

(Re-)Regulating Remote Work in the Post-pandemic scenario:

Lessons from the Italian experience

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Abstract

This essay addresses the complex model of regulation of remote work existing in Italy, composed of three distinct schemes: telework, “ordinary” agile work and the special form of agile work temporarily established to tackle the pandemic emergency. It compares the structural and functional features of the three bodies of rules by the systematic analysis of the relevant sources of legal and contractual nature. The aim is to assess the different solutions they envisage for the current problems of remote work, with a view to exploring possible ways to prepare the transition of this form of flexibility in the post-pandemic world of work.

Keywords: Remote Work; Telework; Smart Work; Agile Work; Italy; Covid-19.

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1. Introduction. Regulating remote work in a post-pandemic world.

At a time when Europe and a large part of the world (or at least of its wealthiest countries) start looking to a possible post-pandemic recovery, it is a widespread opinion among scholars and policy makers that the legacy of Covid-19 will (or should) prompt a change of paradigm in employment relations. While many options have been brought to the table in this respect, there is little doubt that remote work will be part of the future landscape.¹

Arrangements to permit (or mandatorily instruct) employees to work from home have been a widespread emergency measure during the outbreak of the pandemic.² Facilitated by digital technologies and accessible high-speed connectivity, they supported public health strategies by ensuring social distancing, at the same time operating as an alternative to business closures. Specific regulations have been introduced to this end in several countries, either by statute or by collective agreements,³ and it is easy to predict that in many cases those regulations will not disappear in the post-Covid era.

It is commonly acknowledged that the remote work arrangements extensively implemented in the pandemic period, especially in the framework of lockdown orders issued by the public authorities, exhibit only a distorted perspective of the real functioning of this peculiar form of work, in terms of both the potentials and the problems it entails. Permanently performed at home, in a state of captivity, often in overcrowded households and while juggling continuously between work and care duties, the pandemic version of remote work is far from the idea of a flexible form of execution of the work obligation that is embodied in the “original” model.⁴ Nevertheless, the pandemic experience can be seen as a stress-test which has shed light on what can be preserved and what needs to be reformed in the current regulation of this topic.

Recent field studies have shown that the adoption of remote work can have uneven effects on the quality of employment conditions, depending on the personal and professional characteristics of the workers, like for example occupational position, job contents, digital literacy, availability of suitable dedicated workspaces, access to connectivity infrastructures and family duties.⁵ Since these effects mostly tend to benefit skilled and economically affluent workers that enjoy high degrees of operational autonomy, and penalize low-skilled and disadvantaged groups (including women with caring responsibilities), remote work could, in the worst scenario, sharpen the polarization of the workforce. Besides, other findings point to a “horizontal” deterioration of certain employment features as a consequence of the

¹ Mangan D., Gramano E., Kullmann M., *An unprecedented social solidarity stress*, in *European Labour Law Journal*, 2020, 11(3), 247 – 275.

² ter Haar B., Menegatti E., Senatori I., Sychenko E. (eds.), *Covid-19 and labour law. A global review*, in *Italian Labour Law e-Journal*, special issue, 2020 Special Issue, 13(1S); Eurofound, *Living, Working and COVID-19*, COVID-19 Series, Publications Office of the European Union, Luxembourg, 2020.

³ Besides the data provided by the contributions cited in footnote 2 above, other examples can be drawn from the national reports of the *iRel* project at: <https://irel.fmb.unimore.it/archive/research-output/national-reports/>.

⁴ Eurofound and the International Labour Office, *Working anytime, anywhere: The effects on the world of work*, Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva, 2017.

⁵ Fana M., Milasi S., Napierala J., Fernandez Macias E., Gonzalez Vasquez I., *Telework, work organization and job quality during the COVID-19 crisis: a qualitative study*, European Commission, 2020, JRC122591.

adaptation of managerial practices to the dislocation of the work performance outside the premises of the company. The symptoms include increased standardization of work processes, pervasive surveillance enhanced by digital devices and dedicated software, higher work intensity, difficulties in reconciling work and private life and the shifting on the worker of the financial costs related to the work equipment, like internet connection and utilities.

On the other hand, the studies indicate that, in spite of these drawbacks, workers generally give a positive assessment of their remote working experience, and would be prepared to continue, prior a renegotiation and a better clarification of terms and conditions of the employment relationship.⁶ Furthermore, the pandemic has demonstrated that a higher number of “teleworkable” jobs exist than it was previously assumed, although in many circumstances translating such “teleworkability” into practice may require a redefinition of the organizational design of the companies.⁷

On these grounds, analysts predict that remote work will become a permanent feature of the post-Covid employment relations, although in most cases it will return to a hybrid form characterized by the alternation between remote and on-site work activities.⁸

Against such background, the question arises of which regulatory strategy is most fit to accompany this process, addressing the most pressing issues that the pandemic has exposed. They include, as pointed out by a recent survey conducted on stakeholders from different European countries: the right to request remote work, disconnection from work devices, the exercise of managerial powers like monitoring and surveillance, data protection, the safeguard of workers’ physical and mental health.⁹

With a specific regard to the European context, the above question raises the problem of the role of EU law vis-à-vis the local and largely uncoordinated initiatives launched by several Member states under the pressure of the pandemic emergency. In fact, as it is well known, the EU level has developed through the years a significant body of rules that are relevant in this field: on the social dialogue side the reference is to the European Framework Agreement on Telework signed in 2002 and the Social Partners’ Framework Agreement on Digitalisation of 2020,¹⁰ while on the legislative side one can mention at least the working time and health and safety directives and the GDPR. Moreover, the matter is closely linked to the initiatives that EU policymakers are currently elaborating under the framework of the “digital transition”.¹¹ Hence, one may legitimately ask whether a realignment of a basic set of rights and obligations on remote work under the EU umbrella represents a feasible and appropriate strategy to countervail the risk of a fragmentation entailed in the proliferation of state-centred

⁶ *Ibid.*

⁷ Eurofound, *Teleworkability and the COVID-19 crisis: a new digital divide?*, Publications Office of the European Union, Luxembourg, 2020.

⁸ Samek Lodovici M. et al., *The impact of teleworking and digital work on workers and society. Special focus on surveillance and monitoring, as well as on mental health of workers*, Study requested by the European Parliament’s committee on Employment and Social Affairs, European Parliament, Policy Department for Economic, Scientific and Quality of Life Policies, Luxembourg, April 2021.

⁹ *Ibid.*

¹⁰ Senatori I., *The European Framework Agreement on Digitalisation: a Whiter Shade of Pale?*, in *Italian Labour Law E-Journal*, 13(2), 2020, 159–175.

¹¹ In general terms presented and summarized in European Commission, *A Strong Social Europe for Just Transitions*, COM(2020) 14 final, Brussels, 14.1.2020.

regulatory initiatives. The subsequent question is whether the existing EU-level regulatory framework, composed of a mix of recent and less recent sources, can still represent an adequate basis to address the problematic features of remote work that have emerged lately, boosted by the fast changes in the social, economic and technological environment.

The Italian experience may represent a useful case study to address the above issues. Italy introduced a dedicated legislation on remote work in 2017, long before the outbreak of Covid-19: Law no. 81/17 on “agile” or “smart” work. This legislation was in turn anticipated by a series of autonomous collective bargaining initiatives at the company level (see sections 5.1 and 8), on which the law has then built on. Interestingly, many of such pioneering agreements, mainly concentrated in medium and large undertakings of the finance and ICT sectors, expressly declared the intention to deviate from the purportedly outdated framework of telework rules, based on the 2002 European Framework Agreement as implemented in Italy by an intersectoral agreement signed on 9 June 2004.

