

NEW FORMS OF WORK AND LABOUR INSPECTION: THE NEW COMPLIANCE CHALLENGES

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Abstract

Non-standard forms of work have a deep impact on work organisation as well as on workers' rights' access and are questioning labour market institutions and labour law. The legal nature and the features of these news employment forms are becoming very complex.

Enforcement become extremely difficult as it is challenging for the authorities to define when an employment relation is existent

Considering these difficulties, the article will try to show some of the possible solutions in selected countries (USA, Spain, France, and Germany), focusing on the new model of work organisation and on the current difficulties of control/enforcement both in terms of gaps in legislation and in relation to identification.

The article will try to conclude by providing some ideas on how to include new legal and practical measures to protect workers' rights and to ensure social protection from a labour administration perspective, including the use of technologies to better prevent and improve enforcement as well as the role of social partners in a context where collective bargaining and social dialogue are also in crisis.

Las formas atípicas de empleo tienen un gran impacto en la organización del trabajo así como en el acceso a los derechos por parte de los trabajadores, a la vez que cuestionan las instituciones del mercado del trabajo y la legislación laboral. La naturaleza legal y las características de estas nuevas formas son cada vez más complejas. El control de su aplicación es más difícil ya que las autoridades enfrentan retos para definir la existencia de una relación laboral. Considerando estos problemas, el artículo trata de mostrar algunas posible soluciones en países seleccionados (EEUU España Francia y Alemania) considerando el nuevo modelo de organización y las dificultades de control tanto en términos de lagunas legislativas como en relación a la identificación de las formas

El artículo intenta concluir dando algunas ideas en como incluir nuevas ideas y prácticas para proteger el derecho de a los nuevos trabajadores y garantizar su protección social desde la perspectiva de la administración de trabajo, incluyendo el eventual uso de nuevas tecnologías en prevención y control, así como el papel de los

actores sociales en un contexto en donde la negociación colectiva y le dialogo social están en crisis

Título: Nuevas formas de trabajo e inspección laboral: Nuevos retos del “compliance”

Key words: nonstandard forms of employment, labour inspection, labour administration, enforcement, employment relationship.

Palabras clave: formas de empleo no estándar, inspección laboral, administración laboral, aplicación, relación de trabajo.

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The past decades have witnessed the rise of new forms of employment in both the industrialized and the developing world. These growths have become today an extending trend, or even a pattern, in the labour market. The reasons for this shift are multi-faceted, including increased competition as a result of globalization, technological change and the use of digitalisation that has facilitated business and work re-organization, the increased participation of women in the labour market, and the rise of new forms of contractual flexibility, sometimes as a result of legal reforms, but also in response to changes in the business model.

However, these new forms of work have a deep impact on work organisation as well as on workers' rights' access. They are questioning at the same time labour market institutions and labour law. We could probably assert, that from regulation to enforcement, the existing labour rule of law is in an unprecedented crisis.

1. The current “employment relationship” situation

All these above-mentioned changes in the labour market have been characterised in practice by less contract duration and job security, more irregular working hours (both in terms of duration and consistency), increased use of third parties (temporary employment agencies and outsourcing), growth of various forms of dependent self-employment (like subcontracting and franchising) and also bogus/informal work arrangements (i.e. undeclared work or any kind of arrangements deliberately outside the regulatory framework of labour, social protection and other laws). In parallel, these atypical forms have generated a dilution of the subjects of the employment relationship, in particular of the employer “part” of the employment contract (the employer is no longer an individual or group of individuals, being instead in some cases a digital platform). On the workers' side, the mix in practise of independent and subordinate work elements in the same relationship makes the definition and identification difficult.

This not only has an effect at the individual level (employment contract). On the worker side, the challenge of organising the collective voice of informal workers and those outside of established employment relationships, and the need to build broad-based coalitions with organizations with similar interests, such as cooperatives, user groups, traders' associations and other civil society, membership-based organizations are becoming a major issue. On the employer side, the challenge of effectively representing the interests of SMEs and the relationship between MNEs and national employer organisations is key for establishing the basis for bargaining. The effectiveness of the negotiation depends on achieving such representation; and this has a direct impact on the regulation of the individual contract.

2. The complexity of the phenomena

It is clear, therefore, that the new forms of work are challenging knowledge and practice as well as the way of understanding and regulating the employment contract.

However, and in the first hand approach, there are several hypotheses that could be considered when reflecting on these new phenomena, in particular to better understand the regulatory and enforcement challenges.

First, changes to work arrangements should be viewed in terms of a spectrum rather than simply the growth of particular categories. For example, global changes to business practices (including repeated rounds of downsizing/restructuring by large private and public sector employers), privatisation, outsourcing/offshoring and ‘converting’ employees into self-employer subcontractors have not only increased the number of workers holding shorter contract duration work. These changes have also increased job insecurity amongst those workers continuing to hold ongoing/permanent jobs, adversely affecting their health, safety and well-being. Further, the growth of atypical work arrangements (temporary, agency and self-employment) in combination with the presence of vulnerable immigrant/displaced groups (especially undocumented workers) appears to have increased the scope for bogus/informal work, especially in traditionally poorly regulated sectors like agriculture and construction. In sum, different categories of work interact and this can flow on to employment and working conditions so that simply comparing non-standard to what is deemed as standard work (as many studies do) will not capture the full impact of changes to work.

Second, different dimensions of the new relationships overlap and interact in complex ways. For example, there is commonly a significant overlap between temporary and part-time work and in some industries such as construction and homecare, workers may move between employment and self-employment on a regular basis. Multiple jobholding (common in industries like hospitality) can further complicate an assessment on the working conditions’ status. Typically many studies only compare two or three different categories of work rather than the full spectrum of work arrangements. Further, temporary employment is quite a diverse category (including on-call, casual, seasonal, fixed-term contract and agency work); workers are often uncertain as to whether their job is temporary; and some studies have failed to control for exposure (i.e. temporary workers often work fewer hours than permanent workers). These complexities make reviews of global research difficult as well as highlighting the need for more carefully designed studies – not always easy given problems of access inherent with many non-standard forms of work.

Third, it is also critical to recognise that the growth of new forms of work has also been associated with significant changes in the workforce of most countries including greater

female participation, an ageing of the population (mainly in rich countries but also some middle income countries, notably China) and perhaps most important, historically unprecedented use of migrant workers (including internal migrants) including those on temporary visas (guest workers, tourists and students) and undocumented workers. These workers are typically concentrated in weakly unionised and poorly regulated sectors (like agriculture), and their vulnerability to exploitative practices is commonly exacerbated by language, ignorance of local laws and weaker regulatory entitlements/protection (the latter even applies to internal migrants in some countries). Undocumented migrants in particular are often found in the most precarious jobs and the informal sector. Of course, the categories just mentioned are not mutually exclusive with, for example, government reports pointing to the vulnerability of young immigrant workers in particularly hazardous industries like construction.

It is also worth noting that multiservice companies have emerged with force seeking to elude the application of sectorial collective bargaining, whilst the requirements imposed on temporary employment agencies are increasingly less exigent. New ways of commercial collaboration between companies such as franchise agreements, *maquila* services or cooperatives are paving the way for a more flexible compliance with law and universally applicable collective bargaining.

