Chapter 9
Digital and remote work: pushing EU labour law beyond its limits

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1. Introduction

Remote work, broadly comprehended as situations in which work is performed outside the employer's premises, is placed in this chapter in the context of the incremental digitalisation and gigification of the labour market. The premise of this reflection is that digital infrastructure can be counted as a key enabler of remote work, encompassing everything from task management apps and productivity tracking software to the more extreme cases of platform work (see Rani, this volume; Risi and Pronzato 2021). Thus conceived, remote work is discussed here as a disruptor to the reach and efficacy of existing labour law systems. This chapter provides an overarching mapping of the challenges to existing labour norms and suggests possible avenues for their reorientation, even at the cost of reshaping their scope.

Enabled through a digital ecosystem, work when done remotely seems to lose its connotations, leading to a relationship with existing labour law instruments that appears precarious and unstable. The increasing diffusion of remote work, especially when performed as gig and platform work, is therefore exerting a transformative effect on the world of work which is framed here along two interlinked trends.

First, there is the rarefaction of the basic and central normative notions on which workers' rights are traditionally anchored (ILO 2021b: 133). An example is the notion of 'worker', meaning a person in an employment contract the existence of which is, in many jurisdictions, linked to the element of control by the employer of the performance of work; historically this is related to physical proximity between both parties. Another example is the concept of 'establishment', traditionally referring to a (physical) space where workers carry out work. Or, again, the notions of 'undertaking' or 'assets' that labour norms use to identify elements inherent to the economic entity acting as the employer and which are inevitably being cut to the bone in business models based on dispersed and outsourced labour provision (Zwysen 2023).

The second challenging development relates to the aggravation of power imbalances between (certain) business players and workers that goes hand-in-hand with the digital and remote work trend (OECD 2022: 132). The shift towards a digital and dispersed workplace exacerbates the vulnerability of workers who not only risk falling outside the scope of existing labour protection but are also isolated and likely to elude the dynamics

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of workforce mobilisation and unionisation (see Vandaele and Piasna, this volume). At the same time, it enables corporate business actors to reinforce their (labour) market position as they can take advantage of the geographical dispersion of labour, allowing them to hire in different jurisdictions on the basis of labour cost considerations. This leads to the emergence of strong and quasi-monopsonistic firms capable of imposing significant downward pressure on labour standards (Zwysen 2023). Such a dynamic is further aggravated by the domination by such firms of digital technology and algorithmic management which consolidates their control of the conditions under which labour is provided.

By touching upon these disruptive trends, this chapter sheds light on the limits of labour law. It also brings forward the idea that, to avoid the marginalisation of labour law both as a legal field and as a discipline, it is necessary to make a revitalising and innovating effort. In this regard, while reinterpreting the scope of existing labour provisions might be a first step, it might also not be a sufficient one. In the context of digitally mediated remote work, the worker-employer relationship needs to be rebalanced through the introduction of new sets of rights and obligations. In exploring possible regulatory paradigms, this chapter seeks inspiration from competition law, a discipline that has so far been more responsive to the impact of the digital economy. After all, digital and remote work will have a more structural and impactful role in the future of our society and it is worth exploring a broader epistemological perspective in order to avoid a further dismantling of the redistributive and social justice contribution that labour law is able to make.

2. Framing the issue: remote work as a labour law disruptor

Remote working has existed for years, long before the advent of the internet and digitalisation (see Messenger, this volume). However, the phenomenon has been somewhat circumscribed to specific types of workers (Felstead 2022: 16). The expansion of digital technology, boosted by the necessity of social distancing during the Covid-19 pandemic, has instead made remote working substantially more widespread, with different implications for workers (ILO 2021b). For some, the impact has been rather limited up to now: hybrid telework arrangements have either been introduced for the first time or, alternatively, made more generous, benefiting workers including university staff, public administration personnel and other employees in conventional economies. On the other hand, there are certain industries where more and more businesses are choosing a fully remote workplace for at least part of the production process (Alexandri et al. 2023).

Existing projections predict a widening of the pool of individuals who will work fully remotely in the future (Eurofound 2023). This is also driven by the alluring and propagandistic narrative with which certain businesses present the 'revolutionary' model of remote work. The consultancy firm Deloitte, for instance, depicts remote work as a move towards autonomy and flexible work models offering a 'way to promote workers' sense of belonging' and allowing them to 'design their workday around their responsibilities' (Dagelet et al. 2021). For companies, the advantages of this model are

obvious, since remote work not only enables employers to draw from a broader pool of workers in their hiring processes but also to reduce administrative red tape and to rely on digital infrastructure constantly to monitor and coordinate aspects of work itself (McKinsey Global Institute 2021: 20). Moreover, remote work also has a certain appeal for local regulators: investment in connectivity, digital skills and lifelong learning is inviting environments for digital nomads and remote work-based service provision and, in turn, facilitating further investments (Ferreira 2022; Rasnača, this volume).

Precisely because of this expansive potential, fully remote working arrangements need to be strictly monitored by labour observers. Especially where remote work is enabled by a digital ecosystem, it can be approached from the perspective of the progressive gigification and platformisation of the labour market. It is no coincidence that recent taxonomies on the different types of remote work include internet work and on-demand online work, as well as gig and platform economy work (when not carried out on location) (Caruso 2019; Piasna et al. 2022; Alexandri et al. 2023).

