Chapter 8
Out of sight, out of mind? Remote work and contractual distancing

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1. Introduction

Since the Covid-19 pandemic, remote work has acquired quasi-Marmite status. It has become difficult, if not impossible, to approach the issue in a measured and dispassionate way, which is one of the reasons books such as the present one are being published. Remote work is often seen as anathema by some who associate it with laziness, low productivity and the degradation of the social fabric of firms and of their creative and collaborative potential. The notorious views of CEOs such as Tesla and Twitter's Elon Musk or JP Morgan's Jamie Dimon come to mind, indicative – in the view of the authors of this chapter – of a certain managerial culture fearing the 'loss of control' that comes with remote work. It should be acknowledged that, even in certain worker-friendly quarters, the spread of remote work is accompanied by concerns about social isolation, unsustainable work intensification, the blurring of private life-working life boundaries and the deterioration of career prospects (Balzano 2022). But remote work is also sometimes portrayed as a kind of new Jerusalem for the future of work, allowing better work-life balance, greater productivity, autonomy and creativity, and higher levels of mental and physical well-being.

This type of polarisation inevitably leads to tensions in the workplace. When Elon Musk purchased Twitter – an early, pre-pandemic, adopter of working from home practices – and became its CEO, one of his first circulars to staff mandated the end of remote work within 48 hours (Milmo and Hern 2022), a move that was allegedly met with a large enough number of employees threatening to resign rather than return on a full-time basis to their offices that the 'Chief Twit' was forced to water down, at least temporarily, his new policy (Wagner et al. 2022). There is mounting anecdotal evidence that some workers are willing to resign rather than accept 'return to the office' mandates, with some organising and taking industrial action in defence of 'remote' or 'hybrid work' practices established during the pandemic (Molla 2022).

This chapter argues that some of the tensions surrounding the use of remote work are, to a large extent, a reflection of a certain managerial culture profoundly rooted in a pre-modern understanding of managerial control, understood as direct or bureaucratic control, over the labour force. These remain widely prevalent in spite of the existence of alternative, more nuanced and trust based, models of human resource management and of novel and more sophisticated (though no less intrusive) forms of control. This observation is developed further in Section 2 of this chapter which identifies managerial control as a key factor in determining the future trajectories of remote work, linking this analysis to the analysis of the contractual arrangements used by businesses to source

labour. This is not the only factor, however: more trust based alternative managerial cultures, skill levels and the potential deployment of other forms of control also play a role in dictating the contractual and relational dimensions of future remote work patterns.

Sections 3 and 4 identify and explore in greater detail four main examples of contractual distancing and how they may intersect with some of the existing labour standards that have sought to manage and mitigate previous waves of contracting out or even outsourcing. This brings us to see remote work as a phenomenon capturing forms of digitally assisted work activities that are executed outside the paradigm of the employment relationship (mainly or entirely) performed from the premises of an employer, such as online platform work, including crowdwork, and of course telework.

This is followed by Section 5 which argues that dealing effectively with the challenges explored in this chapter may ultimately require a more radical set of reforms seeking to grant labour rights and protections beyond the traditional concept of the contract of employment while, at the same time, encouraging and fostering managerial cultures that are less insistent on control and more accepting of higher levels of cooperation, autonomy and trust. This is something that could be facilitated by reducing the centrality of the concept of subordination in work relations and substituting it with other concepts that, for instance, focus on notions of personality.

The chapter concludes that, under certain conditions, remote work can be perfectly reconcilable with high levels of employment protection, as enshrined in labour legislation, collective agreements and secure contractual arrangements, with both companies and workers profiting from this virtuous configuration. But it also warns against the risk that, for many workers providing their labour to 'unadjusted' employers (i.e. companies or workplaces that remain insistent on traditional forms of direct managerial control), remote work may come at a price of contractual distancing, a notion we explore below, with the progressive fragmentation and deterioration of employment protections and standards, a phenomenon also discussed by Rainone in this volume.