Hence, Italy features two different and apparently alternative models of remote work: the “old-fashioned” telework and the “modern” agile/smart work. However, whether and to what extent the two models actually differ from each other in legal and operational terms, whatever the opinion of lawmakers and social partners, remains open to debate. The idea behind this essay is that a comparative analysis of the contents and functioning of the two models may clarify this point and contribute to the understanding of the phenomenon of “remotization” of work in two main directions.

First, it will showcase a pioneering example of regulation of remote work on which other systems, either national or supranational, may draw upon (taking into account its potential if not its effective implementation), now that the adoption of this form of work is accelerating on a global scale.

Second, measuring the real distance between the two models may help understand whether the established European framework, which inspired the former and was rejected by the latter, may still represent a viable regulatory instrument, or should instead be subject to a deep revision. The assumption behind this second research goal is that the shorter the distance between agile/smart work and telework should result in practice, the stronger would be the case against the alleged obsolescence of the EU rules.

The essay will proceed as follows. The next sections, from 2 to 8, will explore in parallel the regulations on telework and agile/smart work, taking into account the framework sources of statutory and contractual nature as well as their implementation by collective agreements. The deviations introduced by the exceptional and temporary rules enacted in response to the pandemic emergency will be addressed, not only for the sake of completeness but also because the possibility that some of the solutions adopted in the special legislation will be confirmed in the recovery stage is still on the table. The conclusive section will assess the results of the comparison between the two models, with a view to answer the research questions outlined above and indicate directions for further reflection.

2. The Italian case in a diachronic perspective. From remote work to smart work.

Talking about remote work, first of all it is necessary to understand the meaning of this term¹², being aware of the purely conventional value that every definition of a phenomenon assumes.¹³

The most recent regulation on remote work in Italy is focused on “smart working”, looking at both the legal framework (Articles 18-23 of Law No. 81/2017) and the collective agreements, mainly signed at company level.

Smart working can be defined as an innovative approach to work organization characterized by an increased responsibility of workers towards the work performance objectives, associated to a greater flexibility in working conditions, with reference to the place and time, but also to the work tools, which the workers can self-determine with (more or less) wide autonomy¹⁴. The use of technology does not matter so much as a qualifying element of this organizational pattern, but rather as an enabling and supporting tool for its implementation.¹⁵

This experience is grafted, however, into a historical path characterized by a mix of continuity and discontinuity.

Since the dawn of the first industrial revolution, the work performed outside the factory was anything but residual. Resorting to home-work, in fact, some phases of the production process were carried out at the home of the employee, because this guaranteed lower costs to the company and, at the same time, responded to the reluctance of workers to enter the factory or move to town.

Since the end of the seventies of the last century, thanks to the development and spread of information and communication technologies, a significant transformation has affected the organisation of production systems and employment relationships.¹⁶ Therefore, telework established itself as a way of performing work outside the company premises and often from home, through an ICT connection with the company.¹⁷

The benefits of teleworking were identified since the beginning, on the one hand, in the achievement of greater flexibility and efficiency by the company and, on the other hand, in meeting the needs of reconciliation between working hours and private life time for workers. However, telework has had a limited application - in Italy more than elsewhere¹⁸ - and has been marginally integrated in the labour market.

¹² Gaeta L., *Lavoro a distanza e subordinazione*, ESI, Napoli, 1993, 1-2.

¹³ Nogler L., *Qualificazione e disciplina del rapporto di telelavoro*, in *Quaderni di Diritto del Lavoro e delle Relazioni Industriali*, 1998, vol. 21, 5.

¹⁴ Chartered Institute for Personnel and Development (CIPD), *Smart Working. The Impact of Work Organisation and Job Design*, Research Insight, London, 2008.

¹⁵ Sarti D., Torre T., *Is Smart Working a Win-Win solution? First Evidence from the Field*, in Addabbo T., Ales E., Curzi Y., Senatori I. (eds.), *Well-being at and through Work*, Giappichelli, Torino, 2016, 237-40.

¹⁶ Aidlass., *Rivoluzione tecnologica e diritto del lavoro*, Proceedings of the VIII National Congress., Milano, Giuffrè, 1986; Veneziani B., *Nuove tecnologie e contratto di lavoro: profili di diritto comparato*, in *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 1987, 1.

¹⁷ IT connection is a qualifying element for telework according to the EU Framework Agreement of 2002 (*infra*, par. 4.2.).

¹⁸ Eurofound, *Telework in the European Union*, Luxembourg, 2010,

With the recent emergence of digital technologies and the high levels of automation of production processes, for many occupations the need to be present at the workplace has been further reduced and limited to some phases of those processes.¹⁹ The work of digital manufacturing, in fact, is designed to be performed both inside and outside the company premises.²⁰

In this new scenario, remote work is carried out through ICT and digital media, out of a predefined place for the execution of the service. It is the so-called ICT-based Mobile Work, a form of remote work with a high rate of mobility.²¹

Companies are often motivated to make use of it for reasons related to the strengthening of the company appeal, since this form of remote work is considered consistent with the goal of finding more flexible and innovative ways of organising work and attracting highly qualified personnel, while reducing costs and improving productivity.²²

ICT- mobile work is considered as third-generation telework,²³ enabled by wireless technologies and mobile devices. ICT mobile work differs from the more traditional form of teleworking as it is not bound to a precise place to perform work; the work activity, in fact, can be carried out without a fixed location, anywhere and at any time, given that the intensive use of digital technology and on-line data is perfectly combined with the high mobility of workers, which takes place between real and virtual environments²⁴.

Working anywhere and at any time and the use of digital devices are the main features of advanced teleworking also shared by smart working, but they do not exhaust the peculiarities of the latter. In particular, smart working is performed in a dynamic work environment, in

<https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/telework-in-the-european-union>.

¹⁹ Donini A., *Nuova flessibilità spazio-temporale e tecnologie: l'idea del lavoro agile*, in Tullini P. (ed.), *Web e lavoro. Profili evolutivi e di tutela*, Giappichelli, Torino, 2017, 81; Tiraboschi M., *Il lavoro agile tra legge e contrattazione collettiva: la tortuosa via italiana verso la modernizzazione del diritto del lavoro*, in *Diritto delle Relazioni Industriali*, 4, 2017, 38.

¹⁹ Salento A., *Industria 4.0, imprese, lavoro. Problemi interpretativi e prospettive*, in *Rivista Giuridica del Lavoro*, 2017, I, 183.

²⁰ *Ibid.*

²¹ It is defined as a new form of employment “where workers do not use their employer’s premises (or their own premises if they are self-employed) as their main place of work, and spend most of their time working with information and communication technologies (computers, the Internet, e-mail and social networks). Their work differs from familiar forms of mobile work such as visiting clients or patients, working on construction sites, making deliveries or driving vehicles, and can be characterised as remote work without a fixed location”. See Eurofound, *New Forms of Employment*, Luxembourg, 2015, 72 ff., <https://www.eurofound.europa.eu/publications/report/2015/working-conditions-labour-market/new-forms-of-employment>.

²² Valenduc G., Vendramin P., *Work in the digital economy: sorting the old from the new*, Etui Working Paper 3, 2016, 31 ff.

²³ According to Jon Messenger, *Team Leader for the ILO Working Conditions Group*, first generation telework was *home office*, second generation telework was *mobile-office*, third generation telework is *virtual office*. See Dagnino E., *What does telework mean in the 21st century? Face to face with Jon Messenger*, in *Bollettino Adapt* 27 July 2016, http://englishbulletin.adapt.it/wp-content/uploads/2016/07/Messenger_Bulletin_Final.pdf.

According to Valenduc G., Vendramin P., *Work in the digital economy...*, “The virtual work carried out by ICT-based mobile workers is undoubtedly an offshoot of remote work, but it is now a feature of increasingly intangible and globalized environments which are not rooted in time or space and where the boundaries between work and home, between employment and self-employment and between producers and consumers of digitised information are blurred” (p. 46)..