Alongside the reduction or even obviation of office space, the workforce is dispersed and workflow coordinated and monitored through digital interfaces. Algorithmic management is now a feature of several digital platforms which organise workflow, although it does vary in its degree of sophistication (Risi and Pronzato 2021). Software which offers services in the area of work operating systems, such as Monday.com, are actually quite user-dependent as the use of AI for the optimisation of work organisation is optional and such services rely mainly on manual input. Algorithmic management is instead much more pervasive on digital platforms that enable on-demand gig work, like PPH (PeoplePerHour) or MTurk (Amazon Mechanical Turk) (Aloisi and De Stefano 2022: 86). Still, in both cases, and thus even when algorithmic management is less invasive, digitally mediated workplaces are characterised by a stronger emphasis on the realisation of externally defined results and tasks than in offline work (Althoff et al. 2022). The combination of the geographical dispersion inherent in remote work and an overreliance on digital technology is therefore producing transformative effects with respect to the world of work that go far beyond the emergence of 'atypical' forms of labour. Rather, it is triggering an evolutionary process that is reshaping the capitalistic approach to labour and which is manifesting itself in a series of disruptive dynamics.

First, it is enabling a purposive recourse to the notion of autonomy as an easy way out from the reach of protective labour norms (Countouris and De Stefano, this volume). The glorified autonomy which is often associated with forms of remote (and digital) work often boils down to flexibility for the worker to determine his or her own work schedule and location, and not in the actual possibility of managing the workstream nor in determining the terms and conditions under which work is performed (Aloisi 2016: 662). The idea of working without a boss is thus most often a myth. In such a case, remote work arrangements place firms in the privileged position of being able to count on a global offer for labour (ILO 2021a: 145). This inevitably triggers a spiral of downward regulatory pressure between national legal systems, with depressive effects on the value that is attributed to labour (Rani, this volume). Moreover, the ease with which labour can be performed from the other side of the globe in competitive conditions entails that, even for 'traditional' firms, the outsourcing of productive and operational processes has

become quite an attractive option. While global labour supply chains are certainly not new phenomena, digital technology has made their operationalisation in the service sector substantially simpler and more widespread as it ensures the smooth integration of externalised activities in the overall economic process. The result is the aggravation of workplace fissuring, with the dismantling of traditional businesses into a network of alienated contractors (Weil 2019). Such a practice is heading towards a future in which white collar jobs increasingly resemble gig and piece work (Schor 2022).

To these disruptive trends, it should be added that the Covid-19 pandemic has further strengthened the infrastructural role of digital platforms as enablers of remote work (both when performed in hybrid or full mode). As Risi and Pronzato explain (2021: 110), remote work inevitably makes use of a digital ecosystem in which the few biggest players are utterly dominant (Alphabet (best known as Google), Amazon, Microsoft, Apple and Meta (i.e. Facebook)). These firms can dispose of an extraordinarily rich and continuous flow of data that further consolidates their market power and the expansion of surveillance capitalism (Guarascio et al. 2022).

When digitally mediated, remote work is therefore strictly interlinked with the very processes that are fundamentally changing the world of work and economic production. There is the risk, however, that regulators continue to perceive these transformative dynamics as little more than marginal, pertaining to the still limited phenomenon of the gig economy. Such a short-sighted approach would eventually condone a model in which dispersed contractors (workers) make their labour available to a limited number of globally dominant business players and where labour relationships become increasingly intangible and unregulated, with labour thus being recommodified. (On the pressing need for regulation, see ILO 2021a: 244; Steinbaum 2019; Gawer and Srnicek 2021.)

In the following sections, these transformative drivers are translated into two major challenges to the efficacy and resilience of existing labour law systems which regulators ought to address: the thinning of the normative concepts on which labour law provisions have traditionally been grounded (Section 3); and the enhanced ability of corporate players to influence working conditions (Section 4). While these challenges are more acutely present in the most extreme cases of digital remote work carried out in the context of the gig economy, they can also apply to more traditional professional figures when labour is performed fully remotely and enabled through digital infrastructure.

3. The thinning of key labour law normative concepts

Remote work, especially when reliant on a strong digital component, reveals the increasing inadequacy of the regulatory and definitional paradigms that legal systems use to allocate obligations and protections in labour relations.

Regardless of the extent of automation of work processes, when labour is performed through digital infrastructure workers assume a role close to that of on-demand content creators and are both dispersed and atomised. The assignment of customers, the

management of complaints and human resources, as well as the processing of payments, is (in whole or in part) entrusted to the work-management digital platform. Needless to say, this model of business organisation is very different from that prevailing at the time when existing labour laws were conceived. Labour law systems define their scope of application through normative notions such as that of (subordinated) worker, asset, establishment and undertaking, which historically refer to a certain degree of physicality of the work performance and the workplace. These concepts are struggling to capture the increasingly liquid and, in a way, non-material work that is typical of digital and dispersed work environments (Risi and Pronzato 2021).

3.1 The notion of worker

In EU law, the concept of 'worker' designates those individuals who are in an employment relationship and who thus fall within the personal scope of employment protection. Workers are indeed the holders of the rights conferred by labour norms. As discussed by Countouris and De Stefano (this volume), the contract of employment is traditionally linked to a relationship of subordination between the labour provider and the employer. However, the granularity of work performance and its spatiotemporal dispersion confer on digitally mediated work a perception of autonomy regarding its execution. This has tangible repercussions for the applicable juridical regime as digital remote workers are predominantly classified as 'freelancers' and excluded from employment protection (Caruso 2019; Gruber-Risak 2022; Alexandri et al. 2023). The thinning of the legal concept of worker has been partially mitigated by the Court of Justice of the EU (hereinafter CJEU), which has gradually developed a wider EU notion that may help pierce digital remote work's veil of autonomy.