2. Take back control – adjusted and unadjusted managerial cultures

There is little doubt that the Covid-19 pandemic that ground much of Europe – and the world's – economy to a halt in March 2020 represented a fundamental watershed moment for the type of working practices that we broadly associate with the concept of remote work, and working from home in particular. Almost overnight, literally millions of workplaces and companies shifted a substantial part of their activities from the physical to the virtual environment, though without necessarily changing their structures, corporate cultures and working practices to an online, working from home milieu.

There is no denying that, for all its material challenges and drawbacks, working from home has the benefit of relieving millions of employees (Fernandes 2022), in Europe

and beyond, from the daily grind of long commutes, the toxicity of certain office environments and part of the drudgery of the 9-to-5 routine. It offers at least the prospect of better work-life balance, greater flexibility and an unprecedented degree of autonomy. And, of course, it allowed many to continue to earn a living and businesses to avoid bankruptcy in spite of the challenges posed by social distancing mandates. Unsurprisingly, in spite of two long winters of seemingly endless Zoom meetings, blistering home schooling sessions and worrying levels of social isolation, surveys continue to suggest a strong attachment of workers to at least some measure of home or remote working and a reluctance to contemplate a full return to the office in the post-pandemic world (Harvard Business School 2021).

Employers have perhaps been more ambivalent about the issue. As noted in the opening paragraphs, some see home working as an aberration to be rectified as soon as possible (Makortoff 2021). Others are increasingly tempted by, and many have embraced, the cost-saving element associated with the reduction of office space (Reuters 2021; Putzier 2021).

It is fair to say that this sudden shift to remote work did come with its own challenges for both workers and managers. The latter in particular were troubled, it seems, by the loss of control that – perhaps inevitably – resulted from this sudden redrawing of the physical boundaries of 'their' firms and the geographical displacement of the workforce (Abgeller et al. 2022). 'Out of sight, out of mind', as the expression goes, became a real concern for several CEOs. Such was the managerial discomfort with this lack of day-to-day control over the workforce that several companies spent the early months of the first lockdown figuring out how to deal with this new state of affairs, which often simply meant replacing direct control with slightly spruced up versions of bureaucratic control or intrusive forms of remote proctoring (Fana et al. 2020). Measures such as tracking the number of keystrokes in a certain period, weaponising green, yellow and red presence statuses against workers, sometimes with paradoxical and abusive outcomes, including wage theft (De Stefano and Taes 2023), and using laptop cameras and screenshots for stealth surveillance became commonplace in many work environments (Aloisi and De Stefano 2021).

Post-pandemic, the dust of mandatory teleworking having finally settled down, it is becoming clear, and evidenced by data referred to in Zwysen (this volume), that remote work is destined to be far more prevalent than it used to be before the pandemic, although certainly less widespread than during its lockdown phases. It is equally clear that ICT developments and a certain popularisation – trivialisation even – of technologies that, until 2020, looked almost esoteric to most workers and employers have greatly contributed to expanding the range and typologies of these practices that now include various working from home modalities, such as the almost ubiquitous hybrid arrangement whereby some days are worked from home and others from the office, but also a growing range of peripatetic and even virtual collaborative forms of work.

But it is also becoming increasingly evident that not all workplaces have genuinely adjusted to, let alone embraced, a new remote work culture and – in particular – few

appear to have shifted from a direct control mindset to one based on higher levels of trust or, as defined by some of the specialist literature on the subject, on 'responsible autonomy' (Abgeller et al. 2022). In effect most businesses appear to have simply migrated pre-existing onsite working and managerial practices to the online environment, their corporate cultures never quite overcoming a certain unease associated with 'distance' and the challenges it poses to more mundane and traditional forms of managerial supervision, micro-management, control and unapologetic opportunities for personal domination. For these unadjusted corporate cultures, remote work remains a challenge, a foreign body, worthy of being expunged or scaled down, including by guile or, when needed, brute strength.