²⁴ The *e-workers* o *e-nomads*, according to. European Commission, *The Increasing Use of Portable Computing and Communication Devices and its Impact on the Health of EU Workers*, Luxembourg, 2010, <https://osha.europa.eu/en/legislation/guidelines/the-increasing-use-of-portable-computing-and-communication-devices-and-its-impact-on-the-health-of-eu-workers>.

which “spaces, hours and work tools are reshaped in front of greater freedom and empowerment granted to workers”²⁵. Smart work is, namely, a system of organizational flexibility that combines work remotely and results orientation,²⁶ so as to operate a balance between business goals and individual needs.

As a new frontier of organising work, smart working is experienced with favour by those who value its potential and push for change and with suspicion by those who highlight the risks and resist it.

Many empirical studies have highlighted that the benefit of organizational flexibility in the interest of the worker is fully realized only if he/she decides with real autonomy where, when and how to perform work. On the contrary, very often the discretionary choices of the worker on the place, time and methods of work can only be made within the constraints imposed by the management.²⁷ Furthermore, the use of technologies can amplify the exposure of the smart worker to pervasive forms of control by the employer.

In this context of fluid and evolving digital revolution, in which diversified, but in some ways overlapping, organizational solutions are affirming themselves, it is inevitable, then, to ask what organizational phenomenon the Italian legislator intended to regulate with the approval of law no. 81/2017 on agile work and with what results. In other words, it is worth to investigate whether a suitable regulatory framework has actually been prepared for the regulation of smart working²⁸ and whether the new discipline is able, given its breadth, to include all the currently widespread forms of remote work.

In this regard, we cannot ignore the impact produced by the Covid-19 pandemic on remote work, not only through emergency legislation, but also on the prospects for future development and possible new regulation of this way of performing work.

3. The legal qualifications of remote work in Italy: Telework.

Moving from the description of the phenomenon to its legal qualification, before indulging into the examination of the provisions on agile work relevant for this purpose, it is necessary to dwell on the definition and legal qualification of teleworking in our legal system, also mentioning its legal and contractual regulation. It is necessary to do so, not so much because agile work could turn out to be, in the end, simply an updated form of teleworking, but above all because the choice made by the Italian legislator to adopt a specific

²⁵ Chiaro G., Prati G., Zocca M., Smart Working: *dal lavoro flessibile al lavoro agile*, in *Sociologia del lavoro*, 2015, 72.

²⁶ Casillo R., *La subordinazione “agile”*, in *Diritti lavori mercati*, 2017, 6-7.

²⁷ Albano R., Bertolini S., Curzi Y., Fabbri T., Parisi T., *Digit.Agile: l'ufficio nel dispositivo mobile. Opportunità e rischi per lavoratori e aziende*, Osservatorio M.U.S.I.C., Working Paper Series 3, 2017, 7 ff.

²⁸ According to Manzella P., Nespoli F., *Le parole del lavoro: un glossario internazionale/ 22 – agile o smart*, in *Bollettino Adapt*, 22 febbraio 2016, <http://www.bollettinoadapt.it/le-parole-del-lavoro-ma-il-lavoro-e-agile-o-smart-2/>, agile work and smart work are not synonymous. More precisely, the term agile work mainly refers to autonomy related to work-life balance, while “smart working” mainly refers to worker’s capability. According to Biasi M., *Brevi spunti sul lavoro da remoto post-emergenziale, tra legge (lavoro agile) e contrattazione (smart working)*, in *Lavoro e Previdenza Oggi*, 2021, 3-4, the difference between the two notions depends on the regulatory sources: “agile work” refers to the statutory regulation whereas “smart work” points to the implementation by collective agreements.

discipline on agile work was, prior to the advent of the pandemic emergency, unique among EU Member States.

The issue of the legal qualification has been deeply investigated with regard to teleworking²⁹. The prevailing literature has held that telework can take on any contractual form, both subordinate and autonomous. However, both in the public and in the private sector, telework has been taken into consideration by the regulatory sources as an alternative way to perform work within an ongoing subordinate employment relationship.

3.1. In the public sector.

The Law of 16 June 1998, n. 191 has regulated teleworking in the public sector with the aim of modernising public administrations through the introduction of remote work. The legislator has identified the essential characteristics of teleworking, while referring its regulation to other sources of law (art. 4).

The organizational measures for the implementation of telework in the public sector have been defined through the Presidential Decree No. 70 of 8 March 1999, where the definition of telework can be found.

According to this definition (art. 2, c. 1, lett. b), teleworking is characterised by “performing work in any place deemed suitable, placed outside the public administration’s premises, where the work activity is technically possible, with the prevailing³⁰ support of information and communication technologies, allowing connection with the public administration where the work is expected”.

The main features of telework can therefore be identified as such: working outside the workplace in any suitable place; prevailing use of ICT for carrying out work; availability of online connection with the public administration.

Each public administration has to put in place a detailed project of teleworking in order to identify, above all, the objectives to be reached, the activities concerned, the technologies to be used, the number of employees involved, the times and methods of implementation, the costs and benefits. (art. 3). The Presidential Decree No. 70/1999 provides also for

²⁹ See, at least: Gaeta L., *Prime osservazioni sulla qualificazione giuridica del «telelavoro»*, in *Lavoro* 80, 1986, 344 ff.; Roma G., *Il telelavoro: aspetti giuridici e sindacali*, in Grasso B. (ed.), *Il telelavoro: lavoreremo tutti a casa?*, Edizioni dal Sud, Bari, 1986, 269 ff.; Gaeta L., *Lavoro a distanza...*, (12); Flammia R., voce *Telelavoro*, in *Enciclopedia Giuridica Treccani*, Roma, 1993, Vol. XXX; Gaeta L., *Il telelavoro: legge e contrattazione*, in *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 1995, 547 ff.; Giugni G., *È necessario subito un altro (tele)statuto*, in *Teléma*, 2, 1995, 46 ff.; Ichino P., *I problemi giuridici del telelavoro*, in *Notiziario Giuridico del lavoro*, 75, 1995, 17 ff.; Napoli M., *Il telelavoro come lavoro subordinato*, in Id. (ed.), *Questioni di diritto del lavoro*, Giappichelli, Torino, 1996, 146 ff.; Gaeta L., Pascucci P. (eds.), *Telelavoro e diritto*, Giappichelli, Torino, 1998; Nogler L., *Qualificazione...*, (13), 105 ff.; Gaeta L., Pascucci P., *Una riflessione critica sul telelavoro*, in *Il Diritto del Mercato del Lavoro.*, 2001, 11 ff.; Gottardi D., voce *Telelavoro*, in *Digesto (discipline privatistiche - sezione commerciale)*, Agg., Utet, 2003, 911 ff.; Toffoletto F., *Nuove tecnologie informatiche e tutela del lavoratore*, Giuffrè, Milano, 2006; Maio V., *Il telelavoro*, in Persiani M. (ed.), *I nuovi contratti di lavoro*, Giappichelli, Torino, 2010, Utet, 779 ff.; Gaeta L., voce *Telelavoro*, in *Enciclopedia Giuridica Treccani – Diritto on line*, 2015.

³⁰ “Prevailing” means significantly relevant in performing work, see Gaeta L., *Il regolamento sul telelavoro nelle pubbliche amministrazioni*, in *Lavoro nelle Pubbliche Amministrazioni*, 1999, 315.

instructions on the characteristics and criteria to be respected when installing and using teleworking stations (art. 5).

On the other hand, it has been deferred to the Framework Agreement of 23 March 2000 to identify the criteria and methods for the assignment of public employees to teleworking projects and define the economic and regulatory treatment to be applied to them, with particular reference to health and safety protection measures, limits to public managers power of control, wages and trade union rights³¹.