3.1.1 An evolving definition

First, it must be noted that, in EU labour law, there is no univocal approach to the notion of worker (Kountouris 2018). Some legal instruments make simple reference to this concept without further qualifying it, leaving the definitional task to the CJEU.[2] Other EU labour laws instead indicate that the notion of worker should be defined in accordance with the law, collective agreements or practices of the Member States.[3] More recently, an intermediate wording has appeared establishing that, in addition to the national definitions, consideration should be given to CJEU case law.[4] This formulation can be expected to become prevalent in future EU lawmaking and to act as a bridge between the two classical definitions so as to bring greater uniformity in the scope of application of EU labour norms (Szpejna and Boudalaoui-Buresi 2020).

2. For instance: Directive 98/59/EC on collective redundancies and Directive 2003/88/EC concerning certain aspects of the organisation of working time.

3. Examples are Directive 97/81/EC concerning the framework agreement on part-time work; Directive 1999/70/EC concerning the framework agreement on fixed-term work; and Directive 2001/23/EC on employees' rights in the event of transfers of undertakings.

4. Examples are Directive 2019/1152 on transparent and predictable working conditions; Directive 2019/1158 on work-life balance for parents and carers; and Directive 2022/2041 on adequate minimum wages.

The extent to which remote workers are included in these notions will largely depend on the nature of remote work and on which of these three definitions is used. It is quite plausible that a scenario of fully remote and digital (or 'platformised') work would fall outside EU labour laws whose scope of application is defined with reference to national notions of the employment relationship, especially if those are anchored to rigidly interpreted requirements of subordination, direction or control. Still, these interpretative formalisms may, to some extent, be curbed in the light of CJEU case law which has established that the discretion granted to Member States cannot jeopardise the achievement of the objectives pursued by EU norms so as to deprive them of their effectiveness (Menegatti 2020). In particular, in *O'Brien*[5] and *Betriebsrat*,[6] the Court ruled that, even if an EU labour law directive covers only those who are 'workers' within the meaning attributed by national law, it also applies to those who are in a contractual relationship that 'by its nature' is not substantially different from an employment relationship which, under national law, is defined as being subordinate. Admittedly, however, this functional interpretation may have a limited effect, bringing into the notion of 'worker' only the most obvious cases of misclassification (Kountouris 2018).

When, on the other hand, EU labour law simply refers to the concept of 'worker' without linking it to national definitions, the scope of application of labour rights is determined by the (broader) EU notion of worker as developed by the CJEU over the years (Szpejna and Boudalaoui-Buresi 2020). The first real defining formula appeared in the *Lawrie-Blum* judgment where the concept of worker was interpreted in relation to Article 45 of the Treaty on the Functioning of the European Union (TFEU) on freedom of movement: a worker is a person who, over a given period of time, performs an activity of an economic nature for and under the direction of another person in return for remuneration.[7] Although the reference to the element of direction reflects the traditional approach to subordinate employment that can be found in most national legal systems, subsequent rulings have substantially broadened the definition (Kountouris 2018; Menegatti 2020).

In particular, in interpreting the EU notion of worker, the CJEU has formulated a series of specifications that might be helpful in bringing certain cases of fully remote and digitally mediated work within the realm of the employment relationship. First, in *Allonby*, the CJEU established that the classification of a person as self-employed under national law does not exclude that his or her independency is merely notional.[8] Rather, it is important to look at the factual circumstances that characterise the contractual relationship between the labour (or service) provider and the party which has contracted him or her.[9] In this regard, the CJEU has also ruled that it is not particularly meaningful, concerning the decision whether or not a contractor should be classified as a worker,

5. Judgment of 1 March 2012, *Dermod Patrick O'Brien v Ministry of Justice, formerly Department for Constitutional Affairs*, C-393/10, ECLI:EU:C:2012:110.

6. Judgment of 17 February 2016, *Betriebsrat der Ruhrlandklinik GmbH v Ruhrlandklinik gGmbH*, C-216/15, ECLI:EU:C:2016:883.

7. Judgment of 3 July 1986, *Deborah Lawrie-Blum v Land Baden-Württemberg*, C-66/85, ECLI:EU:C:1986:284.

8. Judgment of 13 January 2004, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, C-256/01, ECLI:EU:C:2004:18, para. 71.

9. Ibidem, para. 69.

whether the individual has the right to accept or refuse a certain assignment.[10] This clarification is particularly interesting in the context of digital and remote work, where tasks are assigned through digital interfaces which can be freely accepted or rejected without explicit or contractual repercussions.

Furthermore, to determine the presence of a de facto employment relationship, in the *Danosa* ruling the CJEU stressed the importance of looking at the nature of the duties, at the overall context in which these are performed and at the actual extension of the individual's power to determine their content.[11] The retention of a margin of discretion in the performance of tasks is not deemed significant when the execution of the activity has to be reported to and coordinated with the party which has contracted out the work.[12] With these specifications, the CJEU has made an intervention on the concept of 'autonomy': the focus has been moved to the overall performance of the service (labour) and in a manner which is better suited to the capture of remote and digital work, often consisting of the execution of pre-defined assignments.