Writing as labour lawyers specialising in the regulation of the contract of employment and of work relations, we are hardly surprised by this state of affairs. It is plainly clear to any employment law expert that the idea of managerial authority, and perhaps the very idea of management, has been traditionally associated with (and even shaped by) the very power of control that, in most legal systems, is also inextricably linked to the traditional concept of the contract of (subordinate) employment (Deakin and Wilkinson 2005). The centrality of authority and employer *fiat* in the operation of businesses, particularly since the start of the Second Industrial Revolution, is a manifest reality even without disturbing Coase and his 'Nature of the Firm' theory, in particular his central insight that a firm's comparative cost advantage derives from its ability to coordinate activities through administrative direction rather than market-centred transactions based on price. This is something that, as far as the domain of labour activities is concerned, labour sociologists and lawyers have traditionally imputed to the power of administrative direction inherent within the contract of employment (see Freeland 2016). Conventionally, a firm means managerial authority, managerial authority means managerial control, and managerial control is channelled through the medium of contracts of employment which, in effect, encapsulate the idea of the subordination of labour to capital and workers to management. Subordination is so deeply ingrained in the legal construction of the contract of employment that, in systems such as that in Italy, the very legal definition of an employee is 'subordinate worker'. So, in that sense, the idea of managerial authority and the idea of the contract of employment have been mutually reinforcing ones, the contract becoming a vehicle for the lawful exercise of managerial prerogatives and control.

As vividly manifested by the substantial processes of outsourcing and contracting-out of the 1980/90s and, more recently, by the emergence of the gig economy and platform work, following decades of undisputed misclassification and casualisation practices, it is certainly possible for capital to control labour even in the absence of contracts of employment, as further discussed in Rainone (this volume) and, more generally, in Weil (2014). If anything, the so-called gig economy has proven the potential for technological control over the performance of both peripheral but also core corporate and business activities, even in the absence of secure contractual arrangements. It is also perfectly possible to develop managerial cultures that are less hierarchical, more trust based and more collaborative and that effectively delegate important aspects of control and supervision to horizontal interactions between peers and teams of workers, fostering both autonomy and responsibility. But, as pointed out by experts working in

this field, 'Trust is the glue in responsible autonomy, yet exists in tension with intrusive managerial control' (Abgeller et al. 2022). In other words, in the minds of several CEOs and in widespread managerial culture, not to mention mainstream policymaking, a strong nexus of association remains between direct control and the use of contracts of employment. And – conversely – that other contracts for work (such as self-employment contracts, contracts for services, quasi-subordinate contracts) are typically associated (at least nominally) with lower degrees of managerial direction and interference. The flip-side of this nexus between degree of control and contractual type is that, whenever management is not satisfied that the circumstances under which labour is provided allow it the degree of full, direct or bureaucratic, control which it is accustomed to and expecting, it is more likely to offer casual contracts or contracts for services as opposed to secure contracts of employment. This is also – and to a large extent – to diminish its liabilities in terms of labour, social security and tax obligations which corporations and management (reluctantly) accept as a quid pro quo for full control over 'their' 'subordinates'.

In Section 3 we posit that these, still surprisingly prevalent, managerial tendencies which, overtly or covertly, idealise direct control may prove of fundamental importance in shaping the future trajectories of remote work, including by effectively imposing on workers a different quid pro quo between a greater use of remote labour (perceived as less controllable) and lower levels of employment protection.

3. Remote, removed, restructured, replaced. The risks of contractual distancing

Both early and more recent studies on remote work have rightly focused on a number of largely unforeseen, but clearly emerging, risks associated with remote working, teleworking in particular. Rising gender inequalities (Rubery and Tavora 2020) and growing psychosocial risks (Franklin et al. 2020) are increasingly documented as some of the main hazards associated with these forms of work (ILO 2020). A heightened blurring of work and private life, a stretching of working hours throughout the entire time that people are awake and an inherent tension between remote monitoring and privacy are also reasons for concern.

