016/2221 (INI) on working conditions and precarious employment, which expressly calls on the Member States to take into account the ILO indicators for determining the existence of an employment relationship, expressly emphasising the centrality of the idea that (subordinate) work implies the integration of the workers into the organisation of the undertaking.

The following European Parliament Resolution of 19 January 2017 (2016/2095 INI on the European Pillar of Social Rights) calls on the Commission to extend the Directive on written declarations (91/533/EEC, as subsequently amended) in a way that covers all forms of employment

[11] Directive (EU) 2019/1152 of the European Parliament and of the Council on transparent and predictable working conditions in the European Union.

and employment relationships providing, inter alia regarding forms of work carried out on digital platforms and other types of self-employment, a clear distinction, for the purposes of Union law and without prejudice to the provisions of national legislation, between such genuine self-employed workers and those in an employment relationship.

In this sense, the European Parliament calls for an account to be taken of ILO Recommendation 198, according to which, as mentioned, compliance with various indicators is sufficient to establish the existence of an employment relationship.

The regulatory outcome of this conceptual development is represented by Directive 2019/1152/EU on transparent and predictable working conditions in the European Union. This directive, which has a transposition deadline of 1 August 2022, repeals Directive 91/533/EEC with effect from that date and aims to define minimum rights « which apply 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 » (Article 1(2)).

The proposal for a Directive on an adequate minimum wage in the European Union goes in the same direction (see COM(2020) 682 final).

This definition tidies up the jurisprudential regulation of the criteria for determining worker status while maintaining a mobile boundary of interpretation, subject to progressive adaptation.

The justification for the criterion adopted by the Directive is well expressed in Recital 8, where the binary perspective is reiterated, stating that « 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 abuse of self-employed status, as defined by national legislation, at the national level or in cross-border situations, constitutes a form of falsely declared work which is often associated with undeclared work.

The intention and purpose of the Directive 2019/1152 is to update the general principles expressed in Art. 31 of the Charter of Fundamental Rights of the European Union, according to which « every worker », without adjectives, has the right to working conditions respecting his or her health, safety, and dignity, to a limitation of maximum working hours, to daily and weekly rest periods and to paid holidays. In the same perspective, it moves principle no. 5 of the European Social Rights Framework, proclaimed in Gotheburg on 17 November 2017, when it is expressly stated that « regardless of the type and duration of the employment relationship », workers have the right to fair and equal treatment regarding working conditions and access to social protection and training, as well as to the promotion of the transition to permanent forms of employment, while respecting the necessary encouragement of entrepreneurship and self-employment (if genuine, of course).

The framework of rights constructed by the directive is of course limited to subordinate workers only, which justifies the criticism in the legal literature of leaving platform workers who cannot be considered subordinate by applying the criteria developed by European case law (Loffredo and Tufo, 2019).

Without prejudice to the certain relevance of this criticism, it is necessary to consider the broader scope of the concept of worker referred to in the Directive 2019/1152, which is based, following the development of the Court's case law, on the integration of the « employed » worker into the undertaking of others. The problem of presumption of subordination is linked to the question of the unavailability of the contractual type.

a) The European definition of workers for free movement and the protection of the single market.

The notion of « worker » developed by the case law of the EU Court of Justice for identifying the subjective scope of application of freedom of movement is closest to the notion of subordination by « symptomatic indications », as commonly recognised by national labour systems.

The seminal Lawrie-Blum judgment of 1986 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 » (EUCJ, 3 july 1986, C-66/85, Lawrie-Blum, § 17).

There are therefore three objective criteria for qualifying the employment relationship destined to operate regardless of the possibly different qualifications attributed by the parties or by the national legislator:

1) the real and effective nature of the service personally provided by the worker;

2) the existence of a power to direct the service exercised by the recipient of the service;

3) the onerous nature of the service.

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

This obvious similarity in definition, however, is more apparent than real.

In the framework of traditional national dogmas, the symptomatic indices of subordination are immediately functional to the identification of the bond of heterodependence-heterodirection, in which the structure of the employment relationship is essentially resolved.

First of all, the Court reconstructs the structural elements of hetero-dependence in a much more flexible manner than the results commonly reached by the doctrine of identification of subordination « by symptomatic indices », such as to include typological categories characterised by a degree of autonomy incompatible with the conceptual perimeter of subordination as recognised by the generality of national legal systems (EUCJ, 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 it is, if anything, the assessment of the « non-marginal », « non-significant » and « non-useless » economic nature of the service that plays a decisive qualifying role.

Secondly, in the European perspective, the condition of heterodirection, once integrated, assumes a substantially recessive character with respect to the other two constitutive presuppositions of the effectiveness of the service and the onerousness of the relationship.

On the other hand, from the perspective of national labour law systems, it is the latter that plays a marginal qualifying role, it is instead the condition of hetero-dependence of the work service that attracts the heart of the question of the qualifying case.

This difference in perspective reflects the different goal orientations with respect to which the definition of worker is functionalised in different systems: the protection of the weaker party to the employment relationship in national law, the protection of the competitiveness of the labour market in European Union law.