In further rulings the CJEU has established that an additional indicator of the notion of a worker is the integration of labour performance in the principal business and the absence of the assumption of business risk, making them part of the same economic unit.[13] Such integration can be found in many cases of digital remote work, even in the most extreme situations of gig work (Rainone and Countouris 2021), where integration occurs when the service being performed converges in the business process of the party receiving the service. Digital remote work goes hand-in-hand with an increase in the outsourcing of production processes and with the fissuring of the workplace, with traditional businesses being dismantled and turned into a network of dispersed but integrated service contractors. Moreover, most digital remote workers perform their tasks without substantial capital investment and do not share business risk, just like employees (Georgiou 2022).

Finally, another element that, in its case law, the CJEU has considered to qualify the notion of worker are the circumstances under which a person can be removed from his (or her) position.[14] When such a prerogative is retained by the entity which also has the prerogative of coordinating the work and to which the work activity has to be reported, then it is a sign of an employment relationship. While the CJEU has established this principle in relation to a member of a board of directors, it also bears significance for digitally mediated work. As digital and remote labour providers are often integrated into the business to which they are contracted, the latter organises and manages the

10. Ibidem, para. 72.

11. Judgment of 11 November 2010, *Dita Danosa v LKB Līzings SIA*, C-232/09, ECLI:EU:C:2010:674, para. 47.

12. Ibidem, paras. 49 and 50. Similar conclusions were reached in the judgment of 10 September 2015, *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllesheim*, C-47/14, ECLI:EU:C:2015:574; and in the judgment of 9 July 2015, *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH*, C-229/14, ECLI:EU:C:2015:455.

13. Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, ECLI:EU:C:2014:2411, para. 36.

14. C-232/09, *Danosa*, para. 47.

delivery of the tasks while the authority to remove a person from that business can easily be conceived of as an extension of such coordinating prerogatives.

3.1.2 The limits of the classical divide based on autonomy vs control

EU case law has thus drawn a notion of who is a worker that could be relied upon to bring certain digital 'freelancers' within the scope of the labour protection conferred by EU labour law. However, there are still serious normative obstacles that prevent a full alignment of the CJEU definition of worker with the actual reality of work in the digital and remote context (Gyulavári 2020).

First, the CJEU has never overcome the principle whereby a person's freedom to choose their timetable and place of work is a strong indicator of self-employment.[15] This principle is hardly satisfied in digital remote work unless it is recognised that the freedom to choose the timetable is seriously constrained by tight assignment deadlines and unless the place of work is understood as the digital infrastructure through which work is performed, namely the digital space provided by the platform.

Secondly, even if the CJEU's consideration of the power of coordination of the work activity may have the effect of opening the door of employment protection to workers who would otherwise be excluded from definitions anchored to the more rigidly interpreted power of direction, this reference to the notion of coordination can be a double-edged sword. In most gig work platforms, for instance, the coordination and surveillance of work performance certainly occur but they are effectively concealed through systems of reward and sanctioning (Adams-Prassl 2019). In these cases, much thus depends on the interpreter's sensitivity to going below the surface and acknowledging the pervasiveness of algorithmic management (Aloisi 2022).

Similar considerations apply with respect to the indicator pertaining to the integration of the worker into the business when the economic unit is disaggregated and fragmented. This occurs in business models largely based on outsourcing, leading to highly fissured workplaces in which the notion of 'integration' risks losing meaning. As further argued in subsection 3.2, this might require a functional reinterpretation that takes into account overall economic and production processes (Zwysen 2023).

Lastly, even the criterion of the business risk assumption may turn out not to be an adequate qualifier in respect of businesses which have become particularly fragmented as a result of outsourcing. In those cases, business risk tends to be distributed to a multiplicity of solo self-employed people who, as Georgiou notes, end up taking it on involuntarily (Georgiou 2022).

It is important to mention that, recently, by proposing an EU directive on platform work, the European Commission has created an unprecedented opportunity to correct the shortcomings deriving from the fragmented coverage of the concept of worker. The

15. C-256/01, *Allonby*; C-413/13, *FNV Kunsten Informatie en Media; judgment* of 22 April 2020, *B v Yodel Delivery Network Ltd*, C-692/19, ECLI:EU:C:2020:288.

result does not seem likely, however, to lead to any significant paradigm change (De Stefano 2022). On the one hand, the directive introduces a presumption of employment which will certainly facilitate labour law enforcement in cases of misclassification. At the same time, its provisions are still anchored to an old-fashioned notion of control that may even frustrate the more flexible interpretation that has emerged from CJEU case law (Rainone 2022a).

Far more innovative is the approach adopted by the European Commission in its (non-legislative) Guidelines on competition rules and collective bargaining (European Commission 2022). With this initiative, the Commission has sought to identify a series of criteria to ensure that the exercise of collective bargaining rights by the self-employed can coexist with the prohibition in EU competition law on concluding anti-competitive commercial agreements. Going beyond the subordination/autonomy divide, the Commission has placed emphasis on the imbalance of bargaining power between service (labour) providers and the party with which they are contracting, thus reaching also the solo self-employed who are not in a situation compatible with that of subordinate employees. Interestingly, a similar paradigm has emerged in the recent *JK v TP* ruling, in which the CJEU extended EU rules on discriminatory dismissals to the genuinely self-employed (in this case, an independent contractor working for a tv broadcaster) (Countouris et al. 2023).[16] Admittedly, the Court did not go as far as the Advocate General who had proposed a broadening of the scope of application of EU labour norms to all cases in which a person is engaged in personal work, irrespective of the legal form under which the work is provided.[17] Still, this has opened the way for the recognition of labour rights beyond employment status, putting forward a precedent which may be highly relevant for those digital and remote workers who do not fall within the notion of worker.[18]

3.2 Notions relating to the business activity of the employer

Even if the concept of worker were to be properly revisited, the question of the scope of labour law would not be resolved. Another problematic aspect concerns the increasingly wide distance between the legal notions pertaining to the business activity of the employer – such as 'asset', 'establishment' and 'undertaking' – and the reality in which remote and digital work is actually articulated. Although it is still scarcely discussed in the labour law literature, it is a quite relevant issue since those notions are used in legal norms to identify specific contexts and situations to which the legal system recognises a need for the protection of workers and thus has a link to specific labour rights.