In this chapter, however, we would like to draw attention to an additional risk, namely the impact that the establishment of remote work as the 'new normal' could have on the future of employment relations and, in particular, on the likely emergence of new forms of contractual distancing between the firm and its remote workforce (Kuper 2021). By the term 'contractual distancing' we refer to a range of HR strategies, including increased recourse to (bogus) self-employment and on-demand arrangements that could have the effect of thinning down the responsibilities and obligations that employers typically take charge of when hiring labour under standard contracts of employment. A study published by consultancy firm McKinsey towards the middle of the pandemic

had already alerted us to this danger (McKinsey Global Institute 2021),[1] noting that 'Businesses have … been rewiring their organizational policies … to better leverage a flexible workforce and use independent workers' skills to help adapt to a postpandemic world', and that, of the 800 business executives it surveyed, '70 percent report an intent to hire more on-site independent workers and freelancers after COVID-19'. More recent studies, such as those reported in a recent article in *The Economist*, seem to confirm these fears (The Economist 2023).

It should not be thought that, in the coming months, all businesses will rush to reclassify their workers as self-employed contractors working remotely. A first group of workers, whose size would vary depending on the type of business or sector employing them, and of course on managerial cultures, is likely to be able to enjoy the benefits of remote working, perhaps even from the safety of employer-sponsored home offices, while retaining contractual security and labour rights. These would probably be employees with highly desirable and hard to find, firm specific, 'core' skills. Their employers will want to keep them close to their chest in terms of their contractual arrangements, grant them a modicum of trust, autonomy and freedom in the manner and location in and from which their work is performed, though likely in exchange for greater intrusiveness regarding the content of their work and their output (including through digital surveillance and monitoring) and some exclusivity expectations over their services. Think of the university professor, top lawyer or cutting-edge software developer.

But a second group of workers, whose services may be perceived as being less high skilled (though not necessarily unskilled or peripheral either) and more readily available in the labour market, could quickly be on the receiving end of restructuring and contractual variation processes that could see them working remotely, on a more or less regular basis, but as freelancers or independent contractors. They would become 'outforced' remote contractors. Think of the lecturer (seasonal or otherwise) now teaching on the new online course convened by the senior professor mentioned above, the junior associate assisting that top lawyer and the army of IT experts that will be needed to sustain the growth in teleworking and other forms of remote work, including in the 'metaverse'.

There is then a third group of workers whose labour risks being restructured as needed on an intermittent or on-demand basis and which could readily be shifted to platform-intermediated forms of work, including through offshoring processes. As further discussed by Rainone (this volume), algorithmic management has abundantly proven its ability 'in chopping up a multipart work into its smallest components and submitting each of them to always available and geographically dispersed "legions" of workers' (De Stefano and Aloisi 2018: 16). It has been so effective at this that there could be a genuine blurring between this third group and the previous one, whose members could also be pushed into performing gigs. These groups will arguably suffer the harshest of trade-offs between the advantages of physical distancing and the disadvantages of contractual distancing and precarisation.

1. See our blog post at https://www.socialeurope.eu/the-long-covid-of-work-relations-and-the-future-of-remote-work

Finally, as already predicted by Stiglitz (2020) in the early days of the pandemic, and confirmed by the McKinsey report, some workers who perform low skill and repetitive tasks are likely to be increasingly substituted with bots and artificial intelligence (AI), although human labour may still remain a feature, albeit a hidden one, of these processes of 'heteromation'. While automation, understood as full substitution, that is to say as technology entirely taking on a task that would usually be undertaken by a worker, naturally does not amount to a form of contractual distancing, we suggest that more subtle forms of heteromation do in fact amount to a, perhaps extreme, version of contractual distancing. In this context, heteromation, a concept originally defined by Ekbia and Nardi (2017), can be understood as the concealed outsourcing of work tasks – that would traditionally be completed by workers – to customers, consumers or clients, a process occurring behind a façade of 'automation' – think of completing a flight check-in online: no automation is involved here; it is simply a task that an airline employee once completed behind an airport check-in desk and which is now completed by another human, the passenger, for free. Heteromation can thus be seen as a type of 'faux automation' which still eminently relies on human activity and even on human labour and which, in that sense, represents a rather insidious form of contractual distancing.