It is consistent with this approach that it is the actuality of the economic nature of the service that prevails in the economy of the uniform definition of the worker, rather than aspects relating to the degree of subjection to the employer's power of direction and control.

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

It follows that the uniform definition of worker for the purposes of freedom of movement (Article 45 TFEU, Article 48 TEC) cannot, in principle, exert any conformative effect with respect to national concepts, at least whenever the latter assume an instrumental importance for the protection of the individual rights of workers, rather than for the protection of the competitiveness of the labour market.

b) The role of the Charter of Fundamental Rights of the EU towards a generalisation of the uniform EU definition of worker

In the framework briefly outlined above (which deliberately does not take into account the further different European definitions of workers in the protection of secondary rights), the introduction of the Charter of Fundamental Rights of the European Union played a decisive historical role.

Entered into force together with the Lisbon Treaty with « the same legal value as the Treaties » (Art. 6(1) TEU), it expanded the catalogue of fundamental rights provided for by the European

Treaties up to that time, sanctioning the recognition of new rights, many of which are of direct relevance to employment (Art. 15, 27, 28, 30, 31, 32, 34). Others were of transversal scope such as to ensure incidental protection in the workplace (Articles 7, 8, 10), and reaffirmed some of the founding principles of the European Union order, such as the principle of nondiscrimination (Articles 21 and 23) and the principle of equality before the law (Article 20), already set out as a 'meta-principle' in Article 2 TEU.

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

The Court has therefore ruled that the Lawrie-Blum definition of worker is applicable to the protection of the right to maternity leave enshrined in Directive 92/85/EC as it is considered covered by the scope of Article 33 of the Charter (EUCJ, 20 september 2007, C-116/06, Kiiski, § 25).

The same was true of the protection of the right to respect for working time (EUCJ, *Union syndicale Solidaires Isère*, quoted, and EUCJ, 20 november 2018, C-147/17, *Sindicatul Familia Constanţa*)and the right to paid annual leave (Fenoll case), both governed by Directive 2003/88/EC and falling within the substantive scope of Article 31 of the Charter.

Such an approach naturally prevents the unreasonable inconsistency that would be created if the subjective scope of certain fundamental rights were to depend on a concept of a worker that was substantially different from the one used to protect other equally fundamental and equally important rights.

This development has a potentially disruptive impact.

This is a large area of EU law whose teleological orientation is aimed at the constitution, in a cohesive form, of a protective statute of individual worker's rights, and therefore substantially homogeneous with respect to the protective « ratio legis » which is inherent, in principle, in the national labour laws, so that, within this context, the extension of the conformative constraint deriving from the uniform concept of worker could and should operate well.

Given that the protective institutions governed by the Cohesion Directives largely fall within the scope of the subject-matter coverage of the EU Charter of Fundamental Rights, the uniform concept of workers, which is relevant for the application of the latter, is also likely to penetrate by osmosis into broad areas of cohesive law of sub-constitutional rank.

III. Hungary : widespread dititalisation loophole in labour law regulations

As in several Central and Eastern European countries, Hungary has a unified Labor Code (LC) as a post-socialist codification legacy. In this respect, it does not carry a pejorative meaning. On the contrary! In terms of the structure of the regulation, this is positive because, with a few exceptions (eg detailed rules on equal treatment, the right to strike, occupational safety and health), 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 (e.g., HR professional, union expert) must apply in their work.

Today's labor law is not uniform, the outlines of three trends are visible, not with an equally sharp contour.

1. One trend is to maintain traditional labour law - but with many concessions and flexibility.

2. The other trend proclaims almost complete freedom of employment and occupation. This cancels or cancels all institutions of labor law.

3. The third trend is characteristic of another type of work. These legal transactions are long-term, the contract establishing the legal relationship is the so-called belongs to long-term contract category. The dominant type of contract is a relational contract, which is based on elements of long-term legal transactions. The essence of this is a new kind of immanent cooperation between the contracting parties. This cooperation also expresses the changing structure of the economy (Kiss Gy., 2020).

III.1. Traditional regulation - with flexibility

The Hungarian codification of labour law follows the trend mentioned in point 1 above. The Hungarian LC defines the main qualifying criteria of the employment relationship in the regulation of the employment contract. Under an employment 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 Section 42 (2)] (See « *a) Qualifying marks of the legal the employment relationship - primary and secondary criterias* » for details).

Flexibility within the employment relationship means that the LC regulates a number of atypical employment relationships. So the fixed-term employment relationships, call for work, job sharing, employee sharing, teleworking, outworkers and temporary agency work [LC Sections 192 – 222.].

a) Qualifying marks of the legal the employment relationship - primary and secondary criterias

In one of the judgments of the Curia (the Hungarian Supreme Court) stated that the work-related legal relationship must be classified on the basis of the set of qualification marks [Mfv. II. 10.573/2015/4.]. The primary rating marks may in themselves be decisive for the classification of the employment relationship. The secondary rating marks are uniquely not necessarily dominant. These often base the determination of the existence of an employment relationship only in conjunction with other qualifying marks. Before the details: the Hungarian qualification conditions of the employment relationship comply with ILO R 198 Recommendation of ILO concerning the employment relationship (see point 13).

aa) The primary criterias based on LC and court of law are :

- *Job function* (eg. legal adviser, bricklayer, HR assistant, surgeon): the set of tasks that the employer may require an employee to perform.