Moreover, new technologies are bringing new labour patterns and the concept of the worker's physical location in an identified workplace is running out of steam. There is no longer any need for a chief/supervisor to be present at the workplace. It is frequent to work in several compatible jobs or work temporarily for different organisations using part-time work contracts.

In this context, the growth of different forms of part-time work, such as mini-jobs, is leading to marginal jobs, lower wages and less social protection.

It seems to be evident that the growth of more complex and dynamic work arrangements has opened a serious challenge to labour inspectorates in terms of accessing and seeking to ensure that the minimum standards are enforced. While in some countries government reports demonstrate some recognition of the “new” problem, inspectorate resourcing has typically failed to keep pace with this and in some cases has been cut back, in particular since the onset of the global financial crisis. The growth of the informal sector represents a particular challenge, especially as government concerns in this area are sometimes more related to the loss of tax revenue than labour standards. Further changes to industrial relations' regulatory regimes that favour flexibility or are explicitly de-collectivist have exacerbated these challenges by making it harder to ensure minimum wages are paid or to ensure working hour arrangements are not harmful to health and living conditions.

3. The employment relationship related issues and the compliance issues

Since the last two centuries, the standard or typical employment relationship has been characterized by an employee working under the subordination and dependence of another person in exchange for remuneration, resulting in a legal link being established between an ‘employee’ or ‘worker’ and an ‘employer’. Inherent in the employment relationship is the notion that the employee “does not assume the risks specific to an employer”.¹ Moreover, in the standard employment relationship the work takes place at the employer’s place of business, or in any place chosen by him/her and under his/her direction.

In a first attempt and in regard to legislation in force, we can identify four main distinct forms of atypical employment relationships: (1) dependent self-employment, (2) disguised employment (3) dispatched, including temporary agency, workers, and last but not least (4) Gig economy workers: On-demand work, crowd work.

(1) In dependent self-employment, the worker performs services for a business or enterprise under a civil contract and as a result, is excluded, except if a specific regulation exists,² from labour law. Dependent self-employment differs from independent self-employment in that the worker depends on one or a few “clients” for their income; thus they are economically dependent on the business that they provide services for, even though they are legally self-employed.

(2) Disguised employment lends “an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by law”.³ It can involve hiding the identity of the employer, by hiring the workers through a third party, or by engaging the worker in a civil, commercial contract or through a cooperative instead of an employment contract. On-call workers and some specific contracts such as key and zero hour contracts are sometimes disguised relationships.

(3) Dispatched workers are contracted to work for a third party, either through a temporary staffing agency or a service provider, and thus form part of multiparty employment relationships. They are recognized as being in an employment relationship, but because of the different parties involved, there may be confusion regarding the obligations of the employer, particularly if the worker has provided services to the third-party enterprise for an extended period of time.

¹ ILO. 2003. The Scope of the Employment Relationship, Report V, ILC 91st Session, Geneva. Page 22.

² This is the case in Germany, Italy and Spain

³ ILO, 2003 op cit, p.25.

(4) The gig-economy is usually understood to include two forms of work: “crowd work” and “work on-demand via apps”⁴. The first term usually refers to working activities that imply completing a series of tasks through online platforms. These platforms put in contact an indefinite number of organisations and individuals through the internet, potentially connecting clients and workers on a global basis. The workers are not covered by labour law.

“Work on-demand via apps” is a form of work in which the execution of traditional working activities such as transport, cleaning and running errands, is channelled through apps managed by firms that also intervene in setting minimum quality standards of service and in the selection and management of the workforce. These are also excluded by labour law and not even regulated by civil or common law.

In practice, as has already been highlighted, many of these new forms of employment could imply vulnerabilities/illegalities that affect the workers employed under these types of contract. Some of the problems are the result of the law/regulation that highlight themselves the inequalities (i.e. employment insecurity). On the other hand, another group of vulnerabilities is the result of the conditions of performance and law evasion (i.e. adequate social protection/coverage). In some cases the vulnerability arises from both reasons.

Let’s describe some specific situations:

Part-time work and mini-jobs may impose vulnerabilities on workers, depending on whether countries abide by the principles of proportionality and non-discrimination that are embedded in national and international law (such as Part-Time Work Convention, 1994 (No. 175) and the EC directive on Part-time work of 1997). In countries whose laws do not reflect these principles, or where there exists extreme forms of short hours (e.g., mini jobs), the law raises important inequalities. It is important to note that the incidence of part-time work has continued to grow in OECD countries in the period 2007-2015 (from 14.6% to 15.7%), and although the incidence of temporary work fell sharply during the recession, it has since rebounded heavily⁵.

On average, part-time workers are paid lower hourly wages than full-time workers, not only as a result of outright discrimination based on contractual status, but also from the fact that workers on part-time jobs are more likely to work in sectors and occupations

⁴ De Stefano, Valerio The rise of the “just-in-time workforce”: on-demand work, crowd work and labour protection in the “gig-economy” ; International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch. Geneva: ILO, 2016 Conditions of work and employment series; No. 71 page 1.

⁵ Recent labour market developments and the short-term outlook; OECD, Employment Outlook 2016; available at <http://www.oecd.org/els/oecd-employment-outlook-19991266.htm>

where hourly wages are lower; they may also be excluded from premia or overtime payments. This situation is a result of both (by) law and practice. Part-time workers are sometimes also excluded from receipt of unemployment insurance if legislation interprets the condition of being available for work as applying to full-time jobs only. Because of their part-time status and the tendency to view them as peripheral employment, part-time workers may also have less access to training and career advancement, even if the law allows the possibility. *On-call work, zero-working hours* contracts and similar arrangements exhibit both variable and unpredictable schedules where pay is uncertain. Workers on zero-hour contracts may also face employment insecurity in cases where the employment relationship is not recognised. In some cases, as in the UK, there is ambiguity as to whether workers on zero-hour contracts are (in UK legal terms) ‘workers’ or ‘employees’. If linked by a service provision contract with no mutual obligation to provide and accept hours of work, they are classified as “workers” and as such are not subject to protection against unfair dismissal, notice of termination or redundancy pay. Case law suggests that whether such protection is afforded depends on the reality of working arrangements rather than the wording of contracts. In this respect a number of zero-hours and on-call arrangements overlap with the “disguised employment” category. Similar problems affected the workers on the *gig economy*, where if recognised as workers they don’t have legal protection or securities.

Vulnerability and illegality is also associated with *fixed-term contracts*, as workers with fixed-term contracts have a low expectation of continued employment, although during the period of contract, workers on fixed-term contracts usually cannot be dismissed before the contract period ends and are thus relatively well protected. They generally have fewer protections against unfair dismissal, as compared to permanent contracts. Moreover, once the end date of the contract is reached, there is no legal obligation to renew or extend the contract on the part of the employer.

Workers on fixed-term contracts may suffer from inadequate social security coverage, mainly because of the short tenure that can lead to de facto lower unemployment benefits and pension provisions. They also have more limited access to on-the-job training, as having workers on temporary contracts decreases employers’ incentives and necessity to provide training, especially if the conversion rate of fixed term contracts into permanent contracts is low ⁶.