4. Regulatory frameworks and contractual distancing

We should be careful, however, not to suggest some degree of inevitability when assessing these risks: many will, in effect, be shaped by the broader and specific regulatory framework and the extent to which it promotes, tolerates or resists any such possible transformations.

The first group of workers discussed above is most likely to succeed in retaining existing protections or even accruing additional contractual rights and benefits, perhaps also accumulating several jobs except that some employers may start to reduce their freedom to work for multiple employers by means of exclusivity clauses – a topic that would, eventually, attract greater regulatory intervention than it has done in the past. Think, for example, of a very senior, stellar academic, tied to one (or more) universities around the globe while essentially being based in her or his villa in Napa Valley, California. These workers are likely to suffer, at most, some blurring between their private and their work life dimensions and, maybe, some subtle yet intrusive forms of remote and digital surveillance, but not of the kind or degree to which workers in the second and third groups are likely to be exposed, a point that is discussed further in the following paragraphs. Perhaps at some point one of the university employers of the above academic decides to introduce an exclusivity clause under which she or he commits to providing lectures and research only for that university and not for other global competitors. Were this group of highly coveted professionals instead to become genuine digital nomads, with their 'home offices' being located in different jurisdictions to the ones in which their employer is based, they may also experience some of the procedural inconveniences and conflicts of law explored at greater length by Grušić and by Rasnača (both this volume).

But it is the second and third groups discussed above – the 'outforced' remote contractors and the gig workers – that will face the greatest disruptions and erosion of employment status and rights and for whom novel protections are needed. In terms of addressing 'outforcing' practices we know, for example, that previous outsourcing waves, those that we could generally associate – in slightly broad-brush terms – with the shift from Fordism to Toyotism in the 1980s and 1990s, were significantly shaped by a European regulatory instrument, the Acquired Rights Directive. This Directive, which was originally designed to offer some protection to the contractual and collective rights of workers when the ownership of their undertaking was transferred from one corporate hand to another, ended up guaranteeing a modicum of labour protection when private corporations and, later, the public sector began outsourcing to private contractors (and, to a lesser extent, sub-contractors) such non-core activities as catering, cleaning, security and waste collection.

Rainone (this volume) draws on the example of the Acquired Rights Directive to argue for the need to reinterpret certain core labour law notions, such as 'assets', or 'undertaking', which are in danger of losing their meaning in a fully dispersed workplace. We argue that, in addition to the wording, some of the central provisions of the Acquired Rights Directive would need to be revised for it to remain relevant in the context of restructuring processes that could be accompanied by a visible geographic fragmentation of the very units (the individual workers) of the 'economic entity' that is being, in effect, outsourced to remote work/home working locations. As noted elsewhere by Rainone, the Court of Justice of the European Union has somewhat struggled in terms of consistency when requiring that a 'transferred entity must be an *organised* group of assets and persons', occasionally 'holding that an *organisational* structure is actually not decisive, and that rather [it] is important to have an *operational* grouping of assets and workers' (Rainone 2018: 319).[2]

This has proved to be one of the Directive's weaknesses in cases involving the radical reorganisation of the transferred business (or part of the business) across scattered geographical locations resulting, in the Court's words, in 'the functional link between the various elements of production transferred [no longer being] preserved'.[3] For example, on the basis of this jurisprudence, national courts have established that the Acquired Rights Directive would not apply to the situation in which the restructuring of a care home business for vulnerable adults resulted in the care home structure closing down and the residents being re-housed into homes of their own, their care being performed by two new firms specialising in care provisions and which recruited the previous care home staff.[4] While the deciding court, in this case, pointed out that the change in the geographical location of the service provision was not, per se, a reason to deny that the Acquired Rights Directive could apply, it effectively drew the conclusion that 'the service was … fundamentally different from that operated' before as 'these clients were *being moved from "Institution" to home*'.[5]

2. Emphasis in original.

3. Judgment of the Court of Justice of the European Union of 12 February 2009, *Dietmar Klarenberg v Ferrotron Technologies GmbH*, C-466/07, ECLI:EU:C:2009:85, para. 45.