- *Perform work in person* - the employee may not use a substitute.

- *Employment obligation* - This obligation of the employer became particularly significant during the pandemic. According to the LC: in the event of the employer's failure to provide employment as contracted during the scheduled working time (downtime), the employee shall be entitled to his base wage, unless it is due to unavoidable external reasons [LC Section 146 (1)]

- *Obligation of the employee to be available* – The obligation of availability is not decisive for a contract of services and business contract governed by civil law. In those legal relations, the main duty is to carry out the case or to achieve the result of the work.

- *The hierarchical relationship* – the employee works in the organisational system of the employer.

ab) The secondary criterias

- *The right of instruction of the emloyer* - the difference between laboru law and civil law is decisive. In the case of an employment relationship, the instruction may cover all phases of the work. In the case of the contract of servises and – in particular – a business contract, the right of instruction applies to the performance of the case and to the product, service and not the details of the work that can be produced by the work. In this respect, teleworking is similar to the contract of servises, because, according to the LC – unless otherwise agreed – the employer's right of instruction is limited solely to the definition of duties to be discharged by the employee [LC Section 197 (1)]

- *Definition of working time* – According to the general rule of the LC the duration of work and the schedule of working hours are determined by the employer. There is a special rule for flexible working arrangement. According to this the employer may permit - in writing - the employee to schedule his working time in the interest of autonomous work organisation (flexible working arrangement). Where the employee is permitted to perform certain functions of the job at a specific time or period in light of their unique characteristics, this shall have no bearing on his flexible working arrangement [LC Section 96 (2)]. In one case, this rule is related to digitisation. Regarding teleworking in the absence of an agreement to the contrary, the employee's working arrangements shall be flexible [LC Section 197 (5)].

- *The workplace of the employee* – it shall be defined in the employment contract. Failing this, the place where work is normally carried out shall be considered the workplace [LC Section 45 (3)]. In the case of a contract of servises and a business contract, the place of work is determined by the agent or contractor, unless the activity is stationary (eg place of education or construction). Teleworking is similar to the two civil law legal relationships in this respect as well. According to LC teleworking' shall mean activities performed on a regular basis at a place other than the employer's facilities [LC Section 196 (1)].

- *Use of employer tools and resources* – In contrast, the agent or contractor usually uses his/her own tools to do the work. As part of digitalisation, telework also has a special rule in this regard. According to the Act XCIII of 1993 on Labor Safety (LS) the work equipment for teleworking may be provided by the employee as well, subject to an agreement with the employer [LS Section 86/A (2)].

- *Occupational safety and health* – According to the LC employers shall be liable to compensate their employees for justified expenses incurred in connection with fulfillment of the employment relationship [LC Section 51 (4)]. In the case of an contract of servises and a business contract, it is the responsibility of the agent / contractor to ensure his/ her own safe working conditions Horváth and Szladovnyik, 2019.).

III.2. Labour protection in digitisation - only for telework

The provisions of the EU Framework Agreement on Telework (FAT) were introduced into the former LC and apply since 2004. This method of implementation has been proposed by the government and social partners agreed to it. In this revision of Hungarian labour law, the FAT and the amendments proposed by the Hungarian social partners have been taken into account, thereby ensuring the implementation of the FAT. The discussions on the draft LC have taken place within the National Interest Reconciliation Council which was the usual body for tripartite discussions.

In this context, a brief look at EU Member States: in Belgium, France, Italy, Luxembourg, Greece, Iceland, Denmark and Sweden, social partners chose to implement the EU framework agreement through national or sectoral collective agreements, with the choice between national or sectoral collective agreements reflecting the features of the national industrial relations system. Since 2003, the Spanish national agreements on collective bargaining have incorporated the EU framework agreement on telework into the Spanish labour relations system. These agreements serve as guidelines for collective agreement negotiators throughout the country, set priorities for negotiations at other levels and foresee a bipartite commission in charge of the follow-up. In Italy the social partners agreed on an interconfederal agreement at national level to transpose the EU framework agreement on telework. This agreement was binding for almost the entire private sector and for local public services. In Germany, social partners provide, either jointly or separately, models of collective agreements for further use in bargaining at sector, company and/or establishment level. In addition to Hungary, for example in Portugal the transposition of FAT was made by law (Implementation of the European Framework Agreement on Telework, 2006).

III.2.1. Definition of teleworking

According to the operative LC teleworking shall mean activities performed on a regular basis at a place other than the employer's facilities, using computing equipment, where the end product is delivered by way of electronic means [LC ection 196 (1)]. This rule corresponds to FAT's provision « 2. Defintion and scope » It states : teleworking is a form of organising and/or performing work, using information technology, in the context of an employment relationship, where work, which could also be performed at the employers premises, is carried out away from those premises on a regular basis

III.2.2. Voluntary character, employment conditions [FAT points 3-4]

According to the LC in the employment contract the parties shall agree on the employee's employment by means of teleworking [LC Section 196 (2)]. Thus – as required by the FAT – teleworking is voluntary for the worker and the employer concerned, because mutual agreement of the parties is required. According to LC, a teleworker is in the same employment relationship as other employees. Thus, it satisfies the FAT requirement that the passage to telework as such, because it only modifies the way in which work is performed, does not affect the teleworker's employment status. Related to this, according to LC the employer shall provide

- all information to persons employed in teleworking as is provided to other employees, and.
- access to the employee for entering its premises and to communicate with other employees [LC Section 196 (4)-(5)].