As far as the modalities for performing telework are concerned, the Framework Agreement provides for three different models to be selected within the specific project: teleworking from home, mobile teleworking and work in telework centres. Therefore, the possibility to choose any place other than the office to execute the work performance is confirmed, providing that it is “suitable”, which means that there are no technological obstacles to perform there the work activity. Alternating telework is also admitted by art. 5, par. 1, i.e. arrangements whereby the worker spends part of his/her working time at the employer's premises and the rest elsewhere. This leads to the question of the extent of the difference between telework and agile work as long as the workplace settings are concerned, that will be further addressed in section 5.

Telework has also been regulated by collective agreements at sectoral level, defining, among other issues, the procedures to implement the projects, the criteria to set working time and availability slots, training initiatives, insurance coverage for damages deriving from the use of the ICT equipment supplied to the teleworker, the duty of confidentiality.

The second level collective bargaining concerned the adaptations of the employment relationship regulations required by the particular characteristics of teleworking³², as well as the regulation of specific training and performance-related bonus for teleworkers.

Prompted by collective agreement regulations, especially in the sectors of non-economic public bodies³³ and local governments³⁴, various teleworking projects have been implemented. Nevertheless, the effective use of this flexible means of execution of the work performance remained far below the expectations even in the public sector.³⁵

³¹ Gaeta L., Pascucci P., Poti U., *Il telelavoro nelle pubbliche amministrazioni*, Il sole 24 ore, Milano, 1999; Poti U., Cordella C., *Il telelavoro nella pubblica amministrazione: aspetti organizzativi e riflessi sull'occupazione*, in *Il Diritto del Mercato del Lavoro*, 1999, 318 ff.; Viscomi A., *Telelavoro e pubbliche amministrazioni (d.p.r. 8 marzo 1999, n. 70)*, in *Studium iuris*, 1999, 1065 ff.; Nogler L., *Lavoro a domicilio*, in Schlesinger P. (ed.), *Commentario al Codice Civile*, Giuffrè, Milano, 2000, 581 ff.; Natullo G., *Il telelavoro*, in Carinci F., Zoppoli L. (eds.), *Il lavoro nelle pubbliche amministrazioni*, Utet, Torino, 2004, 611 ff.; Battisti A. M., *Commento all' art. 36 – Parte prima. Le tipologie flessibili*, in Amoroso G., Di Cerbo V., Fiorillo L., Maresca A., *Diritto del lavoro – Il lavoro pubblico*, Giuffrè, Milano, vol. III, 2011, 567-570.

³² Art. 3, c. 4, *Framework Agreement on Telework* 23.3.2000.

³³ National Institute for Social Security (INPS) agreement of 15 October 2014; National Institute of Insurance against Accidents at Work (INAIL) regulation of 21 January 2015 No. 12.

³⁴ Spinelli C., *La flessibilità degli orari per la conciliazione dei tempi di vita e lavoro: l'organizzazione municipale*, in Bavaro V., Carabelli U., Sforza G., Voza R. (eds.), *Tempo Comune. Conciliazione di vita e lavoro e armonizzazione dei tempi della città*, Franco Angeli, Milano, 2009, 107.

³⁵ Penna M., *I numeri del telelavoro nel pubblico impiego*, Rapporto Tecnico ENEA, 2016, <http://openarchive.enea.it/handle/10840/7614.2016>.

More recently, an attempt was made to promote a sort of telework by default in the public administrations, according to Article 9, par. 7, Law Decree 18 October 2012, No. 179, converted by Law n. 221 of 17 December 2012. The norm requires public administrations to implement a Telework Plan in which they must specify “the methods of implementation and any activities for which the use of telework is not possible”. The intention was to undertake a real reversal of perspective, which would have seen teleworking switch from the exception to the ordinary rule. By March 31 of each year, public administrations should have published on their website the state of implementation of the Telework Plan, the non-publication of which would have been considered relevant for the measurement and assessment of the individual performance of the responsible public managers.

But even this provision was largely disregarded and, therefore, a few years later the legislator intervened again with article 14 of Law No. 124/2015, entitled “Promotion of work-life balance in public administrations”. In this perspective, the norm provides for (once again!) the adoption of organizational measures to implement teleworking and aims at testing, also in order to support parental care, new space-time flexible ways of carrying out the work performance, for at least 10% of the workers who so request.

As will be seen (section 5.2), the adoption of agile work in public administrations relies on this provision, while it is on the basis of its amendment that derogatory rules on agile work have been introduced in the wake of the Covid-19 pandemic (*infra*, par. 6.2).

3.2. In the private sector.

Telework regulations for the private sector has been adopted through collective bargaining and, therefore, they are binding for the signatory parties only, since in Italy collective agreements have no *erga omnes* effect.

In this perspective, the main source of regulation is the Intersectoral Agreement of 9 June 2004,³⁶ which fully implemented, with a few marginal adjustments, the EU social partners’ Framework Agreement on Telework of 16 July 2002.

First of all, the contracting parties of the Intersectoral Agreement on teleworking share the aims pursued by the EU social partners: modernising work organisation; promoting work-life balance; giving greater autonomy to the workers in the accomplishment of their tasks; making the most out of the information society; combining flexibility and security; enhancing quality of jobs and increasing the chances of disabled people on the labour market.

Telework is defined by art. 1 of 2004 Agreement, in line with the EU social partners Framework Agreement, like “a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer’s premises, is carried out away from those premises on a regular basis”.

³⁶ The Intersectoral agreement was signed by Confindustria, Confartigianato, Confesercenti, CNA, Confapi, Confservizi, ABI, AGCI, ANIA, APLA, Casartigiani, CIA, CLAAI, Coldiretti, Confagricoltura, Concooperative, Confcommercio, Confetra, Confinterim, Legacooperative, UNCI e CGIL, CISL, UIL. See Faioli M., *Telelavoro*, in *Enciclopedia Giuridica Treccani*, Aggiornamento 2006.

Even in the private sector, then, telework is not qualified as a new form of work, but as a way to perform subordinate work outside the employer's premises with the essential support of ICT.

However, there is a critical point in this definition that concerns the expression "on a regular basis" referred to the work performance carried out outside the company premises. It seems to leave out, beyond the intention of the social partners to adopt a broad notion of telework,³⁷ those type of telework in which this regularity could be lacking, as in the case of occasional, mobile or alternating telework.³⁸

In the Report on the state of implementation of the EU social partners' Framework Agreement on telework,³⁹ as a result of the analysis of the national regulations considered, the European Commissions suggested a modification of the definition of telework adopted by the social partners, consistent with what had been its original proposal at this regard, that is, to provide for a quantitative threshold for qualifying remote work.⁴⁰

There is no doubt that the expression "on a regular basis" could have more than one meaning. On the one hand, it can be considered as inherent to the temporal continuity of telework, which cannot be occasionally performed to be qualified as such; on the other hand, it could entail that the work activity shall be performed permanently outside the workplace.⁴¹

The Intersectoral Agreement of 2004 confirms that telework is voluntary for both the employer and the employee, which means that the latter has not a right to telework but, at the same time, he/she cannot be dismissed because of his/her refusal to opt for telework (art. 2)

The decision to shift to telework shall be reversible by individual and/or collective agreement (art. 2, c. 6), which shall provide for specific modalities in this respect (art. 11, c. 2). The reversibility could imply returning to work at the employer's premises, at the worker's or at the employer's request. The passage to telework as such does not affect the teleworker's employment status, because it only modifies the way in which work is performed (art. 2, c. 5). This provision confirms that the employment contract remains the background regulation

³⁷ ETUC, *Framework Agreement on Telework – Interpretation Guide*, https://resourcecentre.etuc.org/linked_files/documents/Telework%20-20ETUC%20interpretation%20guide%20EN.pdf

³⁸ See Gottardi D., *Telelavoro* (29), 909.