In general, workers on project or *task-based contracts* are more vulnerable as compared to workers on fixed-term contracts. Such workers also face significantly higher representation, social security coverage, and training insecurities. Indeed, project or task-based work often implies limited social security contributions, does not envisage

⁶ Dolado, J. J., S. Ortigueira, and R. Stucchi, 2012. Does Dual Employment Protection Affect TFP? Evidence from Spanish Manufacturing Firms. CEPR DP No. 8763.

maternity or sick leave compensation, and does not entitle workers to unemployment benefits.⁷

Casual and daily work can be rightfully considered as the most disadvantaged type of temporary employment as they have no guarantee of remaining employed with the same employer, nor do they have right to any compensation in case of premature ending of the employment relationship. Moreover, unpredictability of employment is further translated into unpredictability of wages, or high income insecurity and inadequate – if extant at all – social security coverage. Similarly, training and career path insecurity is high. Performing tasks at different work sites and the often informal nature of employment raises concerns in terms of responsibility in case of accidents and work-related injuries, implying significant insecurity in working conditions.

The Dublin Foundation⁸ has recently considered the so-called *employee sharing* as a new form of employment. A good example of it is the *AGZ Südbrandenburg* in Germany, one of the oldest experiences in Europe of an employer group managing a cooperative labour pool. The companies participate in the cooperative and are jointly responsible for the employees hired by the *AGZ*. The workers may work in different companies through the cooperative on a rotating basis. The average for a single worker is to work in two to four companies. The workers have a contract with the *AGZ* and have equal terms of labour conditions regardless of which company they work at. The *AGZ* is a non-profit organisation and is financed by the employers group that pays workers' wages, social insurance contributions and ancillary wage costs, jointly with a membership and management fee of about 15% of the wage costs.

In France *AdPartners*, in Lyon, is another employee sharing experience. It is known as “*portage salarial*” or “*umbrella company*”, and gathers co-workers who are mainly independent executives working in consulting services for at least three years. The “*umbrella company*” takes care of clients, prepares the invoices and paperwork in exchange for a fee paid by workers (10% of their income). The difference with temporary work agencies is that the “*umbrella company*” does not help their co-workers find clients and the co-worker is not subordinated to the client. The system serves as a support to workers who wish to work independently but prefer to maintain some benefits of an employee, such as social security, sickness pay, maternity leave, unemployment benefits, etc.

⁷ Garibaldi, P., F. Taddei, 2013. Italy: A Dual Labour Market in Transition. Country Case Study on Labour Market Segmentation. ILO Employment Sector Working Paper No 144.

⁸ New forms of employment report; Eurofound; Mandl et al.; available at <http://www.eurofound.europa.eu/new-forms-of-employment>

There are other new forms of employment such as in Luxembourg the “*prêt temporaire de main d’oeuvre*” (sublease of employees) which operates as a job retention tool used by private companies and the government of Luxembourg in the framework of tripartite agreements negotiated by social partners. In Italy and Belgium there exist employment vouchers (in Belgium the Landelijk Dienstencoöperatief (LDC), and in Denmark there is the ‘*boundaryless work*’ or ‘*flexible work*’, a sort of fluid ICT-based mobile work for temporary project offices at the premises of clients or at home (case study of the company Grontmij-currently belonging to Sweco AB).

According to other sources, “*Factoo*” operates in Spain, a cooperative in the region of Valencia that runs a platform for freelancers. The platform bills their work and presents VAT declarations on behalf of workers, who join the cooperative not as self-employers but as employees of the cooperative. The workers save the more expensive self-employment social security contributions and enjoy the same benefits of an employee such as sickness pay, maternity leave, health insurance, unemployment benefits or old age pension. The cooperative registers them as employees in the Social Security General Treasury, but only for the periods in which they effectively work, obviating periods of inactivity⁹.

In the *independent self-employment*, the worker is performing services for a business under a civil contract, thus the worker is not protected by labour law, potentially giving rise to a significant number of vulnerabilities. To begin with, working under a civil contract does not provide employment protection as the contract is for services rendered and thus expires at the end of the contract. Since it is not an employment contract, the worker does not benefit from regulations on working time, including hours and paid leave, or from social security protection. Contributions to a social security system are usually optional and the worker would contribute as independent self-employed, which in many countries requires a higher level of contributions than if the person were in a recognized employment relationship.

There are two types of self-employment: those who freely choose self-employment and those who are forced into it, the latter falling very often into a sort of grey area close to what we know as ‘bogus’ self-employment¹⁰.

The so-called “*knowmads*” is a phenomenon that is increasing with the eruption of electronic platforms acting as an intermediary between freelancers and clients.

⁹ Information available at <http://factoo.es/>.

¹⁰ Precarious Employment in Europe: Patterns, Trends and Policy Strategies; Directorate General for Internal Policies Department A: Economic and Scientific Policy; Study for European Parliament's Committee on Employment and Social Affairs; May 2016; © European Union, 2016; available at <http://www.europarl.europa.eu/studies>.

According to a survey carried out by McKinsey Global Institute¹¹, there are four types of freelancers: a) free agents, who choose independent work and obtain their primary income from it; b) casual earners, who use independent work for supplemental income and do so by choice; c) reluctants, who make their primary living from independent work but would prefer traditional jobs; and d) financially strapped workers, who do supplemental independent work out of necessity. The report asserts that there is an increased demand of independent work by clients and organisations and points out that today 15% of independent workers use the digital platforms and markets. However, the report draws attention to the key challenges of this shift such as concerns related to benefits, income-security measures and training. Furthermore, freelance workers are only covered in part by social insurance, having access only to old age pensions or unemployment benefits according to the level of social security contributions they pay.

Dispatched or temporary agency workers are recognized as being in an employment relationship and thus benefit from the protections of national labour law. There are geographical areas in which the posting of workers is becoming a matter of serious concern. Yet because they carry out their work at the premises of the contracting company, they are usually not entitled to receive any additional benefits that workers of the contracting firm may have, and their pay, particularly if they perform less-skilled jobs, is likely to be lower. They are less likely to have employment protection and often experience high job rotation, making it difficult to receive training and build career paths.

On the other hand, the globalization has been the seedbed of a sharp increase of transnational movement of workers and a constant flood of migrants who undergo lower working conditions than national workers, bringing precarious employment to foreign workers. Dispatched workers usually provide their labour services either through a temporary agency or through subcontracting schemes. Despite most countries have regulations on both institutions, the lack of information on legal documents and the insufficient knowledge of language and national regulations remain as main elements contributing to job precariousness.

At the European Union, posted workers of certain countries suffer low wages and limited labour rights as long as national standards of the host country are only partially implemented during the posting. Moreover, posted workers usually lack access to trade unions representation, have difficulties to access to translated information, often work in low-quality employment and do not always receive proper compensation or reimbursement of their travel, board and lodging expenses.

¹¹ Independent work: choice and necessity and the GIG economy (Expansión, October 29th, 2016); <http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy>.

Actually, the Directives 96/71/EC of 16 December 1996, concerning the posting of workers in the framework of the provision of services and the so-called Enforcement Directive **2014/67/UE**, of 15 May 2014, only guarantee a part of working conditions related to working time, rest periods, paid annual holidays or minimum wages. The proposal of 8 March 2016 for a revision of Directive 96/71/EC on the posting of workers (Mobility Package) aims at improving the working conditions of posted workers by making compatible the rights of these workers with the freedom to provide services in the Union, thus ensuring a level playing field for businesses. The new proposal seeks to lay down that all mandatory rules on remuneration in the host Member State apply to posted workers, including both law and universally applicable collective agreements in all economic sectors.