III.2.3. Data protection and privacy [FAT points 5-6.]

The following general rule of the LC also applies to telework: employers shall provide the necessary working conditions [LC Section 51 (1)]. This general rule also includes the provision of the FAT that the employer is responsible for taking the appropriate measures, notably with regard to software, to ensure the protection of data used and processed by the teleworker for professional purposes. As defined by FAT, according to LC the employer shall inform the employee concerning any restrictions as to the use of computing equipment or electronic devices. The LC's general rule of restricting the use of the information technology and computing equipment (computing equipment) also applies to telework. According to the LC employees shall be allowed to use computing equipment, system provided by the employer for the performance of work solely for reasons within the framework of the employment relationship, unless there is an agreement to the contrary [LC Section 11/A (2)]. Undoubtedly, in practice, the teleworker mostly provides the computing equipment.

According to the FAT the employer respects the privacy of the teleworker. In this regard, the LC's rule on teleworker control : unless there is an agreement to the contrary, the employer shall determine the type of inspection and the shortest period of time between the notification and commencement of the inspection if conducted in a property designated as the place of work. The inspection may not bring unreasonable hardship on the employee or on any other person who is also using the property designated as the place of work [LC Section 197 (4)].

III.2.4. Equipment, health and safety [FAT points 7-8.]

According to FAT,as a general rule, the employer is responsible for providing, installing and maintaining the equipment necessary for regular telework unless the teleworker uses his/her own equipment. According to the general provision of Hungarian law, the employer provides the working conditions. Special rule of teleworking: work equipment for teleworking may be provided by the employee as well, subject to an agreement with the employer [LS Section 86/A (2)]. In harmony with FAT, according to the general rule of LC the responsibility for the implementation of occupational safety and occupational health requirements lies with the employers [LC Section 51 (4)]. Special rule of telework : if the employee provides the work equipment, the employer shall conduct risk assessment in order to ascertain that the work equipment is in a safe state. In that case the responsibility to ensure that the work equipment is in a safe state at all times lies with the employee. General obligation of the teleworker: And a general obligation: the teleworker shall not be allowed to alter working conditions at the workplace without the employer's prior consent [LS Section 86/A (2)-(3)].

III.2.5. Organisation of work, training, collective rights issue [FAT points 9-11]

In connection with work organisation, the FAT requires: within the framework of applicable legislation, collective agreements and company rules, the teleworker manages the organisation of his/her working time. The LC meets the expectation: in the absence of an agreement to the contrary, the employee's working arrangements shall be flexible [LC Section 197 (5)]. This means by law that

the employer may permit - in writing - the employee to schedule his working time in the interest of autonomous work organisation [LC Sections 96 (2]. In accordance with the FAT, to prevent teleworker isolation, the LC states: the employer shall

- inform the employee concerning the department to which the employee's work is in fact connected,
- provide all information to persons employed in teleworking as is provided to other employees, and
- provide access to the employee for entering its premises and to communicate with other employees [LC Sections 196 (3)-(5)].

The LC does not contain any rules on employee training at all. Thus – by way of derogation from the FAT provision – it does not require that teleworkers receive appropriate training targeted at the technical equipment at their disposal and at the characteristics of this form of work organisation. According to LC a teleworker is one of the parties of an employment relationship, therefore they have the same collective rights as employees at the employers premise. Thus, according to the FAT requirement the same conditions for participating in and standing for elections to bodies representing

employees or providing worker representation apply to the teleworkers. They eligible to vote and stand as candidates in the election of works councils. Another example: according to LC a trade union shall be entitled to conclude a collective agreement if its membership of employees at the employer reaches ten per cent:

- of all employees employed by the employer;
- of the number of employees covered by the collective agreement concluded by the employers interest group[LC Sections 276 (2)]. Teleworkers should also be included in the membership. According to the FAT worker representatives are informed and consulted on the introduction of telework. According to Hungarian labour law employers shall consult the works council prior to passing a decision in respect of any plans for actions and adopting regulations affecting a large number of employees. Employer's actions shall mean - among others -: the introduction and amendment of new work organisation methods [LC Sections 264 (1)-(2). This includes teleworking.

III.3. 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 the employees in Hungary, 144.000 employees worked as teleworkers (Nagy A., 2020). At that time, the number of teleworkers was lower in only four other member states compared to Hungary (Science for policy brief, 2020. The epidemic caused by the coronavirus 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 people, 17% of all employees worked as teleworkers or in home offices. That number dropped to February 2021. Telework and the home office affected 482,000 people, 11% of employees in February 2021. Approximately 3.5 times more than in 2018.