³⁹ European Commission, *Report on the implementation of the European social partners' Framework Agreement on Telework*, SEC(2008) 2178, Bruxelles, ec.europa.eu/social/BlobServlet?docId=463&langId=en. Berti V., *Il telelavoro nel contesto europeo tra nozione comunitaria e sistemi giuridici statali*, in *Diritto delle Relazioni Industriali*, 2008, 1233-34.

⁴⁰ The report reads: "The Commission therefore proposed the following definition of telework: «*Telework is a method of organising and/or performing work which accounts for at least a considerable proportion of working time and which is done by a natural person in the framework of an employment relationship, in the following cumulative conditions:*
- *the work is done at a distance (away from the firm's premises or away from the place where the work is expected),*
- *the work is performed using information technology and technology for data transmission, in particular the internet.*»
Definitions based on these factors could cover the three types of telework identified: teleworking from home, mobile teleworking (via portable communication systems) and work in telework centres (outstations, neighbourhood offices, telecottages). They could also cover both permanent and alternating telework, i.e. arrangements whereby the worker spends part of his/her working time at the employer's premises and the rest elsewhere" (par. 3.1.).

⁴¹ This interpretative issue will be further analysed in section 6.1, comparing the definitions of telework and agile work.

to look at for both the EU social partners' Framework Agreement of 2002 and the Italian Intersectoral Agreement of 2004.

As far as working conditions are concerned, teleworkers shall benefit from the same rights, guaranteed by applicable legislation and collective agreements, as comparable workers at the employer's premises (art. 3).

Other provisions deal with the effects on the work performance deriving from the use of ICT, mainly related to work equipment (art. 6), data protection (art. 4) and privacy of the teleworker (art. 5).

Finally, other relevant issues addressed by the social partners concern health and safety of the teleworker (art. 7); work organisation aspects, such as working time, workload and prevention from the risk of isolation of the teleworker (art. 8); access to same training opportunities as comparable workers at the employer's premises and appropriate training targeted at the technical equipment at their disposal (art. 9); collective rights and workers' representation issues (art. 10).

The most recent legislative interventions to promote teleworking in the private sector have been conceived with the aim of facilitating work-life balance, as has already been highlighted with regard to public administrations. The measures adopted to enhance telework consist of normative and economic incentives, (e.g. performance-related bonus) foreseen by Law No. 183/2001 (art. 22, c. 5) and Legislative Decree No. 80/2015 (articles 23 and 25).⁴² To be eligible for the incentives, the law requires that telework be activated by means of collective agreements.

4. Telework in collective bargaining. The implementation of the 2002 European Framework Agreement in the private sector.

4.1. Levels of collective bargaining.

As it has been recalled above, the 2002 European Framework Agreement on Telework (EFAT) was implemented in Italy by the National Intersectoral Agreement (Accordo Interconfederale, AI) of 9 June 2004, signed by the leading trade unions and employers' organizations of the private sector.

The AI amounts to a large extent to a plain transposition of the EFAT provisions. However, differently from the latter, it features a specific clause (article 11, entitled "Collective Bargaining"/"Contrattazione collettiva"), addressing the regulatory competences

⁴² Calafà L., *Le misure di conciliazione vita-lavoro: un quadro di sintesi*, in Zilio Grandi G., Biasi M. (eds.), *Commentario breve alla riforma "Jobs Act"*, Kluwer-Cedam, 2016, 693 ff.; Tarantini E., *La conciliazione tempi di vita – tempi di lavoro nella legge di stabilità 2016*, in Ghera E., Garofalo D. (eds.), *Semplificazioni - sanzioni - ispezioni nel Jobs Act 2*, Cacucci, Bari, 2016, 189 ff.

L. Calafà, *Le misure di conciliazione vita-lavoro: un quadro di sintesi*, in G. Zilio Grandi, M. Biasi (a cura di), *Commentario breve alla riforma "Jobs Act"*, Kluwer-Cedam, 2016, p. 693 ff.; E. Tarantini, *La conciliazione tempi di vita – tempi di lavoro nella legge di stabilità 2016*, in E. Ghera, D. Garofalo (a cura di), *Semplificazioni - sanzioni - ispezioni nel Jobs Act 2*, Cacucci, Bari, 2016, p. 189 ff.

of the lower bargaining levels. Article 11 builds on two opportunities that the EFAT expressly grants to the Member States' social partners. The first one, fully consistent with the method of European Social Dialogue, is the power (and duty) to implement the European rules "in accordance with the procedures and practices specific to management and labour" nationally (article 12 EFAT). The second is the possibility to adjust the employment conditions of teleworkers to the particular characteristics of this form of work by means of complementary agreements of an individual or collective nature (article 4 EFAT).

Article 11 AI does not lay down a clear-cut rule of competence, in fact it refers to the possibility to conclude agreements at the "competent level". The terminology, however, is meaningful. The use of the adjective "competent", instead of more flexible terms such as "appropriate", can be interpreted as an implicit reference to the general rules on the functioning of the collective bargaining system in force in the country at any given time. Such rules, mainly set out by autonomous contractual sources, namely intersectoral agreements, tend to favour the sectoral bargaining level, vesting it with a sort of coordinating authority *vis-à-vis* the company and local levels, notwithstanding the increasing importance acknowledged to the latter in the past three decades.

Indeed, specific clauses on telework are present in industry-wide collective agreements of prominent branches, such as trade, banking, telecommunications, clothing and cleaning, embracing roughly 70% of employees in the private sector.⁴³ Such texts show many similarities with one another, regardless of the amount of time that separates the different experiences. This is clearly due to their common origin in the AI, but also suggests that the regulation of telework at the national level has been almost unresponsive to the increasing opportunities and challenges offered by the technological development. In this regard the case of the clothing sector is particularly noteworthy, since it consists of a series of branch agreements (including apparel, leather, fashion, footwear) whose enactment encompasses the time span from 2004 to 2014, simply repeating the same template-clauses.

The collectively negotiated clauses can be divided into two categories. Those falling into the first category basically reproduce the contents of the AI, on matters such as the voluntary character of telework, the principle of equal treatment between teleworkers and comparable standard workers, data protection and the health and safety obligations imposed on the employers. Clauses of the second kind, instead, translate the general principles laid down at the intersectoral level into operational rules adjusted to the specific sectoral needs.

The latter address in particular topics such as work patterns, the degree to which teleworkers can self-organize they work hours, the typologies of remote workplaces from which the work obligation can be discharged, the criteria that govern the selection among the possible remote workplaces, the teleworkers' right to training, the conditions for using remote surveillance devices and treating the data collected during the execution of the work performance, information and dialogue between employers and employee representatives, and the guarantee of the collective rights of teleworkers.

⁴³ The texts of the collective agreements cited in this essay can be consulted in the Archive of the *iRel* project's internet site, at: <https://irel.fmb.unimore.it/archive/>

Company-level agreements are also present, but with a narrow coverage, mostly corresponding to large companies of the banking, computer and energy sectors. Their function is to integrate and bring to a deeper level of detail the provisions laid down at the sectoral level, sometimes adding room for a further customization of the organizational arrangements. They deal with topics encompassing in particular the possibility to alternate periods of remote and on-premise work, the contents of training programmes for teleworkers, the allocation between the parties of the costs incurred for work equipment and its maintenance while working from home, the specific arrangements for monitoring and assessing the work performance, and the criteria for employees to be eligible as teleworkers.

To summarize this point, an industry-specific regulation of telework is present in the majority of sectors in Italy. Second-level agreements are not as much common and are concentrated only in specific sectors. However, where company agreements exist, they show a sound degree of coordination with the higher bargaining level.