4. *Nottinghamshire Healthcare NHS Trust v Hamshaw & Ors* [2011] UKEAT/0037/11/JOJ.

5. Ibid. para. 17. Emphasis added.

There is a genuine risk, under this type of jurisprudence, that the social distancing process in the provision of labour could easily be seen as altering the nature of the service that is being provided, or at least altering it sufficiently to permit that contractual terms be changed without the Acquired Rights Directive applying to the transfer. This risk is only magnified by the presence in the Directive of provisions such as those contained in Article 4(1), allowing a free hand to management to fire and rehire on different terms transferred staff by way of 'economic, technical or organisational reasons entailing changes in the workforce'. This is a type of provision that, in some jurisdictions, has facilitated the transfer of workers previously on secure contracts of employment to contracted-out franchising arrangements[6] and that could well be used in the context of the contractual distancing processes linked to remote work. There are reasons to believe that the Acquired Rights Directive would need to be reviewed and to recognise that any gains in terms of autonomy which may come with remote work will not magic such workers into genuine small businesses capable of functioning independently on the market.

Similar concerns would apply in respect of those groups of workers for which social distancing and remote work could result in both a geographical and a temporal fragmentation of the way in which their labour is sourced and performed, a group that – as noted in the opening paragraphs of this section – may well be sucked into the growing gig economy. In this respect, there are inevitably very high expectations that the pending draft Platform Work Directive may offer some help in underpinning the rights of these workers.

This Directive, which has now entered the trilogue process, would establish a rebuttable presumption of employment for platform workers. In the draft proposed by the EU Commission, the presumption would be triggered if the platform controlled 'the performance of work' of a platform worker. To establish this kind of control, at least two out of five indicators should be met: remuneration setting by the platform; a restriction of the worker's freedom to organise their work, including through sanctions; a limitation on the ability to work for other parties; the imposition of standards of conduct; and the platform's supervision of the work performance or the verification of the quality of the results, including by electronic means.

Establishing a presumption of employment in the field of platform work is, in general, a positive development. If the presumption were too difficult to activate, however, it would be more harmful than not intervening since a failure to activate it would most likely result in the worker being unable to obtain reclassification (i.e. as an employee) by ordinary means. This risk would hardly be a theoretical one were the current draft to be approved. The current indicators that point to the existence of control and subordination in a platform work relationship are drafted in a very narrow way and are easy to circumvent simply by tweaking the terms and conditions of platform work and introducing boilerplate clauses that would nominally escape the draft's indicators.

6. *Meter U LTD v Hardy & Ors* [2012] UKEAT 0207_11_2802.

Moreover, some of these indicators should already be strong indicia of the existence of an employment relationship and would already imply reclassification in several European domestic jurisdictions with no need for a rebuttable presumption. For instance, it is difficult to imagine how the kind of control and subordination that is sufficient to determine employment status could be absent when one party 'effectively restrict[s] the freedom, including through sanctions, to organise [the other party's] work'. Yet, if the current draft Directive were adopted, this element would be 'declassed' to just one of the several indicators that, in addition to the presence of one other, could trigger a rebuttable presumption of employment. So, platforms could restrict the freedom of workers to organise their work and still prove that this should not result in reclassification even were one of the other indicators above to be met. For these reasons, amending the current Commission's draft would be crucial. In this respect, the amendments recently voted by the EU Parliament to the draft Directive are to be welcomed. Although definitely not watertight, the Parliament's criteria strengthen the presumption by making it more complicated to avoid through boilerplate clauses compared to the original version.