Teleworkers or home office workers are over-represented, as well as those aged 25-44 and those living in the city. The vast majority (77%) were 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 or home office workers 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 labor market situation during an epidemic. Therefore, its wider spread is likely to have an impact on future labor market processes (Central Statistical Office 2021)

III.4. In the wake of a lost legislative opportunity - a person with a similar legal status to the employee

The bill of LC (2011) - as an absolute novelty - included a rule for a person with a similar legal status 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 modernization in the 21st century: the task of legislation is to create flexible employment - with social security for workers. According to the Hungarian bill, a person with a similar legal status to the employee would normally have been the same as an economically dependent self-employed worker (trabajador autónomo económicamente dependiente) under Spanish law.

Under German law, this is the « arbeitnehmerähnliche Person », under English law, this is the « worker ». This person is not a fictitious entrepreneur. Mostly he/she works under a contract of services or business. And it is as economically dependent on the recipient of its service as the employee. The bill was similar to under Spanish law « economically dependent self-employed worker (trabajador autónomo económicamente dependiente) »

One of the legislative goals was to provide the same social protection to curb illegal employment. According to the bill, a person with a similar legal status to an employee should be considered, 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) 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.

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 with a status similar to that of an employee could not have been lower than the minimum wage (The bill of LC Sections 3].

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.

According to the author's 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. (Gyulavári T. 2019.). 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 becomes huge.

The existence of the following of the indicators of the existence of an employment relationship in the R 198 Recommendation of ILO cited in our paper 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 R 198 Recommendation of ILO.

III.5. Automation and robotics - proposal to rescue workers

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 be easily 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 (For example, there are four car factories, Audi, Mercedes, Opel and Suzuki in Hungary, which together employ 21,500 people). 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) 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 (Balázs Zs, 2018).

Legislation must also respond to this process. The LC does not contain a rule at all on the employer's training task. Automation and robotization can result in termination of employment relastionship by the employer. According to LC an employee may be dismissed only for reasons in connection with his/her behavior in relation to the employment relationship, with his/her ability or in connection with the employer's operations (LC Sections 66 (2)]. The reason for robotization 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 lack.

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 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 labor law in the light of current technological changes. All this should be considered even at the level of international regulation.

IV. Italy : juridical subordination and symptomatic indices

IV.1. Qualification of the employment relationship « by symptomatic indices »

There are legal systems, such as in Italy, which provide a normative definition of subordination. According to the Article 2094 of the Italian Civil Code, a subordinate worker is the one who is « obliged, in return for remuneration, to collaborate in the enterprise, lending his intellectual or manual work to the dependence and under the direction of the entrepreneur ». On the other hand, other legal systems, such as France, do not have a legislative definition of subordinate worker (employee/salarié). This is why, in France, the core characterising the legal subordination link has been identified through case law development as « the performance of work under the authority of an employer who has the power to give specific orders and general directives, to control their execution and to sanction breaches » (Cass. Soc. 13 nov. 1996, *Société Générale*, *Dr. Soc.*, 1996, 1067, note J.-J. Dupeyroux).

Despite the systematic heterogeneity (Nogler, 2009) the various legal traditions all share the decisive role of dogmatic reconstruction played by national jurisprudence. Almost everywhere, the latter have developed doctrines of qualification inspired by the « symptomatic evidence » approach, which is characterised by focusing judicial verification on elements revealing the substantially dependent nature of the employment relationship (Cavalier and Upex, 2006).

In particular, the most common indicators are the degree of control over the way in which the service is carried out, the existence of an obligation to give work to the worker, the more or less personal nature of the service, the ownership of work tools, the tax and social security system, the possibility for the worker to offer his or her services also to other clients, the distribution of the costs of carrying out the work, and the holiday regime.

In the Italian legal system, this dogmatic approach is today particularly revitalised, in view of the need to distinguish the traditional concept of subordination, based on the definition provided for in Article 2094 of the Civil Code, from the new normative subtypes progressively introduced or revised by the legislators on the basis of the so called « Jobs Act » (Legislative Decree n. 81) in 2015, such as « co-hordinated collaboration » (Article 409, § 1, n. 3 of the codice di procedura civile, modified by the Article 15, § 1, a) of the Law 81/2017), the « organised collaboration […] also by a digital platform » (Article 2 of the Legislative Decree n° 81/2015, modified by the Article 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 delivering of goods in urban areas (Article 47 bis of the Legislative Decree n° 81/2015, introducted by the Article 1, § 2 of the Law Decree n° 101/2019, converted in Law n° 128/2019).

IV.2. The Italian approach and the integration of the worker into the client company organisation as a distinctive criterion

The Italian legal system, in formal terms, has only two labour contract types: subordination (Art. 2094 of the Civil Code) and autonomy (Art. 2222 of the same code) and can therefore be defined as a binary system. 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 worker in substance autonomous benefits from the extension of the protection regime typical of subordinate work, even if without changing the structure in the substance binary of the system of classification of work, between the two subordinate and autonomous types.

The resulting system is difficult to understand to the extent that authoritative scholarship has stated, referring to Italian law, that « labour law, which began in the late 19th century, is in a disastrous state after more than a century » (Vallebona, 2020).