4.2. Rationale: the social and economic functions of telework.

The EFAT and the AI consider telework as a way to modernize the organization of the company, reconcile work and private life and entrust workers with more autonomy in the fulfilment of their tasks. Collective agreements at the company and sectoral levels mainly reaffirm this win-win function. Nonetheless, in some experiences, mainly (but not necessarily) at the company level, other possible purposes are attached to this form of flexibility.

For instance, environmental sustainability, linked to a lower impact of the working population on the transport service, is mentioned in several agreements of sectoral as well as company level.⁴⁴ In other cases, telework is presented as a special labour market instrument, to be activated as an alternative to mass layoffs or the geographical mobility of workers in case of transfer of a plant;⁴⁵ or as a “disaster recovery” solution aimed at ensuring the continuity of production in cases of temporary closure of the offices due to force majeure; or even as a measure of social support addressed to special categories of workers.⁴⁶

To summarize this point, collective bargaining in Italy brought about a multi-pattern implementation of telework that has been reiterated more than a decade later in the experience of “agile work” (see below at section 8). Genetically characterized, according to its institutive sources, by the mission of accommodating the (sometimes) conflicting interests between organizational efficiency and personal wellbeing, this form of work is recognized in practice as an inherently flexible and versatile organizational resource that can be adjusted to a wide range of circumstances, depending on the mutual willingness of the parties. This outcome is probably the result of a broad understanding of the personal and productive needs mentioned in the definitory sources. It suggests that the teleological framework laid

⁴⁴ Trade and services 2001, prior to the signature of the EFAT and the AI; banking 2015; telecommunications 2013; IBM 2003.

⁴⁵ GDF Suez 2013, energy sector; Bassilichi 2016, metalworking sector.

⁴⁶ Both the latter functions are mentioned in the Groupama agreement 2014, insurance sector.

down at the highest regulatory levels is not interpreted by the players “on the ground” as a strictly binding provision, but rather as a general guiding concept, subject to be implemented differently depending on the case-specific balance between the purposes and interests pursued by the parties.

This is confirmed by the observation of the array of choices made by the contracting parties about the priority and eligibility criteria that regulate the access to telework. While some agreements neglect the issue and put all the workers on the same standing, others grant special prerogatives to specific categories, ranging from caregivers to long-distance commuters, physically impaired workers and workers above a certain seniority level.

4.3. Definitions and structural elements of telework.

Sectoral collective agreements generally reaffirm the elements that define telework according to the EFAT and the AI. These are, as mentioned in section 3 above, the circumstance that work is performed outside the employer’s premises “on a regular basis”, provided that the work obligation could also be executed on site,⁴⁷ and the use of information technologies in the organization and the performance of the work activity.

Another element, which is not strictly included in the definition of telework, but which nonetheless can be qualified as a structural ingredient in the light of its fundamental importance, is its voluntary nature. The voluntary nature, which is such for both the workers and the employers, entails the reversibility of the passage to telework and the right to refuse a proposal to establish a telework arrangement. It is also consistent with a clause, that recurs frequently in company agreements, that makes the activation of telework subject to an organizational assessment by the employer⁴⁸ on the condition that the work activity can be carried out remotely without causing any detriment to the production process.

While the above definitory elements are present in all the sectoral and company agreements, some texts integrate the definitions and the categorizations, to the effect of circumscribing further and more clearly the scope of the relevant regulations and the limits to the establishment of a telework arrangement. For instance, the national agreement for the clothing industry of 2004 makes it clear that the flexibility of time and space patterns alone does not suffice to qualify an organizational arrangement as telework. Therefore, the cases when the activity is performed remotely without the use of ICT, or when ICT is used on the company’s premises, will not be covered by the telework regulations.

A remarkable element recurring in several sectoral and company agreements concerns the classification of the different categories of telework on the grounds of the place (different from the company’s main premises) where the activity is performed. The most common distinction is between telework performed at the worker’s home and from work centres, company hubs and other venues of such kind, that are usually part of the company’s

⁴⁷ Which excludes from the definition of telework the category of mobile workers, as expressly stated by certain sectoral agreements, e.g. Cleaning-multiservice sectoral agreement of 2005.

⁴⁸ Sometimes prior consultation with the trade unions: e.g. Unicredit 2010, banking sector, only for circumstances where the number of requests exceeds the threshold of available positions.

properties.⁴⁹ This distinction is not merely descriptive, since home-based telework work is covered by special protective rules, for instance limiting the conditions and modalities of a workplace inspection by the employer, in line with the EFAT provisions.

Some agreements push the degree of flexibility one step further, to the extent of envisaging a third category, named “mobile” telework, corresponding to a performance executed with no fixed workstation, with the support of computer and connection devices.⁵⁰

Other texts, mainly at the company level, have introduced some form of rotation between remote work and work performed on the premises of the company. An example is the “hotdesking” mode envisaged by the ENEL agreement of 2011, under whose terms each teleworker is obliged to return to the office at least one day per week, alternating with colleagues on shared workstations. Arrangements of this kind, which are present in other bargaining experiences as well,⁵¹ suggest that the negotiating parties can opt for a broad interpretation of the requirement that telework should be performed remotely “on a regular basis”, encompassing cases in which the remote performance is not continuous or permanent, provided that it is not merely occasional.

More generally, the experiences summarized above confirm the impression that the telework should be not simply considered as a form of homework enhanced by digital technologies and fast internet connectivity. In fact, the general regulation provided by the EFAT and implemented nationally by the AI is consistent with multiple organizational settings characterized by different degrees of “agility”. This was precisely the aim of the European social partners, who expressly stated in the first section of the EFAT the preference for a “definition of telework that permits to cover various forms of regular telework”, in order to keep the pace with a “wide and fast evolving spectrum of circumstances and practices”.

This raises the question of whether, and to what extent, the flexible character originally embodied in the regulatory framework of telework makes the instrument still responsive to the opportunities and the problems attached to the current state of technological progress.

4.4. Organization of the work performance.

Article 8 of the AI provides that teleworkers should manage autonomously the organization of their working time, within the framework of the applicable legislation and collective agreements and in accordance with the company directives. It also stipulates that the workload and performance standards of the teleworker are equivalent to those of comparable workers employed at the employer’s premises. Both the provisions represent a plain transposition of article 9 of the EFAT.

While such general regulatory framework grants broad margins to the self-organization of teleworkers, the implementing agreements adopt a more cautious approach. Many of them classify the departure from the ordinary rules on the number and the distribution of daily

⁴⁹ For instance, sectoral agreement of telecommunications 2015.

⁵⁰ Enel 2011, energy sector; see also national agreement for the banking sector 31 March 2015.

⁵¹ E.g. Sara 2013, insurance sector; Nestlé 2010, food sector.

hours as a mere possibility for teleworkers.⁵² Others, in a similar vein pose the equivalence of work patterns between remote and on-site workers as a default rule that the individual parties remain free to derogate by means of a specific agreement. In some cases, teleworkers are left free to determine their daily working hours but remain bound to respect the overall time parameters for the longer reference period, as laid down by the applicable sectoral agreement.⁵³

A vast majority of texts, especially at the company level, make sure that, in case a flexible work pattern applies, the teleworker remains available on call in specific time spans to ensure the coordination with the overall organizational process.

Quite rare are, instead, the extreme cases of a rigid and not amendable correspondence of schedules between telework and work on the premises⁵⁴ and, at the opposite end of the spectrum, of a total exemption of the teleworkers from the legal and contractual regulations on working time, resulting from the broad freedom to organize their schedules.⁵⁵ It should not be overlooked that, in the latter case, freedom and flexibility come for the teleworker at the cost of a weakening (if not a total deprivation) of the protections attached to working time rules.