Bogus self-employment has become a new mantra of precarious employment. In those places where undeclared work is not the main problem, bogus-self-employment arises as another form of precarious work. There are no accurate figures on the estimation of bogus-self-employed workers, but some surveys suggest an increase of dependent self-employment and bogus self-employment as a precarious way of work. In countries such as Germany, Netherlands, Lithuania or Spain some indicators point at an increase of bogus self-employment¹². This increase may be greater insofar the new digital platforms are emerging and contracting more and more workers. Sometimes the growth of bogus self-employment is linked to the spread of subcontracting in parallel with the increase of the dismissal rate in companies that release their employees but continue to work with them through a commercial or civil contract as self-employers. In other cases, the companies join to set up cooperatives that recruit workers as fake self-employers. The cooperative subsequently post these fake self-employers (workers) to the different work places of the client companies, which save social security and other costs derived from the application of collective bargaining¹³. In this case, bogus self-employment is a sort of *disguised employment*, given that its principal definitional characteristic is the employer's attempt to conceal or distort the employment relationship. Workers are, therefore contracted through a third party via bogus self-employment contracts. Under bogus self-employment, the worker has the same vulnerabilities as described under dependent self-employment, with the added dimension that the employer's attempt to deliberately conceal the employment relationship can exacerbate the insecurities that the worker faces. The disguised employment is also being extended to the atypical forms of work where the protection as already mentioned is diminished

¹² Precarious Employment in Europe: Country Case Studies; Directorate General for Internal Policies Department A: Economic and Scientific Policy; European Parliament's Committee on Employment and Social Affairs; Andrea Broughton et al; available at <http://www.europarl.europa.eu/studies>

¹³ An example of this practice are the meat industries in Barcelona y Girona, in the north of Spain.

It is, then, clear that the legal nature and the features of these new employment forms are becoming very complex. There are a huge variety of forms of contracts that no longer include the elements that have been used for more than two centuries to define employment relationships by traditional (and current) labour law. Identifying the different elements of employment relationships and ensuring compliance with law has become a challenge at all levels.

Regulation is at the heart of the emergence and spread of non-standard work in most countries. In some instances, the law has encouraged - either purposefully or unwittingly - the use of non-standard employment arrangements by facilitating or creating incentives for enterprises to use these arrangements. In other instances, there are gaps or grey areas in the law that have provided fertile grounds for their arrival. Enforcement become extremely difficult as it is challenging for the authorities to define when an employment relation is existent and therefore when social protection and labour law are applicable. Moreover the governance of this situation has become more difficult because of the lack of human and material means of the enforcement authorities.

In practice, fraud and evasion in the labour market are increasing in an arithmetic progression and existent legislation and existent means cannot always provide solutions to all the regulatory gaps and therefore the possible lack of compliance. However there are some examples that we will analyse.

3.1. New phenomenon: raise and plethora of the sharing economy

As mentioned above, sharing economy shows up, in terms of different types of employment, either as “*on-demand*” work or as “*crowd work*”. The main characteristic of the sharing economy is that workers work through an electronic platform or by using an app for mobile phones. Both forms of working are also known as “*gig-economy*” and have particular impact on labour organisation. For instance, wages are replaced by buy orders, affecting a huge number of people who used to be employees and now have become independent workers. The “*gig workers*” work on punctual works (gigs) using all the resources of robotic and smart technology. It is becoming clear that the Information and Communication Technologies (ITC) are allowing a new type of labour relation where the mobile apps and electronic platforms are the main work tools and means of production.

It is still too early to predict how the new technological framework will tailor the current labour relations and employment schemes, yet only one thing seems undoubted: the “*gig economy*” has burst into the market and not without controversy. The authorities, corporate lobbies and interest groups try to restrain the emergence of new platform businesses. Courts (see below) are upholding administrative and judicial

convictions of companies such as *Uber Technologies Inc* or *Airbnb* for breaking transport or labour laws. The new sharing economy companies are facing legal demands, social demonstrations and protests in big cities against their activities or they are being confronted by administrative barriers. There are countries in which new regulations have been adopted or could be put in place with the view to establishing a level playing field for taxi drivers and *Uber Technologies Inc.* drivers, including training for the latter or evaluation programmes through an internet application for taxi drivers (e.g. France, México or Portugal)¹⁴.

In Germany an online survey of over 2,180 Germans revealed that 22% of adults aged 16-70 say they have tried to find work in the online ‘gig economy’ platforms such as *Upwork*, *Uber Technologies Inc.* or *Handy* during the past year. This percentage is equivalent to nearly 13 million people¹⁵. However, the authorities and corporate lobbies and interest groups try to restrain the emergence of new platform businesses¹⁶.

In Denmark the Danish High Court has upheld the conviction of six *Uber Technologies Inc* drivers found guilty of breaking the country’s taxi laws, imposing fines on them of between 2,000 and 6,000 kroner each¹⁷.

In France a judge imposed on *Uber Technologies Inc.* a fine of up to €800,000 for managing the UberPop service without a license¹⁸. In parallel, the French Government has adopted a new law (*Law Macron*) envisaging functional and legislative measures for regulating the new platforms.

¹⁴ Uber-pop low cost service was banned by a German Court after complaints from taxi drivers; <https://www.theguardian.com/technology/2014/sep/02/car-sharing-uber-ban-taxi-germany>; see also: The Telegraph, November 19th 2016, <http://www.telegraph.co.uk/news/2016/11/19/uber-declared-an-illegal-taxi-service-by-danish-high-court/>; Knowledge of English language at (<https://www.bloomberg.com/news/articles/2016-10-18/london-to-put-uber-drivers-through-english-proficiency-testing>); The Guardian, Gwyn Topham, David Hellier and Aisha Gani; Friday October, 16th 2015; <https://www.theguardian.com/technology/2015/oct/16/uber-wins-high-court-case-taxi-app-tfl>; Bloomberg at <http://www.bloomberg.com/news/articles/2016-08-16/uber-drivers-under-criminal-investigation-by-finland-s-police>; El País at: http://elpais.com/elpais/2016/08/27/opinion/1472312073_042143.html; also see Forbes at <http://www.forbes.com.mx/uber-sera-regulado-en-la-ciudad-de-mexico-reuters/#gs.lbYl8jw>

¹⁵ Crowd Working Survey, November 2016, Size of Germany’s ‘Gig Economy’ revealed for the first time; Ursula Huws, University of Hertfordshire; Simon Joyce, University of Hertfordshire. http://www.uni-europa.org/wp-content/uploads/2016/11/crowd_working_survey_Germany.pdf

¹⁶ Uber-pop low cost service was banned by a German Court after complaints from taxi drivers; <https://www.theguardian.com/technology/2014/sep/02/car-sharing-uber-ban-taxi-germany>.

¹⁷ The Telegraph, November 19th 2016, <http://www.telegraph.co.uk/news/2016/11/19/uber-declared-an-illegal-taxi-service-by-danish-high-court/>.

¹⁸ uber-suffers-legal-setbacks-in-france-and-germany.