A functional Platform Work Directive would be vital in mitigating the risks of contractual distancing mentioned above. However, a weak presumption of employment would have the opposite effect of providing a blueprint for sham terms and conditions of work that would escape both the Directive and possibly other venues of reclassification. To avoid the paradoxical outcome of favouring contractual distancing and a further 'gigification' and casualisation of European economies, the Directive should thus arguably be fine-tuned to the realities of online platform work by fixating less on elements such as stringent supervision, and concentrating more on the integration of personal work performance in someone else's business, either as platform or as client. This instrument should, at least on paper, be able to do that as some of its provisions – for instance those introducing transparency rights on the use of automated monitoring and algorithmic management – do in fact refer to broader concepts of the employment relationship, applying as they do to all 'persons performing platform work'; that is to say, to 'any individual performing platform work, irrespective of the contractual designation of the relationship between that individual and the digital labour platform by the parties involved' (see Articles 2(3) and 6 of the Draft Directive).

Finally, coming back to the issue of augmented managerial control coupled with the shedding of employers' responsibilities, remote work undoubtedly engenders the risk of a further exacerbation of monitoring and surveillance on the part of employers who are only willing to concede direct control for far more subtle and intrusive forms of digital and remote control and surveillance. This greater subtlety is desired to allow them to have their contractually distanced/low liabilities 'cake' and, at the same time, 'eat' it by enjoying substantial amounts of the managerial prerogative of direction and supervision. In this respect we are rather adamant that neither the provisions contained in the GDPR, nor those enshrined in the AI Act or currently being discussed in the context of the Platform Work Directive negotiations, are up to the task.

The AI Act mentions:

> AI systems [that are] intended to be used for recruitment – for instance in advertising vacancies, screening or filtering applications, evaluating candidates in the course of interviews or tests – as well as for making decisions on promotion and termination of work-related contractual relationships, for task allocation and monitoring and evaluating work performance and behaviour,

and provides that these be classified as 'high-risk'. However, it also specifies that these systems' conformity will essentially be subject to mere 'self-assessment by the provider'. This is a much weaker kind of safeguard than the one applying to those high risk systems requiring 'stricter conformity assessment procedures through the involvement of a notified body'. Introducing an ex ante assessment by third parties instead of self-assessment would be vital in protecting workers' rights (De Stefano and Wouters 2022). Moreover, the AI Act has a 'liberalising' legal basis which would be likely to imply that, if the AI systems used at work comply with its procedural requirements, these systems should be allowed. Even more protective national regulation could thus be overridden or pre-empted, paving the way to dystopian scenarios of substantially unregulated mass algorithmic surveillance and discipline.

For those remote workers captured in trends towards platformisation, the EU Platform Work Directive could act as a lex specialis that would prevail on conflicting legal standards and avoid the outright deregulation of algorithmic management that the AI Act could cause (De Stefano 2022). The draft Directive also allows for more favourable regulation to be adopted at national level and establishes information and consultation duties for platforms when they adopt and operate algorithmic management systems. Even these provisions, however, would be likely to fall short of providing adequate safeguards. First, the Directive accepts that these systems be allowed in principle. It could be argued, instead, that algorithmic management should not be assumed as a given and its introduction made subject to actual negotiation with workers' representatives and the oversight of administrative bodies, in line with the provisions of several national legislations within Europe concerning the use of previous technologies, such as cameras, that may allow the remote monitoring of work performance. It seems unreasonable that algorithmic management should be held to lower regulatory standards than past, potentially less intrusive, surveillance practices.

Moreover, the Directive would only apply to platform work and, even in that field, collective information and consultation duties would not extend to self-employed platform workers and would thus fail to cover many remote workers subject to contractual distancing and bogus self-employment. It is impossible to overstate what an incentive this loophole represents for businesses to avoid the application of the Directive, and particularly its collective rights provisions, by moving around the definition of 'digital labour platform' included in the text and, even more, to engage in further misclassification and contractual distancing. Once again, without calling into question the good faith behind the current formulation of the draft Directive, the risk that its adoption in its current form would do more harm than good when it comes to remote work is striking.