Such a “mild” implementation of this part of the framework regulations suggests that the idea of “modernizing the organization of work” promoted by the European social partners was probably too ambitious and visionary for the time when the EFAT entered into force, whereas the real functioning of production processes required (and to a large extent still requires in more recent years: see below, at the section 8, the considerations on agile work and collective bargaining) a close synchronization between each single work activity and the organization as a whole.

This cautious approach may also be rooted in the EFAT clause which stipulates the mandatory equivalence between the standards on workload and work performance of teleworkers and on-site employees. In fact, in the practice of employment relations, time has always represented the most objective measure of workloads and a reliable benchmark of the correct fulfilment of the work obligation. Thus, lacking any alternative criterion to organize and assess the activity performed in telework mode, the social partners have probably considered the strict harmonization of work patterns (both as long as the number and the distribution of work hours is concerned) as the most secure means to ensure the compliance with the equivalence rule and protect the rights of teleworkers.

4.5. Employment conditions, rights and obligations of teleworkers.

Besides declaring that teleworkers benefit from the same rights granted by statutes and collective agreements to comparable on-site workers, the EFAT and the AI clearly hold the employer accountable for the effective protection of those rights, placing on him a series of

⁵² E.g. Telecommunications 2013; Clothing 2004.

⁵³ Nestlè, food, 2010.

⁵⁴ Cleaning-multiservice 2005; Unicredit 2010, banking sector.

⁵⁵ ENEL 2011.

obligations with regard to employment conditions, data protection, surveillance, work equipment, health and safety and training. This set of prescriptions, which stand at the core of the framework regulation of telework, is translated by collective agreements of both sectoral and company level into specific norms and practices, which at times add further details. The implementing sources also attempt to lay down the conditions for a proper exercise of the managerial prerogatives, while also imposing on teleworkers a duty to cooperate with a view to facilitating the correct fulfilment of the employer's obligations.

For instance, with regard to the right to training enjoyed by teleworker, some agreements extend its contents beyond the technical aspects concerning the remote performance, to encompass cultural profiles and other relational skills, like the attitude to privilege a result-oriented attitude to work.⁵⁶

Another recurrent topic is the quantification of the compensation due by the companies for the utility costs incurred by home-based teleworkers (telephone, electricity and the like). Such compensations supplement the obligation normally taken by the employer to supply the equipment necessary for the performance of work. In fact, the vast majority of the agreements do not consider the possibility afforded by the EFAT and the AI to execute the work activity by means of the worker's own devices.

It is normally the task of company agreements to lay down a detailed regulation of the duties and prerogatives of the parties as regards the adequacy of the workplace and the work equipment to the requirements on health and safety and data protection. This includes *inter alia* the conditions and limits of the employer's power to access and inspect the teleworker's home (meant at ascertaining the appropriateness of the selected workplace), the measures to be adopted by the teleworker to prevent accidents and data breach (including confidentiality obligations and the information that the employer must provide on the security software installed), the restrictions to the use of work equipment for personal purposes and the liability for damages occurred to the technological devices.

Unsurprisingly, the exercise of surveillance and control over the work performance executed remotely is a typical concern of collective agreements, especially at the company level. Remote monitoring is in principle allowed by the framework regulations, within the limits of the proportionality between means and objectives. Some texts substantiate this prescription by permitting the collection of data and their use for performance assessment purposes, under the assumption that such practice is instrumental to the execution of the work performance and therefore consistent with privacy legislation (article 4 of the Workers' Statute).⁵⁷ In other cases the agreement, while admitting that the typical managerial prerogatives can be exercised by means of telecommunication instruments, expressly prevents the employer from using work appliances (such as microphones and webcams) for remote surveillance purposes.⁵⁸

The exercise of managerial prerogatives in the context of telework is regulated by most of the agreements in line with the standard hierarchical model based on direction and

⁵⁶ Nestlè, food, 2010.

⁵⁷ Banking sector 2013; Nestlè, food, 2010.

⁵⁸ ENEL, energy, 2011.

control.⁵⁹ However, some cases envisage a possible shift towards result-oriented solutions: for instance, the national agreement for the telecommunication sector of 2013 opens to the possibility of a performance assessment based on the accomplishment of targets adjusted to the daily or weekly duration of the work activity, whereas the 2013 agreement at Sara (insurance) provides for the possibility to control the work performance by means of periodical reporting.

4.6. Collective relations.

The collective agreements at the sectoral and company level generally confirm the EFAT and AI provisions that grant teleworkers the same collective rights as enjoyed by their on-premises peers. The specific instruments created for that purpose mainly aim at guaranteeing teleworkers the possibility to maintain a permanent communication with their representatives and co-workers. Examples include the access to electronic boards⁶⁰ and intranet networks.⁶¹ The participation in person to trade union meetings is always granted to teleworkers.

However, only in rare cases the trade unions or other collective representation bodies are directly involved in decisions concerning the strategies and the problems linked to the implementation of telework in each organization. One example is the Unicredit agreement of 2010 (banking sector), which provides for the activation of a joint examination of the signatory parties in case the applications for telework positions exceed the threshold of 8% of the total workforce.

A remarkable experience is the Bipartite Observatory established by the national agreement for the telecommunications sector signed in 2013. The prerogatives of the observatory encompass the analysis, assessment and discussion on every issue related to telework, while one of the aims is to set up a “competence center”, open to external participants, to deal with the implementation of modern ICT in the work activity.

5. The Italian way to smart working between law and collective bargaining: regulatory purposes and techniques.

As it has been emphasized above, one of the questions surrounding the legal and contractual norms on agile work in Italy is whether they simply represent a further step in the regulations of remote working or, instead, they also offer a favourable regulatory framework to promote smart working, thus combining space-time flexibility of the work performance and work organization by objectives. To discuss the issue in deeper detail, it is necessary to analyse the evolution of these legal and contractual regulations to identify their inspiring rationale.

⁵⁹ E.g. Graphics 2008.

⁶⁰ E.g. Sara, insurance sector, 2013.

⁶¹ Nestlé, food sector, 2010.

5.1. In the private sector.

The initiatives and activities expressly defined, or in any case related to, forms of smart working, have been launched, in recent years, mainly by collective bargaining, as a pilot experiment to test the potential of this work organization model, well before the approval of the Law n. 81/2017.

These are mainly company collective agreements, stipulated above all in the banking / insurance sector,⁶² but also in those relating to food products,⁶³ metal processing⁶⁴ and energy / oil.⁶⁵

The classification used in the texts of the company-level agreements to indicate the forms of space-time flexibility of the work performance are quite diverse: above all smart working⁶⁶, sometimes flexible working,⁶⁷ rarely agile working.⁶⁸

These collective agreements regulate the possibility of carrying out work outside the company premises, defining, among other aspects: potential beneficiaries; coordinates of space and time of the work performance; remuneration to be paid; health and safety protection measures; limits to the managerial power of control in compliance with privacy rules; confidentiality obligations.⁶⁹

The purposes agreed by the signatory parties concern the improvement of work-life balance for employees, the promotion of change management in the company strategies, the increase of productivity. However, examining the contents of the collective agreements, it has been pointed out that the goal actually achieved, if not really intentionally pursued, has been no more than simply regulating advanced remote work, so as to escape the rigidity of the teleworking regulation examined above.⁷⁰ In this respect, more detailed comments will follow the subsequent in-depth analysis of the collective agreements (section 8).

At this stage of the analysis, it is worth considering that, due to the existing regulatory framework described above, the legislative intervention was not necessary at all to let

⁶² Intesa Sanpaolo 2014, BNL 2015, BNP 2015, Zurich 2015.

⁶³ Nestlè 2012, Barilla 2015.

⁶⁴ General Motors Powertrain 2015.

⁶⁵ Snam 2015, ENI 2017, ENEL 2017.