The model can be described as follows.

Definitions	**Subordinazione (dependent workers)**	**Autonomia (independant 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-horganisation	Absence of directive power, particular types of transports’ means, delivery of goods in hurban 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. That is, technically, not a question of contract types in

their own right, but of subcategories of autonomous work, to which, in different ways, the law recognises some or all guarantees of the "subordinate" (employment) work.

This is, of course, an expression of considerable chaos.

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.

Notwithstanding the highlighted imperfections, 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 could arise in a relationship of coherence with the clearly 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 into Member States to ensure fair work and adequate and sustainable social protection, by assessing the adequacy of the respective national labour disciplines « taking into account the different needs of workers and self-employed in the digital world as well as the innovative nature of collaborative business models ».

The Italian Supreme Court, through the quoted judgement, recognises, via the Article 2 of the Legislative decree n. 81/2015, « equivalent protection and, consequently, recourse to the full application of the discipline of subordinate labour ».

The Italian judgment does not deal with the issue of technical characteristics and the latitude of legal subordination; the Court, however, while applying a special rule, characteristic of the Italian legal system, offers to debate a essential starting point in the perspective of the tendency towards an expansive remodulation of protection through a broadening of the scope of application of the general labour law discipline. There is a clear signal of the progression of the Italian legal system in the direction of an opening towards the emphasis on hetero-organisation as a criterion of access to labour law protection in respect of (or, at least, alongside) the traditional hetero-direction.

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 », where the notion of « worker », broadened and nuanced, refers - on the basis of the approach stabilised since the *Lawrie-Blum* judgment - to 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 most emblematic passage of judgment no. 1663/2020 is the one in which the Italian Court states, regarding « hetero-organised » collaboration, that « it makes no sense to ask whether these forms of collaboration, so characteristic and from 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 ».

The Court's judgement refers exclusively to collaborations characterised by « economic weakness » and « hetero-organisation » and considered by the legislator, according to the Court, « deserving in any case of homogeneous protection », and not to « situations in which the full application of the discipline of subordination is ontologically incompatible with the matters to be regulated, which by definition do not fall within the scope of art. 2094 cod. civ. » (i.e. legal subordination).

In this passage of the reasoning, the Court attempts to identify a systematic key to the Italian model, which is based on a « choice of a legislative policy aimed at ensuring the same protection for the worker as for subordinate labour, in line with the general approach of the reform, to protect lenders who are clearly considered in a state of economic weakness, operating in a grey area between autonomy and subordination ».

Here lies the most innovative profile of the judgment, which, without moving in the field of the reconstruction of subordinate labour, assigns anyway to economic dependence the role of an index of qualification of the hetero-organisation, understood as a gateway to the integral regulation of subordinate labour. This is like saying that the system of Art. 2 of Legislative Decree No. 81 of 2015 is based on economic weakness as its raison d'être.

The « economic weakness », referred to by the Court as a kind of functional justification for the extension of the discipline of labour law protection, is related to « hetero-organisation » which is characterised as an « element of a functional relationship of collaboration with the client's organisation, so that the worker's services can, according to the modulation unilaterally arranged by the former, adapt to and be suitably integrated into its commercial organisation ».

It remains to be defined what « functional integration into the client's organisation » consists of. The « Foodora » case provides a clear example: the « rider » is inserted in a highly ubiquitous computer system, which allows it to be subject not only to organisational indications regarding delivery time and location, but also to their communication in real time, delivery by delivery, as well as its constant control by the « App » and the fundamental relevance of the opus deduced in the contract for the needs of the client company's activity.

It is on the basis of these elements, all inherent to the telematic nature of the management methods of the contractual relationship, that the Court recognises the functional insertion of the « rider » into the production organisation of the client. Thanks to the « application », there is no room for the rider to discuss the spatio-temporal indices of coordination, and any possibility for the same thing is reduced to the alternative between accepting and not accepting the task.

It thus returns to the centrality of economic dependence, which is the core of the Italian Supreme Court's reasoning, in full coherence with trends in European law. Economic dependence and hetero-organisation, perceived as the integration of the employee in the production process of the client, must act as a discrete criterion between subordination and autonomy.

The Italian labour law system is therefore and remains binary. The protections (and therefore the limitations imposed to protect one of the parties to the relationship) cannot extend to truly autonomous relationships, the connotation of which the Court seems to say, is given by the absence of economic weakness and integration / insertion into the organisation of the client's business.

The Law 81 of 2017 and the Article 47-bis et seq. of the Legislative Decree 81 of 2015 are intended to provide certain types of self-employed workers with ad hoc protection.

In the first case, the Italian legislator has extended certain important rules to self-employed workers, among which a central importance has the prohibition of abuse of economic dependence.

In the second case (that of riders), the protections concerns some very particular aspects, first and foremost that relating to the fairness of the fees.

IV. Spain: a third status or the classical solution

V.1. 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 delivering and the possible existence of an employment relationship as the door to entry under the protection of Labour Law. Aside the legal changes which are right now being developed and that have been previously analysed, the first impact of the platform economy has been taken by both the academy and the courts.