16. Judgment of 12 January 2023, *JK v TP* (*Monteur audiovisuel pour la télévision publique*), C-356/21, ECLI:EU:C:2023:9.

17. Opinion of Advocate General Capeta of 8 September 2022, *JK v TP* (*Monteur audiovisuel pour la télévision publique*), C-356/21, ECLI:EU:C:2022:653, para. 66.

18. The CJEU had already, albeit indirectly, considered the importance of the personal nature of the performance of work as a meaningful indicator of the existence of an employment relationship in its decision in *Yodel*, where it excluded from the notion of worker those who could appoint a subcontractor or substitute for the whole or part of the service provision (C-692/19, *Yodel Delivery Network*). The notion of personal work was, however, not as explicit and unpacked as in the Advocate General Opinion in the *JK v TP* case.

3.2.1 Asset

Starting from the notion of 'asset', in terms of labour law this describes the instruments and tools that are necessary for the business to function. In traditional firms, the definition of assets is quite simple. In an urban transport company, for example, these are the buses used to provide the service. There are then those cases, such as in the cleaning sector, in which the contribution of assets is quite marginal and the business can be defined as 'labour intensive' since the service is mainly performed through human labour (Beltzer 2007; McMullen 2021).

The determination of the main assets of a company is not a doctrinal exercise but it is decisive for the application of, for instance, directive 2001/23/EC on transfers of (part of) undertakings (Bennet and Belgrave 1996; Even 2014). This directive recognises the employment rights of workers who have been transferred from one firm to another, and the taking over of a majority of the assets (or personnel, if in a labour intensive firm) has crucial importance in determining whether a transfer has occurred and thus whether labour protection applies (Rainone 2018).[19] But how can the scope of application of this directive be transposed to the context of remote and digital work, for instance when a smaller digital business becomes incorporated in a larger platform? It is necessary to determine whether digital platforms are labour intensive businesses or whether the contribution of assets is predominant. Precisely what business assets are constituted from also needs to be clarified: the personal laptop that workers use to perform their tasks; or rather the algorithms, software and data that actually keep the business going? In such a scenario, a narrow interpretation that fails to consider the technological component of the business would ultimately fail to deliver full implementation of the employment protection rules laid down in the directive.

While no meaningful interpretation effort readapting the notion of asset to the digital world of work is surfacing in EU policymaking in the field of labour law, interesting developments have emerged in the area of EU competition law. In a recent competition law guidance note on the enforcement of the EU Merger Regulation (European Commission 2021), the Commission has recognised that, in the digital economy, the market value of a firm can additionally be determined by its ability to build up significant data inventories. According to the Commission, transactions that concern undertakings which have significant access to data may have a restrictive impact on competition within the internal market. Competition law thus considers data an important business asset with a high capacity to generate competitive potential. It would be timely for a similar interpretation to make its way into the field of labour law.

A promising – but not yet sufficiently explicit – step in this direction occurred in the recent *Dodič* judgment where, in a ruling on the application of the Transfer of

19. Recently, in the judgment of 27 February 2020, *Reiner Grafe and Jürgen Pohle v Südbrandenburger Nahverkehrs GmbH and OSL Bus GmbH*, C-298/18, ECLI:EU:C:2020:121, the CJEU showed a departure from the classical dichotomy between asset and labour intensive businesses. Nevertheless, the relevance of the transfer of assets remains pivotal, in line with the *Spijkers* doctrine (judgment of 18 March 1986, *Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV*, C-24/85, ECLI:EU:C:1986:127).

Undertakings Directive in the banking sector, the CJEU stressed the importance of intangible assets.[20] In particular, the CJEU considered that records concerning clients' accounts (in a way, a term comparable to data), as well as the documentation relating to investment services, might also fall within the notion of 'asset'.[21] This case might thus, in the labour law domain, offer an opening for a future functional reinterpretation grounded on the principle of the effectiveness of the concept of asset as encompassing the digital infrastructure that enables and regulates workflow in the digital and remote work context (see Nagy 2019 on the adaptation of traditional normative legal concepts based on the principle of effectiveness).

3.2.2 Establishment

Another legal notion whose meaning is in danger of being emptied out by digital remote work is that of 'establishment'. This concept is central to two EU law instruments conferring information and consultation rights on workers: directive 98/59/EC on collective redundancies and directive 2002/14/EC establishing a general framework for information and consultation practices (Rainone 2022b). In both instruments, information and consultation rights are anchored to the attainment of a minimum quantitative threshold calculated on the number of workers who are assigned to, and/or are dismissed from, a particular 'establishment'.[22] It follows that the scope of application of these directives will be more or less comprehensive depending on how broadly this notion is interpreted. This emerges as a serious problem when considering the context of remote and digital work and the geographical dispersion that characterises it. How should a regulatory concept introduced at a time when work was carried out almost exclusively in terms of physical presence, on industrial sites or offices, be adapted to a reality in which economic processes take place through digital infrastructure?