In the UK, companies such as *Uber Technologies Inc.* have been working in big cities but facing social demonstrations and protests against its activity or confronting administrative barriers¹⁹. In the case of *Uber Technologies Inc.* the use of apps for mobile phones as a taximeter was declared legal after a complaint from Transport of London (TfL)²⁰. However, the solicitors' firm Leigh Day, with the support of GM (*British Trade Union - General Municipal Boilermakers*), has brought the case to the Central London Employment Court, which ruled last 28th October that several *Uber Technologies Inc.* drivers are not self-employed and should be paid the minimum wage and holidays.

In Finland the police has recently filed a lawsuit against *Uber Technologies Inc.* for its drivers not holding a taxi license²¹. In Portugal a new regulation could be adopted with the view to establishing a level playing field for taxi drivers and *Uber Technologies Inc.* drivers, including training for the latter or evaluation programmes through an internet application for taxi drivers²². In Mexico a new regulation has been also announced²³.

In Spain, platforms such as *Uber Technologies Inc.* are emerging strongly despite some legal setbacks after adverse judgements ruled by Commercial Courts. Since then, companies such as *Uber Technologies Inc.* have changed the external appearance of their business evolving from taxi activity towards a car renting activity, although the Madrid Taxi Professional Federation will probably continue suing the company²⁴. On the other hand, new and emerging crowd work platforms are surging in the internet spectrum, employing thousands of freelancers, such as Upwork²⁵, Nubelo²⁶, Twago²⁷ Freelancer²⁸ o Infojobs freelance²⁹. In the transport sector, new companies such as Cabify³⁰ or Amovens³¹ are also emerging.

¹⁹ Knowledge of English language (<https://www.bloomberg.com/news/articles/2016-10-18/london-to-put-uber-drivers-through-english-proficiency-testing>).

²⁰ The Guardian; Gwyn Topham, David Hellier and Aisha Gani; Friday October, 16th 2015; <https://www.theguardian.com/technology/2015/oct/16/uber-wins-high-court-case-taxi-app-tfl>.

²¹ Bloomberg; <http://www.bloomberg.com/news/articles/2016-08-16/uber-drivers-under-criminal-investigation-by-finland-s-police>.

²² El País; available at http://elpais.com/elpais/2016/08/27/opinion/1472312073_042143.html.

²³ <http://www.forbes.com.mx/uber-sera-regulado-en-la-ciudad-de-mexico-reuters/#gs.lbY18jw>.

²⁴ <http://www.expansion.com/empresas/tecnologia/2016/03/30/56fb6b3d268e3e771e8b4665.html>.

²⁵ (<https://www.upwork.com/>).

²⁶ <http://www.nubelo.com/>.

²⁷ <https://www.twago.es/>.

²⁸ <https://www.freelancer.es/>.

²⁹ <https://freelance.infojobs.net/>.

³⁰ <https://cabify.com/>.

³¹ <https://amovens.com/>.

In the United States *Uber Technologies Inc.* is facing a long and winding process of judicial disputes about the classification of drivers as employees or as independent workers. In the judgement *Berwick v. Uber Technologies*³² the Supreme Court of San Francisco has scrutinized the Uber case against the “*multi-factor test Borello*”³³. The court analysed to what extent *Uber* activities exceeded the simple activity of an intermediary platform, getting directly involved in the management of the transport business, establishing working and control rules and finally taking profit from the activity’s bottom line. The Court also highlighted that the drivers could hardly be seen as independent workers as far as they did not carry out any managerial activity nor take over any investment.

The *Uber* case in the United States (California) continued with the judgement *O’Connor v. Uber Technologies*³⁴. In this case, the Court examined issues such as who takes care of the driving licence, car registration or assurance, and how the platform pays the drivers, how the working time is organised or how the company carries out the *background check* on drivers. While *Uber Technologies Inc.* held that it only followed up the transport from an operational point of view, not interfering in the drivers’ activity, the Court again turned to the *Borello test* for analysing the type of relationship between the platform and the drivers. The Court reached the conclusion that labour relations were evolving in accordance with the new collaborative economy and that the criteria set up in the *Borello test* were not sufficient for testing this new economic reality. Therefore, a redefinition of the *Borello test* (as well as others such as *Martinez/IWC’s (Martinez v. Combs)*³⁵) would also be necessary.

In the aftermath of the litigation, a 100 million dollar agreement between the drivers and the company settled the disputes³⁶, but only apparently, as in the Judge Edward Chen-*O’Connor* case, following complaints from the drivers and the San Francisco Bay Area

³² Superior Court of California County of San Francisco, June 16 2015, available at:

<http://digitalcommons.law.scu.edu/historical/985/>.

³³ *S.G. Borello & Sons, Inc v. Department of Industrial Relations*, 1989, 48 Cal. 3d 341.

³⁴ *District Court for the Northern District of California*, available at:

<http://digitalcommons.law.scu.edu/historical/931/>

³⁵ The test *Martinez/IWC’s (Martinez v. Combs)* sets out three criteria for differentiating between an employee and an independent worker, say, a) whether the employer exercises control over the wages, working time and labour conditions; b) whether he suffers and permits to work; c) whether he engages, thereby creating a common law employment relationship; (further information at Peter Tran, Comment, The Misclassification of Employees and California’s Latest Confusion Regarding Who is an Employee or an Independent Contractor, 56 Santa Clara L. Rev. 677 (2016) (available at <http://digitalcommons.law.scu.edu/lawreview/vol56/iss3/5>).

³⁶ Información disponible en <http://arstechnica.com/tech-policy/2016/06/most-drivers-in-uber-labor-case-would-get-under-25-so-some-protest-settlement/>.

Drivers Association the Drivers³⁷, who questioned the agreement in June 2016 and rejected it in August³⁸. The agreement allowed drivers to receive tips, payment calculated by kilometres and protection against unjustified cessation of activity³⁹. The Judge said that the agreement could release the company from being liable of the drivers' claims for minimum wages, overtime work or termination of employment protection. Now the parties are awaiting a decision by the 9th U.S. Circuit Court of Appeals in relation to the validity of the arbitration agreement⁴⁰.

In the European Union the “*Digital Single Market Strategy for Europe*” (COM (2015) 192) stated the need to evaluate the collaborative economy⁴¹. The Communication from the Commission (COM (2016) 356 final, 2.6.2016) adopted “*A European agenda for the collaborative economy*”⁴². This *Agenda* defines the collaborative economy as all companies that work with electronic platforms to sell goods or to provide services.

The Agenda takes two different approaches on the collaborative economy. On the one hand, it describes the ‘peers-to-peers’ economy, in which users exchange goods and services as private individuals, and the cases in which a professional sells goods or provides a service to particular individuals. The Agenda provides criteria to define a professional service (frequency, a profit-making objective, turnover, etc.).

On the other hand, the Agenda also lays down differences between a genuine information society and an information society that also acts as a service provider. The first one limits its action to making the platform available to the users (limited requirement to enter the market), while the information society as a provider of service gets involved in the provision of the underlying service, requiring in this case a licence or an authorisation. The Agenda lists some criteria to distinguish both types of information societies, such as who decides prices of the service or product, who settles

³⁷ *Drivers Slam Uber's \$100M Deal To End Misclassification Suits*; Matthew Guarnaccia Law360, New York (August 1, 2016, 7:30 PM ET) (<http://www.law360.com/articles/823416>).