Regarding the first one, the debate has been highly intense and could be summarized, as in so many other discussions, in three different perspectives (Álvarez Alonso, D. 2019):

Firstly, the position of the companies, supported by some economists and lawyers, which requires and specific regulation for platform work, which would be outside the prototypical 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 crystalize

in the creation of a fourth new category to be added to the three explained above (Mercader Uguina, J. R. 2018; Martínez Escribano, A. 2018; Otero Gurruchaga, C. 2018; Pérez de los Cobos y Orihuel, F. 2019; Rodríguez Fernández, M. L. 2019). This alternative would be inspired by the French Law 206-1088 on labour, social dialogue, modernization, and the guarantee of professional itinerary (*Loi nº. 2016-1088 du 8, août 2016, relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*).

Secondly, the perspective close to trade unions' point of view, supported by most of the academy, which highlights that platforms' the business model 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 debate would not be too different to others taken in the past and the solution would be the same one: revealing the abuse and applying the correct legal framework, that is, Labour Law (Molina Navarrete, C. 2017; Todoli Signes, A. 2017; Ginès Fabrellas, A. 2018; Trillo Párraga, F. 2018; Baylos Grau, A. P. 2019).

Finally, there is still room for a third intermediate position which is based on the idea that not new categories 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 economic dependent self-employee but suggests that, depending on the final accommodation according to the particular circumstances of the case, specific rules should be considered (Álvarez Alonso, D. 2019). This would be the option chosen by the draft law promoted by the government, but keeping in mind that this proposal selects one alternatives, 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 project, if succeeded, would be applicable to this type of platform exclusively, so cases placed on other platform sectors should be analysed as it is being done so far, on the base of the "obtuse triangle". 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 delivering.

Precisely, courts have been the 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 been usually terminated previously) should be considered as employees, as self-employees or as economically dependent self-employees. Table 1 shows the courts' resolutions delivered from 2018 to October 2020[12], distinguishing between fist instances (light grey) and appellations (dark grey). According to its content, the following elements must be highlighted: i) the discussion is monopolized by delivering 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 unemployment relationship, and iii) this would not preclude other solutions for other types of platforms.

If focused on the details, the discussion was more open at the first instance level, in spite of a majority of resolution pointing to the employment relationship direction, than at the appellation, where the discussion clearly drove to this solution. The only judgement in favour of the existence of self-employment, STSJ 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 appellation level's opinion is practically unanimous.

The reasons provided by the courts to mostly adopt this particular option can be summarised according to the main factors that support the notion of employment relationship (COGENS Project 2020). 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 lend his activity disconnected from the platform, owing to the platform is 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.

[12] The moment in which the Supreme Court delivered its rulling, as it can be seen below.

The rider could not lend his work outside the digital platform in which it is integrated. If he decided to undertake this type of activity by himself as a true self-employed person, he 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, in this case Glovo, which is advertised on social networks through Google-type search engines, a place where customers go when they need the purchase and delivery of the products that demand provides» (SJS Madrid (nº 33) 11/02/2019). In other words, the platforms business model uses the app as a technological tool, to interconnect subjects, so who is its owner, determines the relationship, and, as a consequence, can be considered as an 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 a number of factors.

It is true, as company usually highlight that riders enjoy a considerable margin of flexibility. For example, regarding working time, riders can choose the schedules and days in which they want to work, as well as the route or the number of orders they want to attend, without the company being able to impose any of these requirements.

Nevertheless, riders have not absolute freedom when rejecting or accepting the service. The rider enjoys some flexibility, but this is the obvious result of platforms' business model.

As the SJS Madrid (nº 33) 11/02/2019 explains «that the assertive faculty in the choice of each microtask is the logical consequence of the atomization of working time, because if the employer could always dispose 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 conceptualization 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 provide an assignment, he can be automatically substituted by another one.

The final 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.

Table 1. Spanish judgement on platforms' legal relationship since 2018

RULING	PLATFORM	CORE-EMPLOYEE	TRADE
SJS Barcelona (nº 11) 29/5/2018	TAKE EAT EASY	✓	
SJS Valencia (nº 6) 01/06/2018	DELIVEROO	✓	
SJS Madrid (nº 39) 3/9/2018	GLOVO		✓
SJS Madrid (nº 17) 11/01/2019	GLOVO	✓	✓
SJS Madrid (nº 33) 11/02/2019	GLOVO	✓	
SJS Gijón (nº 1) 20/02/2019	GLOVO	✓	
SJS Oviedo (nº 4) 25/02/2019	GLOVO		✓