Directive 2002/14/EC indicates that 'establishment' means a unit of business, defined in accordance with national law and practice, in which an economic activity is carried out on an ongoing basis with human and material resources.[23] Directive 98/59/EC, on the other hand, does not provide any definition, leaving the notion undetermined until 1995 when the CJEU, in the *Rockfon* judgment, ruled that it refers to the unit to which workers are assigned to carry out their duties.[24] In *Athianaiki* the CJEU further specified

20. Judgment of 8 May 2019, *Jadran Dodič v Banka Koper and Alta Invest*, C-194/18, ECLI:EU:C:2019:385. While intangible assets have been included since the *Spijkers* case as among the relevant factors to consider in transfer cases, in *Dodič* the CJEU showed that this notion can also be interpreted to reflect the digital nature of business assets.

21. C-194/18, *Dodič* (para. 37).

22. Directive 98/59/EC applies only if 10 workers are made redundant in an establishment employing more than 20 and less than 100 workers; at least 10 per cent of workers in establishments normally employing between 100 and 300 workers; at least 30 workers in establishments normally employing 300 workers or more; or, in the alternative, at least 20 over a period of 90 days. Directive 2002/14/EC applies to establishments employing at least 20 employees.

23. Article 2 Directive 2002/14/EC.

24. Judgment of 7 December 1995, *Rockfon A/S v Specialarbejderforbundet i Danmark*, C-449/93, ECLI:EU:C:1995:420.

that an establishment does not require any legal, economic, financial or technological autonomy.[25]

Clearly, such definitions can be more easily applied to work carried out in physical workplaces rather than in digital ones. Especially in firms where the workspace is digital (and thus non-material), it might be enough for the employer purposively to organise workers into micro units, or for a business to adopt a model based on subcontracting, to avoid reaching the threshold and thus activating information and consultation rights.[26]

To curb the emptying out of the notion of establishment, functional reinterpretation is needed. Ideally, it should be recognised that, for digital workers, the place of work is within the digital ecosystem. The 'unit to which workers are assigned' should thus be understood as the digital infrastructure through which the tasks are distributed, performed and then delivered.

3.2.3 Undertaking

Equivalent interpretative issues arise with respect to the notion of 'undertaking' on which depends, for example, the application of the already discussed directive 2002/14/EC on information and consultation rights. Article 3 refers to 'undertaking' as an alternative reference point to 'establishment' in determining whether the minimum quantitative threshold of employed workers which determines the scope of application of the directive has been reached.[27] It is also a crucial notion for directive 2009/38/EC which establishes a procedure for the creation of European Works Councils in community-scale undertakings. Here too, 'undertaking' is used to define the scope of application of the directive,[28] while it is additionally functional in terms of identifying the central management to which the demands of workers' representatives to start negotiations on the creation of a European Works Council might be addressed.[29] Finally, 'undertaking' is a core concept for directive 2001/23/EC on the transfer of undertakings as it constitutes the very object of the transfer operations to which the directive applies.[30] In these instruments, the concept of undertaking is not defined with the effect that, across the labour law discipline, it is widely understood as coinciding with the legal person (the 'company') as defined in its founding statute.[31]

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25. Judgment of 15 February 2007, *Athinaïki Chartopoïïa AE v L. Panagiotidis and Others*, C-270/05, ECLI:EU:C:2007:101; then confirmed in the judgment of 13 May 2015, *Valerie Lyttle and Others v Bluebird UK Bidco 2 Limited*, C-182/13, ECLI:EU:C:2015:317; in the judgment of 30 April 2015, *Union of Shop, Distributive and Allied Workers (USDAW) and B. Wilson v WW Realisation 1 Ltd and Others*, C-80/14, ECLI:EU:C:2015:291; and the judgment of 13 May 2015, *Andrés Rabal Cañas v Nexea Gestión Documental SA and Fondo de Garantia Salarial*, C-392/13, ECLI:EU:C:2015:318.

26. This issue was raised, in relation to physical stores, in C-182/13, *Lyttle and Others* where the referring judge indicated that the existing predominant interpretation of the notion of establishment leaves room for abuse but the CJEU did not engage and confirmed the *Rockfon* doctrine.

27. Directive 2002/14/EC applies to undertakings employing at least 50 employees.

28. Article 2(1)c.

29. Article 2(1)e, Article 3, Article 5(2)c, Article 6(1), Article 9.

30. Article 1.

31. The closest we have to a definition is in Article 2 in Directive 2002/14/EC: 'Undertaking' means a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States.

Digital and non-integrated businesses, outsourcing practices, fissured workplaces and dispersed workforces have inevitably created a perception of a thinning of the legal concept of undertaking. Such a notion now appears less relevant from a (labour) market perspective than the overall network of integrated businesses (Weil 2019). For instance, in relation to two of these directives, why should the exercise of information and consultation rights be attached to the number of workers in an undertaking, as juridically defined, when the decisions affecting the workforce are taken by other business actors; namely, those who control the actual business processes?