³⁸ Society for Human Resource Management; <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/uber-settlement-rejected.aspx>.

³⁹ “*Uber in Dare to Judge Says It's Ready to Ditch Driver Deal*”; Joel Rosenblatt; August 1, 2016 — <http://www.bloomberg.com/news/articles/2016-08-01/uber-in-dare-to-judge-says-it-s-ready-to-ditch-driver-settlement>.

⁴⁰ Society for Human Resource Management; <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/uber-settlement-rejected.aspx>.

⁴¹ COM(2015) 192 final Brussels, 6.5.2015.

⁴² Brussels, 2.6.2016 COM(2016) 356 final “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda for the collaborative economy <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20160356.do>.”

contract clauses, who assumes costs, who owns equipment, who decides quality requirements of the service.

Finally, the Agenda brings the matter of labour relations in the collaborative economy into the public arena. It sets out several criteria to guide the analysis, such as whether there is a relationship of subordination between the employee and the employer, the nature of the work carried out, whether there is payment of a salary, etc.

4. Effects of the sharing economy in labour organisation and law: change of labour and gaps in applicable legislation.

In most developed countries, as explained above, there is a lack of legal and policy orientation with regard to the emerging forms of work provided by the new technologies, in particular concerning the categorization of workers, either as employees or as independent workers.

Definitely, we can say that new technologies are prompting an environment of unstoppable growth of labour that appears to be currently out of legislative control. Presently, a huge number of new “freelancers” are working in the sharing economy platforms all around the world and frequently under hard labour conditions, low wages and long working times, many of them working from developing countries. The platforms usually lure workers into further tasks by rewarding them with points or stars (guarantee of future and supposedly better paid tasks) or, on the contrary, may reject their tasks or work done without further justification.

At any rate, the scope of a new legal framework should be broad enough to cope with issues such as protection of fair competition, clients and workers. A first step in this direction has been taken by the Law Macron in **France**, which has reinforced the information obligations between the platforms and the clients. According to this law, both the service providers and the owners of the platform must supply clear and transparent information (art. 134). The law requires the platforms to provide detailed information on the service, the different offers on line, civil and fiscal rights, obligations of the different parties involved and information about the professionals, service providers and consumers who use the platform⁴³.

The “sharing economy is transforming the society”, is a “huge opportunity to foster competition” and it is advisable to suppress unnecessary and disproportionate legal restrictions in the current legislation, in particular in sectors such as transports and

⁴³ L121-17 Code de la consommation. Comments at *Economie de partage et loi Macron : nouvelles obligations pour les plateformes collaboratives*; Mélanie Defoort, see:

<http://www.village-justice.com/articles/Economie-partage-loi-Macron,20242.html#biqidtirDKbGtZp6.99>.

accommodation⁴⁴. However, in the field of labour relations some studies⁴⁵ show that labour organisation in the era of new technologies presents quite a few handicaps such as dispersion on the internet, absence of work place, difficulties for inspection and control, little chances to join trade unions for fear of being fired⁴⁶, low wages⁴⁷, risks linked to child work or work of disabled workers, lack of social protection⁴⁸ or lack of security concerning income⁴⁹.

⁴⁴ Spanish National Commission for Markets and Competition (CNMC); available at <https://www.cnmc.es/CNMC/Prensa/TabId/254/ArtMID/6629/ArticleID/1684/La-CNMC-somete-a-consulta-p250blica-las-Conclusiones-preliminares-del-estudio-sobre-los-nuevos-modelos-de-prestaci243n-de-servicios-y-la-econom237a-colaborativa.aspx>.

⁴⁵ “*Transformation numérique et vie au travail*”, Rapport établi par M. Bruno METTLING (A l’attention de

Madame la ministre du Travail, de l’Emploi, de la Formation Professionnelle et du Dialogue Social); pg. 12; available at <http://www.ladocumentationfrancaise.fr/rapports-publics/154000646/>.

De Stefano, Valerio; “*The rise of the "just-in-time workforce" : on-demand work, crowdwork and labour protection in the "gig-economy"*”/International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch. -Geneva: ILO, 2016 Conditions of work and employment series; No. 71), pág.10; available at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf.

⁴⁶ Although there are web pages where crowd workers can obtain information about their labour conditions, such as *Fair Crowdwork* hosted by the German union IGM (Industriegewerkschaft Metall); available at: <http://www.faircrowdwork.org/de/debatte/wir-sind-dynamo-gemeinsame-aktionen-f%C3%BCr-crowd-worker>. There are also new information platforms for crowd workers such as TurkerNation (<http://turkernation.com/>) or MTurkGrind (<http://www.mturkgrind.com/>). Recently the company *UBER TECHNOLOGIES INC.* has promoted in New York a company-funded guild for drivers (Independent Drivers Guild); Bloomberg (<http://www.bloomberg.com/news/articles/2016-10-27/uber-found-an-unlikely-friend-in-organized-labor>) in an attempt to thwart unionization of drivers.

⁴⁷ In the web *On-demand Society* (<http://www.ondemandsociety.com/piecemeal-jobs-and-breadcrumb-salaries/>), a platform for *freelancers*, it is mentioned that 90 % of tasks for Amazon’s Mechanical Turk are paid an average of 4.80\$ per hour, low wage compared with a US federal minimum wage per hour of 7,25\$ or the US average salary per hour of 25.73 \$ (BLS, August 2016 (available at http://www.bls.gov/news.release/empsit.t19.htm#ces_table3.f.p).

⁴⁸At the web pages of the IRS, Internal Revenue Service, y SBA (Small Business Administration, US) differences between the so-called “*workers 1099*” and employees are explained:<https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>
<https://www.sba.gov/starting-business/hire-retain-employees/hire-contractor-or-employee>.

Lack of social protection and undeclared work are paramount issues, as long as most of the internet service providers consider their workers as independent workers and do not register the in the general social insurance. In an attempt to reduce this lack of protection there are companies as UBER that are trying a so-called Individual Retirement Account including insurance funds and fiscal benefits for drivers (available at <http://www.wsj.com/articles/uber-lets-drivers-hail-an-ira-with-betterment-1472043939?mod=mktw>).

⁴⁹ Many workers of the “gig-economy” do not find quickly available work in the internet platform or there is a poor communication between them and clients (requesters) or the platforms. Further information at “*Income security in the on-demand economy: findings and policy lessons from a survey of*

At this point, we may ask ourselves what should be the way forward. It seems clear that traditional national standards may not be sufficient to regulate the new emerging forms of work and in particular the right classification of crowd or on-demand workers. We have seen how in the US the traditional tests for labour relations are failing in that classification. The judgement *O'Connor vs Uber* unveils that the new reality may not fit into the traditional labour framework and that the idea of building up a new intermediate category of workers is permeating the analysis of more than one jurist and researcher (e.g. *Patrick Cotter v. LYFT, INC., Tribunal Distrito Norte de California, Caso No. 13-cv-04065-VC, marzo 2015*)⁵⁰.