5. Conclusions – remote work between adjusted and unadjusted regulatory frameworks

This chapter argues that what it refers to as adjusted vs unadjusted corporate culture will emerge as an important factor – among others, of course – in shaping the future trajectories of remote work, with equally fundamental consequences for the nature and typology of the contractual arrangements that will sustain future remote working. In practice, of course, several workplaces and companies will be swinging between the two ends of the adjusted vs unadjusted spectrum, exploring difference mixes of in-presence and remote work and other hybrid arrangements. These authors believe that the more successful a working or corporate culture will be at adjusting to, and genuinely embracing, remote work (including in the context of 'semi-adjusted' cultures and hybrid working arrangements), the less likely it is that remote work will be rolled back or result in a loss of employment rights. And vice versa. Surely other factors will come into play, including skills and human capital, labour supply, the opportunity costs associated with office space and – no less importantly from our point of view – the ability of regulation and collective bargaining to shape the direction of these processes.

This chapter examines in particular the role that rules on the transfer of undertakings, on platform work and on digital surveillance could have on shaping and regulating these dynamics and providing a contrast to the risks of contractual distancing, which – we argue – are considerable, clear and present. By way of conclusion we also suggest that a more radical reconceptualisation of the personal scope of application, beyond the traditional conception of the subordinate contract of employment and as applicable to all 'personal work relations' (Freedland and Kountouris 2011; Countouris and De Stefano 2019), could act as a powerful force to counteract these trends in two crucial ways.

First, it would mitigate and possibly eliminate the effects of contractual distancing by extending labour protections to all those workers providing personal work or services, regardless of their stated contractual or employment status (in this respect, see the important judgment in *JK v TP*).[7] So even if a remote worker is reclassified as, say, a self-employed contractor or a platform worker, all labour rights would still apply.

Second, it would reduce the temptation for employers to engage with contractual distancing in the first place, both by virtually eliminating any labour, waged and non-waged, advantages arising from the contractual reclassification processes discussed above and, no less importantly, by progressively reducing the fetishised attraction that some managerial cultures feel towards the idea of subordination. As the European social partners embark on a process of renegotiation of the 2002 Telework Agreement (ETUI 2022) this is a useful time to reflect on these challenges and on their impact on the future of remote work arrangements.

7. Judgment of the Court of Justice of the European Union of 12 January 2023, *TP (Monteur audiovisuel pour la télévision publique)*, C-356/21, ECLI:EU:C:2023:9.

The world of work has a long and proud tradition of defying the prophets of doom predicting its final demise. This could, and should, be one of those instances. As recently noted by the International Labour Office, there is nothing novel about home working (ILO 2021). Yet this form of work has not historically been associated with decent or secure employment conditions. The home connotes private space which does not lend itself to regulatory action by the state, trade union activity or administrative inspection. A societal shift in favour of remote and home working could, nevertheless, prove a historic opportunity for the labour movement, liberating millions of workers – at least those fortunate enough to be able to perform their work remotely (European Commission 2020) – from the excesses of managerialism and go as far as reshaping the very idea of work, in which they are controlled and subordinate, in favour of an idea of more autonomous, collaborative and trust based personal labour. It could give a new impetus to the much needed 'human-centred agenda for the future of work' (ILO 2019: 24).

This liberation, however, is not what most remote workers have experienced during the pandemic, nor what they are experiencing in unadjusted workplaces. To have a truly liberating effect, future remote work schemes must swiftly depart from these 'lockdown work' paradigms and reshape corporate cultures (Aloisi and De Stefano 2020), something that can realistically only be achieved through collective and union action. And workers, unions and regulators will need to be much better aware of the pitfalls of contractual distancing.

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