In this case too, it may be worth moving towards a functional reinterpretation of the notion of undertaking, realigning it with the effective expression of economic power. In EU law there are already examples of such hermeneutic reorientation. Substantial interpretative flexibility is found in the field of competition law where, based on the principle of effectiveness, the notion of undertaking transcends legal status and covers the whole economic unit (Stănciulescu 2018; Nagy 2019). This consents to the inclusion of situations where, due to 'organic and functional links' between two firms, one controls the other.[32] Admittedly, in competition law this interpretative flexibility is facilitated by the normative rationale of this discipline which was conceived to focus, among other things, on the market power of business actors and on transactions that provoke market power concentrations.[33]

A purposive approach has, instead, been remarkably slower to emerge in the field of labour law. Still, an innovative opening recently occurred in the *Ellinika* judgment regarding the transfer of undertakings. In *Ellinika*, the CJEU was confronted with an elusive scheme whereby an economic entity was deliberately fragmented with a view to laying off a portion of the workforce without incurring adverse financial consequences. The Court approached the issue in a functionalist manner and ruled that, if an undertaking is dependent upon the economic choices unilaterally made by another undertaking (in this case, affecting access to the factors of production), then the autonomy between the two undertakings is fictitious.[34] If transposed and developed in the field of the digital economy, this reasoning could be used as a first step in refuting the artificial atomisation of economic contractors and in proposing a revisited notion of undertaking, as well as of autonomy, that bears a rather closer resemblance to reality.

4. Growing labour market asymmetries

In addition to exposing the limited reach of the traditional normative concept of labour law, the spread of digital remote work is causing an alteration in the distribution of

32. Judgment of 10 January 2006, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, C-222/04, ECLI:EU:C:2006:8 (para. 117).

33. For instance, Council Regulation 139/2004 (the EC Merger Regulation), in order to determine the impact of a concentration of competition in common markets, also considers operations leading to the creation of joint ventures performing the functions of 'autonomous economic entities' (Article 3(4)).

34. Judgment of 13 June 2019, *Ellinika Nafpigeia AE v Panagiotis Anagnostopoulos and Others*, C-664/17, ECLI:EU:C:2019:496 (para. 69).

bargaining power between labour providers (the workers, however classified) and labour receivers (the de facto employers) in favour of the latter (ILO 2021a: 51). This is reflected in the substantial impoverishment of working conditions which the existing body of labour rights does not appear adequately equipped to address.

Several studies show that technological innovation and (remote) work through digital platforms are concurrent factors that contribute to conferring on a limited number of firms the ability to dictate the conditions under which labour is provided in certain labour markets (Steinbaum 2019; Posner 2021: 118). Among the causes of this is the increasing concentration of (labour and product) market power in the hands of a few dominant players in the tech and digital industries (Guarascio et al. 2022; Traina and Kirov 2022). The emerging dynamics point towards the creation of semi-monopsonistic labour markets; namely, labour markets which are concentrated and thus non-competitive, there being only a few 'buyers of labour' and where labour tends to be 'sold' at a lower price than in competitive labour markets (Marinescu and Posner 2019).

Concentrated markets having a degrading effect on labour standards is not a recent discovery, but this notion has recently attracted increasing attention from scholars and expert observers (OECD 2022) as it appears to be further exacerbated by the digital economy and especially in the context of digital labour platforms. For instance, studies based on elasticity conducted into crowdworking platforms, such as Amazon Mechanical Turk and PeoplePerHour, found that not only do (certain) digital labour platforms hold a strong market power but that they have learned how to use it in order to exert a downward pressure on labour costs (Dube et al. 2020; Duch-Brown et al. 2022).[35]

The concentration of labour market power among tech and digital business players is not the only factor that gives these firms the ability to control the conditions under which (digital) remote workers provide their labour. Another key element can also be found in the informational asymmetries which have a strong impact on the contractual conditions that workers are willing to accept since they make them more inclined to take prices below market value. For instance, it has been shown that a policy change in a crowdworking platform demanding prospective clients/contractors to disclose more information (for instance, the rate they are willing to pay and the level of experience required) has a positive effect on wages (Duch-Brown et al. 2022).

Furthermore, the bargaining imbalance between the tech and digital business players and workers has been aggravated by businesses' direct access to digital technology as well as their leading role in technological innovation (Traina and Kirov 2022). Using Eeckhout's metaphor, the domination of digital technology has allowed digital economy players to build a moat around themselves (Eeckhout 2021: 23). Not only does this protect and make inaccessible the key drivers of their market power, but it also boosts their data collection and data mining capabilities. This enhances firms' ability to extract

35. The correlation between market concentration and declining working conditions can be measured by looking at elasticity in a given firm or sector which quantifies the sensitivity with which workers react to changes in wages (Posner 2021: 21; Dube et al. 2020). Put simply, low elasticity indicates that, when faced with a reduction in wages, few workers will leave the company.

revenues from work processes without there then being effective legal mechanisms to redistribute this additional revenue to workers (Schechter 2021). The monopolisation of technology thus proves to be a tool of domination, causing a further widening of the bargaining gap between employers and workers (Guarasco 2022).

While tech and digital employers are increasing their bargaining power, among workers the opposite phenomenon is occurring (Zwysen and Piasna 2023). Digital remote work is often performed by freelancers; atomised workers who are unable to determine the terms and conditions of their labour and who, even when they are classified as 'workers', see their bargaining power losing its bite. Remote digital labour confounds the traditional dynamics of unionisation and workers thus have fewer prospects of engaging in effective collective bargaining practices with the powerful parties with which they contract.

The growing gap in the distribution of bargaining power between business and labour calls for an intervention in the legal framework so as to ensure that (excessive) labour market power is better embedded in its regulatory paradigms. To this end, it is not necessary to dig very deep: addressing the distribution of bargaining power between business and labour is one of the fundamental principles that originally shaped labour law as a discipline (Hendrickx 2012). So far, however, labour law has engaged with this function by focusing on the contractual relationship between employers and workers while it is clear that the scope of action should also be expanded. To this end, two avenues could be explored.