For the time being, in the new forms of employment the classification of workers either as independent workers or as employees must be carried out on a case-by-case basis. The classification may be relatively easy in certain sectors such as food, delivery, social care and cleaning, in which the presence, in some cases after judicial litigation, of the labour elements is more visible. However, in other sectors such as transport or crowd work in platforms the approach may be more difficult. It is here where the borderline between the concept of employee and independent worker still remains very unclear and subject to confusion between genuine self-employment and bogus self-employment. Nonetheless, several countries have adopted intermediate solutions for cases where the special characteristics of the relationship between employer and worker do not meet the basic elements of the traditional labour relation. In this respect, some analysts take the stance that “it is not possible to behold self-employment as a single and homogeneous reality, from both a sociological and a legal point of view” (e.g. Cruz Villalón, 2013⁵¹).

In this context, it is important to examine to what extent all these new forms of employment and work could be included within the scope of the labour contract or whether it should be more convenient to resort to a new legal framework enclosing elements that cover specific characteristics such as casualness, ubiquity, flexibility, job

crowdworkers / Janine Berg ; International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch. - Geneva: ILO, 2016 (Conditions of work and employment series; No. 74); page 5.

Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_479693.pdf.

⁵⁰ http://adapt.it/adapt-indice-a-z/wp-content/uploads/2015/06/Cotter_Lyft.pdf.

⁵¹ “*El Trabajo autónomo económicamente dependiente en España. Breve valoración de su impacto tras algunos años de aplicación*”; Jesús Cruz Villalón, President of Spanish Labour Law Association, Catedrático de Derecho del Trabajo y de la Seguridad Social, Universidad de Sevilla, Documentación Laboral; N° 98, 2013; pág.3 in internet available at:

<https://idus.us.es/xmlui/bitstream/handle/11441/41506/TRABAJO%20AUT%C3%93NOMO%20ECON%C3%93MICAMENTE%20DEPENDIENTE%20EN%20ESPA%C3%91A%20%20D%20179.pdf?sequence=1>.

sharing, etc. The new forms of work in the electronic platforms are far from the traditional jobs. At this regard, the European Economic and Social Committee held last March an audience⁵² in which the discussions about the new forms of work and sharing economy focused on problems such as fair wages or fundamental rights and social protection. The meeting brought up new proposals such as benefits' portability, concept of an intermediate category of worker or a new reading of basic conditions for the workers of the sharing economy.

In Europe, for instance, the dependent self-employer has gained steam over the last few years⁵³ as a hybrid between the employee and the genuine self-employer. New ideas are emerging, such as for instance the so-called “fully portable safety net based on Individual Security Accounts” for crowd workers⁵⁴, in which the different platforms could transfer wages and a part of social insurance costs allowing employees to qualify for pensions (age, unemployment, etc.).

The particular characteristics surrounding the “*gig workers*” (working time flexibility, telework, availability, etc.) make it extremely difficult to regulate aspects such wages, working overtime, task-wage, time-wage criteria, etc. It is thus necessary to analyse what exactly is the relationship of dependence and subordination between employer and employee in the sharing economy and electronic platforms. It is equally unavoidable to take an approach in relation to who owns the means of production or working tools. The European Agenda has taken first steps in the definition of criteria, and at national level several countries' policy makers are claiming a regulation that envisage the working conditions of workers in the gig economy⁵⁵.

⁵² [The changing nature of employment relationships and its impact on maintaining a living wage](http://www.eesc.europa.eu/?i=portal.en.events-and-activities-changing-nature-employment-relationship); Public Hearing - European Economic and Social Committee (EESC), VMA building, room VMA 3, 2 rue van Maerlant, 1040 Brussels, Belgium; ver en <http://www.eesc.europa.eu/?i=portal.en.events-and-activities-changing-nature-employment-relationship>.

⁵³ DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT A: EMPLOYMENT POLICY; Social protection rights of economically dependent self-employed workers; Study for European Parliament's Committee on Employment and Social Affairs; Eichhorst, Werner et al. See also for Italy <http://www.eurofound.europa.eu/observatories/eurwork/articles/working-conditions-labour-market-law-and-regulation/italy-economically-dependent-self-employed-work-in-the-jobs-act>; see for Spain <http://www.eurofound.europa.eu/es/observatories/eurwork/comparative-information/national-contributions/spain/spain-self-employed-workers>.

⁵⁴ Steven Hill, New Economy, new social contract, A plan for a safety net in a multiemployer world, 2015 New America, August 2015, pg. 9.

⁵⁵ For instance in the UK the Labour Party presented the New Clause 24; available at <http://www.independent.co.uk/news/uk/politics/uber-judgment-workers-rights-minimum-wage-holiday-pay-london-uk-a7385591.html>.

5. Labour administration versus new form of work: enforcement current problem, experiences.

There is growing evidence that a great portion of employees will telework from home in the next years and that the traditional working day 9.00-17.00 commute-to-the-office job is eroding⁵⁶. New technologies will thus place pressure on labour relations insofar as they may be used improperly to circumvent the law on labour or to disguise an employment relationship. Currently, new technologies today provide employers with numerous tools to divide tasks and entrust them to workers, who may fulfil them from home. Hence, this work from home is rarely subject to inspection. For instance, it is not easy at all for labour inspection to check whether workers working from home are registered with social security, as it is hardly possible to carry out checks related to working time because workers are only subject to telematics' supervision by the employer. At the same time, new forms of part-time work make inspections more difficult as the working timeframe is not clearly defined.

In the years to come, labour inspection will need to be up-to-date in all related new technologies, web domains, cloud computing, electronic signatures, etc. For this reason, labour inspection needs to invest in training and qualified staff, including special teams integrated by inspectors and IT experts. For instance, crowd work employers, cooperatives of fake self-employers or fictitious companies may misuse new technologies by abusing the trust of workers by requiring them to transfer their electronic signature for managing all types of improper administrative procedures, such as undue applications of social benefits, work permits, etc. Furthermore, there are new *softwares* capable of tampering with machinery and work equipment or digital devices that miscalculate work time or work environment clouding data or information. Labour inspection has the challenge of fighting these virtual fraudulent practices and combatting undeclared work or precarious employment in the cloud.

Equally, the so-called “*smart working*” is emerging strongly. The new work places are airports, trains, waiting rooms and home. The work equipment are portable computers, smartphones or tablets that allow working anywhere and anytime. The new *millennial* workers are “*ubiquitous workers*”, who are permanently interconnected and tele-operating, thereby working with ever seen flexibility. Many questions rise in relation to these new forms of work. How may working time be subject to control? What are the risks related to health and safety at work? How may the regulations on daily or weekly rest or holidays be complied with? How should an accident at work be defined? How can workers conciliate private life with work? Is it necessary to undertake a new

⁵⁶ London Business School's Global Leadership Summit: available at <https://www.london.edu/news-and-events/news/majority-will-work-remotely-by-2020-say-executives#.WEkdfelTFjo>.

regulation that provides for the switch-off right? Some institutions⁵⁷, large multinational companies and collective bargaining agreements⁵⁸ have already started to tackle the subject and take measures.

A discussion paper edited by OSHA-EU in 2015 emphasises that crowd work may entail physical risks (ergonomic, safe use of screens and laptops, etc.), psychosocial risks (pressure, tight deadlines, interruptions, lack of sickness pay, etc.). It also draws attention to certain unsolved issues such as the status of crowd workers, who is the employer, how insurance and liability are schemed, how consumers and public safety is protected, and how Directives on Working Time, Part-Time Work, Temporary Agency Work and Directive on Health and Safety in Fixed-Term and Temporary Employment (91/383/EEC) will apply to crowd work⁵⁹.