SJS Madrid (nº 1) 3/4/2019	GLOVO	✓	
SJS Madrid (nº 1) 4/4/2019	GLOVO	✓	
SJS Barcelona (nº 24) 21/05/2019	GLOVO		✓
SJS Barcelona (nº 24) 29/05/2019	GLOVO		✓
SJS Valencia (nº 6) 10/6/2019	DELIVEROO	✓	
SJS Barcelona (nº 31) 11/06/2019	DELIVEROO	✓	
SJS Salamanca (nº 1) 14/06/2019	GLOVO		✓
SJS Madrid (nº 19) 22/7/2019	DELIVEROO		
SJS Barcelona (nº 29) 30/07/2019	GLOVO	✓	
SJS Vigo (nº 2) 12/11/2019	GLOVO		✓
SJS Barcelona (nº 3) 18/11/2019	GLOVO	✓	
SJS Zaragoza (nº 2) 27/4/2020	DELIVEROO	✓	
SJS Barcelona (nº 21) 7/9/2020	DELIVEROO	✓	
STSJ Asturias 29-07-2019	GLOVO	✓	
STSJ Madrid 19-09-2019	GLOVO		✓ (reviewed aby the Supreme Court)
STSJ Madrid 27-11-2019	GLOVO	✓	
STSJ Madrid 18-12-2019	GLOVO	✓	
STSJ Madrid 17-1-2020	DELIVEROO	✓	
STSJ Madrid 3-2-2020	GLOVO	✓	
STSJ Castilla y León 17-2-2020	GLOVO	✓	
STSJ Cataluña 21-02-2020	GLOVO	✓	
STSJ Cataluña 7-5-2020	GLOVO	✓	
STSJ Cataluña 12-05-2020	GLOVO	✓	
STS Cataluña 16-06-2020	DELIVEROO	✓	

TOTAL		23	8
STS 23-09-2020	GLOVO	✓	

Source: updated from ignasibeltran.com. Light grey: first instance; dark grey: appellation. Black: Supreme's Court Resolution. SJS: *Sentencia de Juzgado de lo Social;* STSJ: *Sentencia de Tribunal Superior de Justicia.* STS: *Sentencia del Tribunal Supremo.*

Regarding judgements excluding the existence of an employment relationship, it is interesting to highlight that five 5 out of 8 rulings set that these riders are TRADES because they would not have the two main features of the employment relationship and additionally, they would comprehend the main elements of the economic dependent self-employee.

Hence, according to this minority position, there is no employment relationship owed to two main reasons. On the one hand, there is no subordination because the rider would have almost absolute freedom to choose working time, place, and route tasks, the rider has a direct relationship with the final clients in case rider accepts the task, and the rider provides his 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 in case one of them refuses tasks, besides 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 activities.

Within these two positions, Spain's Supreme Court has inclined to the existence of an employment relationship for the platform called Glovo. In its Resolution 25 September 2020 (ECLI: ES:TS:2020:2924) sets that a rider is not completely free to decide when he works owing to the point system conditions 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 it was mentioned above, this resolution closes the judicial debate for the delivery sector, but not for others and even for other platforms.

V.2. The emergence of "Riders' Law"

Spain is quite close to passing the first European law on platform work. The agreement[13] between the social partners and the Government to regulate the delivering sector (the so-called "Riders' Law") seems to go beyond these limits. Despite the agreement, as the proposed legislation must be debated in the Parliament, the draft 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. 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 to all employees.

Several reasons have been considered to initiate the social dialogue to regulate platform work. Firstly, it was a compromise of both political parties in the coalition Government (Socialist Party and Podemos). Secondly, the poor working conditions of these workers have been at the core of both political and social debate, putting pressure on political agents and social partners to find a solution. Thirdly, the intense judicial debate empowered also the legislative path. Despite negotiations were initiated before the Supreme Court's judgement, the different resolutions delivered by lower courts highlighted the necessity of having an explicit legal framework. The Supreme Court's judgment gives the final support in favour of the employment relationship solution.

Nevertheless, according to the text of the proposed legislation, the new law will include the following reforms:

[13] https://prensa.mites.gob.es/WebPrensa/noticias/laboral/detalle/3958

First of all, it presumes, unless proven otherwise, the existence of an employment relationships for those who provide services, in exchange of remuneration of delivering and distribution of 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, article 64 of Workers' Statute (Spanish Employment Law) sets that employees' representatives have the right, among others, «to issue a report, prior to the execution by the employer of the decisions adopted by him, on [...] the implementation 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». As a consequence, 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 the employer's representatives to regulate it.

Despite Trade Unions' proposals were more detailed[14], it is a great advance, as it does not only extend information and consultation on this issue, but makes collective bargaining to negotiate the details. In order words, it puts algorithm into the object of negotiation.

The following steps will be that the proposed legislation is sent to the parliament to be discussed. As it is based on a social dialogue, it would not be mayor political problems to pass it. Additionally, as it was mentioned above, once it is passed, collective bargaining should start to regulate this issue as well, empowered by the new law. Despite this is going to be the first law on platform work in Europe, it may be not the last one, especially if the proposal of a directive on platform work succeeds. So far, this directive would be a broader scope, so it would make Spanish legislator to expand both the scope and regulated fields of the current reform.

[14] For example, «all the information related to the parameters and decision-making rules used by the algorithms used by the company that may directly or indirectly affect the conditions of work and access and maintenance of employment». Their proposal also included the creation of a platform register, in which it must be included the « g) Algorithm applied to the organisation of the activity, which will include, as a minimum, the pseudo code or flow diagram used, as well as the reputation systems used, if any, and to whom they apply»

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