The first is to establish, preferably at supranational level across the European Union, a system that ensures that wages are not pushed below market value across the entire production and value generating process and in respect of all labour providers, regardless of status (Manning 2020; Posner 2021: 120). This could be achieved, for instance, through the introduction of social and labour clauses to be observed throughout the whole network of contractual and commercial relationships, both within the economic unit and beyond. Ideally, such social clauses would prevent outsourced labour from being cheaper for the company than hiring its own staff (for a discussion on wage differentiation in relation to outsourcing practices, see Zwysen 2023).

The second is to strengthen the bargaining power of workers through the active promotion of collective bargaining and union representation (Posner 2021: 138; Picard 2019). The recently adopted Minimum Wage Directive goes in that direction in as much as it requires Member States to reach certain standards in terms of collective bargaining coverage. However, the directive only applies to those which EU law already recognises as workers while regulatory support for social dialogue needs to be expanded to take into account the growth of self-employed work, especially among digital and remote workers.[36]

36. Directive (EU) 2022/2041 of the European Parliament and the Council of 19 October 2022 on adequate minimum wages in the European Union, Article 2.

It is worth noting that, in undertaking this renewal exercise, labour law would be able to rely on a multidisciplinary justification which could strengthen its normative legitimacy. By means of such a regulatory reorientation, labour law would in fact not only reinforce its traditional social function of improving working conditions but it would also curb the excessive bargaining power of tech and digital business players and thus respond to an economic rationale (Steinbaum 2019). And this means that, in a way, and at least vis-à-vis the specific goal of readdressing power asymmetries in the digital economy, labour law would find competition law as an ally. While originally focused on product markets, scholars in both the field of economics and competition law have recently been stressing the importance also of addressing the labour market distortions that aggravate the accumulation of economic power (see the work of scholars such as Eric Posner, Jan Eeckhout, Ioana Marinescu, Arindrajit Dube and Alan Manning, among others). Therefore, and rather interestingly, a certain support has emerged in the competition law field for reinforcing collective bargaining and the wage setting capacity of labour. Remarkably, this has found a first institutional expression in the 2021 Guidelines on collective bargaining and the solo self-employed (Rainone 2022a).

Finally, in order to contain the ability of tech and digital business players to shape the labour market, new norms should be introduced to ensure that data ownership or access does not result in excessive information asymmetries to the detriment of labour providers. Here too, labour law could look at synergies with other disciplines. In particular, improved transparency on the functioning of digital platforms and greater accountability on the part of business players could be obtained through stronger interactions between labour laws, AI, data and algorithmic management regulations (Aloisi 2022; De Stefano 2019; Ponce Del Castillo and Naranjo 2022; Hendrickx 2022). A radical but desirable solution has been proposed by Dario Guarascio and his colleagues who view the core of the problem as lying in the private nature of digital information; they advocate instead for the decommodification of personal data as well as of digital platform infrastructure (Guarascio et al. 2022).

5. Concluding remarks

This chapter has provided a broad cartography of the disruptive impact of digitally mediated remote work on the sustainability and effectiveness of labour law. With online gig work as the tip of the iceberg, work carried out remotely and through digital infrastructure means that labour law is losing its bite. Digital remote workers no longer resemble the prototype found in existing labour norms, but neither are they in the position of actually enjoying economic freedoms. And that's not all: the normative concepts related to the employer's business activity assume blurred boundaries as traditional interpretations of these notions do not even come close to capturing the actual expressions of economic power. At the same time, the existing body of workers' rights appears inadequate to address the unprecedented amassing of economic and bargaining power in the hands of the few tech and digital business players.

While discussing these challenges, several constructive insights have emerged. First, opting for a functional reinterpretation of specific normative notions would help readjust

the scope of otherwise outdated and inapplicable notions. A purposive hermeneutic approach should not be perceived as a taboo: the current EU legal system provides the space to conduct such an operation since a similar renewal effort has already occurred in other fields of law, including competition law.

The second insight is that business strategies based on digital, remote and outsourced labour will continue to aggravate labour market power asymmetries as long as legal systems allow it. Evidently, current labour law frameworks are ill-equipped to curb the deregulatory pressure that the tech and digital business players are exerting on working conditions. New instruments are necessary. Regulators should thus evolve innovative solutions to mitigate the hegemonic drift of the platforms and these players. In this respect, it seems particularly urgent to provide active support to collective bargaining and to ensure a minimum floor for labour standards across the entire labour supply chain. Such interventions are not only required to promote the improvement of working conditions in the EU but they can also count on an economic justification since they would contribute to mitigating the expanding economic and labour market power of certain dominant economic players.

Finally, a time when working conditions are so heavily influenced by private actors, and when the key to their power is access to data and the dominance of digital technology, is also a time for the emergence of new paradigms and for a creative and multifocal approach to be taken to normative solutions. A cross-disciplinary perspective – looking at competition law but also at privacy and AI regulations – would therefore bring added value to improving the effectiveness of existing labour norms. A consideration of the developments which are occurring in other fields of law can prove helpful in the effort to modernise the interpretation of classical normative notions, as can exploring innovative regulatory avenues. But, before regulatory solutions can be developed along those axes, that cross-disciplinary perspective itself needs to emerge more structurally from scholarly research. The answer may be close, yet it will be unreachable if one does not know where to look for it.

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