The so-called hyper-connected working life is already being tackled in some countries. As from 1st of January, France has put in place a new regulation envisaging the right to switch-off of all workers⁶⁰.

In this context, Labour Inspection needs to continuously update and modernise, which will require improving efficiency in combating fraud and undeclared work derived from the undue use of new technologies. Labour inspection has to address the challenge of dealing with deregulation situations as long as the labour market is evolving quicker than the law. On the other hand, the sharing economy platforms usually have an international dimension, which poses aggregate difficulties linked to the capabilities of the authorities to display its control and enforcement powers. In this context, the Directive e-Commerce 2000/31/CE could serve as a first-hand guidance in order to identify the platforms' direction and control centres, but greater cooperation between countries is essential.

The challenges that the new forms of work and crowd work present are of the utmost importance in the enforcement of labour law. Labour inspection is at the heart of the

⁵⁷ For instance, the Politecnico de Milano has opened an Observatory Smart Working; available at http://www.osservatori.net/smart_working.

⁵⁸ The report Mettling encloses some experiences such as the agreement in 2014 of Syntec, Cinov39, CFDT y CFE-CGC in France; Volkswagen with a new surveillance system of the smartphones servers within a certain time frame, or Daimler-Benz with a device for e-mails (Transformation numérique et vie au travail, Rapport établi par M. Bruno METTLING (A l'attention de Madame la ministre du Travail, de l'Emploi, de la Formation Professionnelle et du Dialogue Social); pg.23; available at <http://www.ladocumentationfrancaise.fr/rapports-publics/154000646/>.

⁵⁹ Discussion Paper; "A review on the future of work: online labour exchanges, or "crowdsourcing": implications for occupational safety and health"; available at <https://osha.europa.eu/en/oshwiki/review-future-work-online-labour-exchanges-or-crowdsourcing>.

⁶⁰ Expansión, 4th January, 2017.

technological *tsunami* and must draw the attention of policy makers for working on innovative regulations that cover the specific characteristics of the new forms of work. Nevertheless, until these regulations are in place, labour inspection should work in the identification of the emerging labour brokers. It should be capable of inspecting the electronic collaborative platforms, combating fraud in a framework of lack of regulation, strong competition, transnational dimension, difficulties of inspection related to working time, new forms of employment and recruitment, easy dismissals, low wages, etc.

Labour inspectors must receive specific training in order to be effective in the detection of these platforms and in the identification of workers, investigating whether these platforms are service providers or information societies. Labour inspectors must be capable of testing who owns the work tools and analysing how the relationship is established between the client, the workers and the platform or the intermediaries.

For instance, the inspection of on-demand (transport) platforms requires looking at how the vehicle is selected, who owns it, who takes care of the car licence, registration and the insurance, who provides the smartphone and GPS equipment. Labour inspection must anticipate changes and should position itself on the front-line of the problem, striving for guaranteeing the respect of decent working conditions for crowd and on-demand workers, and should be heard by policy makers where these decide to regulate the new forms of work.

The 5th ASEAN Labour Inspection Conference organized in Yogyakarta last November 2015 shows the way forward for labour inspectorates. It underscores the need to strengthen labour inspection capability and capacity through ICT, regional and bilateral cooperation for the development of national ICT plans and systems for labour inspection including technology transfer and technical advice, and to enhance cooperation among countries particularly in labour inspection system through ICT⁶¹.

Another challenge is that inspections will have to concentrate on the non-standard and precarious forms of employment, where trade union presence is limited. In this respect, precarious work should not be associated with a lack or shortage of labour inspection resources or with the low efficiency rate of enforcement systems. In general, the question of number of inspections is not as relevant as the issue of the efficiency of the labour inspection system. Enforcement systems must not only address the issue of prosecution and sanction, but also serve as a key information resource.

Enforcement systems should not be limited to conventional prosecution schemes, but they should also promote and follow-up good industrial relations and collaboration with

⁶¹ The 5th ASEAN Labour Inspection Conference was organized from 11 to 12 Nov 2015 in Yogyakarta with the theme of "Enhancing Labour Inspection through Information and Communication Technology".

trade unions, self-auditing systems and social responsibility in companies, insofar as employers prefer to gain the prestige and credibility that provides the security of standard working conditions in their work places.

To sum up, labour inspection needs to adapt to the new technological changes, growing sharing economy and precarious employment. It will need to tackle the new forms of precarious work and shadow economy that may grow in all corners of the new cyber physical industry 4.0, the digital industrial revolution. Labour inspectors will need to become familiar with large data management, the use of electronic files and signatures, smart factories, large logistic and electronic platforms, remote work and gig economy. Digitalisation will bring a new way of understanding human relations and therefore labour relations, and labour inspection should effectively play its key role as guarantor of the new law.

6. Conclusions: a way forward.

As was shown in the present analysis, the heterogeneity and dispersion of the phenomena makes it difficult for the compliance actor and enforcement authorities to act according to traditional routes. Workers in this kind of jobs are not working either in standard hours, in standard work places and are not even regulated by clear and well defined laws (social security rights are not clearly defined in some cases for instance) . Moreover, in some particular forms of work the “supervision” task and the authorisation of leave and some other compensatory rights are given to the platforms.

At the collective level nonstandard workers have reservations and/or resistance to the intervention to the formal unions (considered as outsiders and not understanding the real nature of their particular work). However recent developments prove that in the long term this new contractual arrangement will only provide a lose-lose situation without getting any real benefits in the medium term.

Social partners’ participation has proven some success in addressing the needs of workers and employers to improve compliance, in particular through raising awareness and increasing better understanding. The need of protection at an early stage could guarantee a better perception of rights and protection needs. It seems clear that fundamental shifts in policies and regulations are required in relation to these particular forms of work. Historically full employment policies discourage precarious/nonstandard work by increasing the bargaining power of labour. However, this no longer seems to be the situation.

Besides the gaps in law, enforcement authorities are poorly resourced and without enough effective power to carry out the task (moreover in the new technologies world). Many standard employment situations occur in the context of subcontracting networks and supply chains, and this implies even new techniques of intervention and addresses

categories of work in special conditions of isolation. CSR have tried to solve some of the problems of this particular situation but there is still an important problem related to law enforcement in practice.

Even with these difficulties we need to have a positive approach when addressing our future; Inspectorate are aware of the challenge and are working hard in founding approaches and solutions to the new challenge. Coordination among authorities and cooperation with social partners to look for fraud have always been the means to achieve results. Training and adapt investigation methods should be the base of progress and collaboration at international level, and could be a source of information and improvement.

Enforcement authorities have not only the role of supervision of compliance but also the role of advising, educating and preventing, and this is key to avoid vulnerability and lack of protection. A more structure role in avoiding precarity should be included in the inspection policies at national and international level and this is the first step.

Last but not least, OSH-related issues should specially be considered when dealing with nonstandard forms of work. The nonstandard workers will be severely affected by the lack of protection and social security coverage as well as not being beneficiaries of prevention policies and training.