⁶⁶ Barilla 2 March 2015, Zurich 23 September 2015, Snam 26 November 2015, Euler Hermes 15 January 2016, Randstad 2 February 2016, AXA 12 April 2016, Philip Morris 21 September 2016, Eni, 6 February 2017, Enel 4 April 2017, Ferrovie dello Stato 2 May 2017, Siemens 6 June 2017.

⁶⁷ Intesa S. Paolo 10 December 2014, BNL 15 July 2015, Banca Etica 28 October 2015.

⁶⁸ BNP 2 November 2015, Baxi 14 September 2016.

⁶⁹ Tiraboschi M., Dagnino E., Tomassetti P., Tourres C., *Il "lavoro agile" nella contrattazione collettiva oggi*, Working Paper Adapt, 2, 2016,

https://moodle.adaptland.it/pluginfile.php/26070/mod_resource/content/0/lavoro_agile_contrattazione_w_p_3.2.pdf; Dagnino E., Menegotto M., Pelusi L.M., Tiraboschi M., *Guida pratica al lavoro agile dopo la legge n. 81/2017*, Adapt University Press, Modena, 2017, 109 ff; Cairoli S., Galli G., Verzaro M., Rocchi L., *Contrattazione collettiva. Periodo I semestre 2017*, in Galli G., Cairoli S., *Osservatorio contrattazione collettiva, Rivista Giuridica del Lavoro.*, 2017, III, 88; Monterossi L., *Il lavoro agile nell'accordo Enel 4 aprile 2017, anche alla luce della sopravvenuta l.n. 81/2017*, in *Rivista Italiana di Diritto del Lavoro.*, 2017, III, 199 ff.; Occhino A., *Il lavoro agile nella contrattazione collettiva*, in *Lavoro nelle Pubbliche Amministrazioni*, 2018, 81 ff.

⁷⁰ Spinelli C., *Tecnologie digitali e lavoro agile*, Cacucci, Bari, 2018.

companies practising smart working. This is a crucial point to have in mind also with respect to the following analysis of the contents of the Law No. 81/2017 on agile work.

The rationale of this statutory law could be identified with the aim to systematise the previous negotiating experiences in order to overcome the problem of the limited effectiveness of collective agreements, which in the Italian legal system do not have *erga omnes* validity, so as to define a regulatory framework to support the adoption of innovative organizational models, mainly to the benefit of small and medium-sized enterprises. In this regard, for example, one should take into account the legislative provisions granting specific prerogatives to agile workers, such as the right to disconnect (art.19, c. 1), to notice in case of termination of agile work (art.19, c. 2) and to lifelong learning (art. 20, c. 2). These rights, albeit conditioned to an individual negotiation, represent an improvement with respect to the regulation adopted by the collective agreements, which had instead completely neglected them. Another important provision to highlight, which is consistent with the promotion of agile work, foresees that “the tax and social security incentives that may be recognized in relation to increases in productivity and efficiency of subordinate work are also applicable when the work is performed in an agile way” (art. 18, c. 4).

In conclusion, although limited to a few relevant profiles, the law fulfils a strengthening function with respect to collective bargaining in order to allow access to remote work - more or less smart, as will be seen - to the extent that it allows employers and employees who adopt it to achieve effects not otherwise achievable.

5.2. In the public sector.

Public administrations have experimented and then regulated smart working, as already mentioned in section 3.1 above, in the perspective of work-life balance.

On the basis of the provisions of the aforementioned article 14, par. 3, Law No. 124/2015, concerning the testing of “new space-time flexible ways of carrying out work performance”, and following the pilot experiences promoted by the Department for Equal Opportunities, in June 2017, the Directive of the President of the Council of Ministers n. 3/2017 was approved. It laid down the guidelines for the adoption of work organization measures aimed at work-life balance and, in this perspective, provided instructions on the use of flexibility at work, “the so-called agile or smart working”, for the public administrations. Article 18, par. 3, Law n. 81/2017 then extended the application of the legal regulations on agile work to public administrations, provided that they are compatible, thus recognising as relevant also in the public sector the aim of improving organizational performance and productivity.

The introduction of “agile work”, then, even in public administrations is intended to trigger virtuous processes of organisational and managerial modernisation so as to produce positive results not only on work-life balance and, therefore, on the organizational well-being of workers, but also on the effectiveness and efficiency of the administrative action. This approach can be confirmed looking at the contents of the Directive No. 3/2017, which,

although slightly prior to the law on agile work, takes into account the related parliamentary debate and is widely influenced by it.

However, it may at first appear contradictory that the legislator, in the context of the same Law No. 124/2015, on the one hand, has promoted flexible work which implies personnel management strategies inspired by mutual trust and collaborative relationships with employees and, on the other hand, has emphasized the exercise of the power of control over the work performance, revisiting the rules on disciplinary proceedings and sickness controls,⁷¹ and imposing limits to collective bargaining on the composition of the funds for the financing of performance-related pay, with reference to the consequences of the absences from work.⁷²

Indeed, the legislator's plan is plenty coherent considering that even agile work, due to its flexibility features, can be useful for a strategic vision aimed at combating absenteeism and achieving cost savings. Furthermore, the approach of checking the work performance by objectives could make it easier to find the "lazybones" than checking their working on site.

Finally, agile work is fully consistent with the importance that the legislator ascribes to the measurement and assessment of work performance in public administrations, the regulation of which was recently revised with the Legislative Decree No. 74/2017. In this regard, the Directive No. 3/2017 specifies that work performance evaluation is an enabling condition for an effective use of agile work, the implementation of which, in turn, must be subject to organizational and individual performance assessment (par. 5).

The latest renewals of the collective agreements, for the three-year period 2016-18, stipulated with great delay and after a long period of freezing of negotiations in the public sector, do not deal with the implementation of agile work, as their priorities have been related to the updating of wages and working conditions. Nevertheless, the establishment of joint public administration-trade unions bodies should not be overlooked, because it is intended to achieve a participatory involvement of trade unions on developing innovative organisational plans regarding public administrations. These joint public administration-trade unions bodies are allowed to carry out preparatory activities for second-level collective bargaining, submitting proposals. It is worth considering, in this regard, that among the issues under their responsibility, much attention is focused on the workers' risks connected to the use, or perhaps we should better say, to the abuse of technology - in general and with specific reference to agile work - as well as on work-life balance measures. Moreover, it is on the second level collective agreements to regulate the effects of the technological innovation on the quality of work and the employees' skills.⁷³

⁷¹ Art. 55 ff., modified by Legislative Decree No. 75/2017, implementing Law No. 124/2015.

⁷² Art. 11, c. 1, lett. g), Legislative Decree No. 75/2017.

⁷³ Art. 7, c. 6, lett. v), ccnl Funzioni Centrali; art. 7, c. 4, lett. t), ccnl Funzioni Locali; art. 22, c. 4, lett. c9), art. 42, c. 3, lett. o), art. 68, c. 4, lett. o), ccnl Istruzione e Ricerca; art. 8, c. 5, lett. k), ccnl Comparto Sanità.

6. Law No. 81/2017 on agile work.

The legal regulations on agile work have been adopted in order to establish a general framework within which the early schemes already experimented by means of collective agreements would have been developed and extended.

At the end of January 2016, the Renzi Government adopted a draft bill in order to integrate the discipline of self-employed work, which also dealt with smart-working. In this regard, the government proposed a minimal regulation, to be implemented and enhanced by collective agreements (art. 20), mainly aiming at introducing more flexibility in the employment relationships, with specific regard to working time and workplace (A.S. 2233)

This was not the only draft bill on this matter submitted to the Parliament. Another proposal was presented by a group of Senators (A.S. 2229) as a set of measures complementary to the government draft bill, with the declared ambitious goal to provide for a legal framework to new patterns of work organisation linked to digital economy. The specific aim pursued was to promote a higher degree of workers' autonomy and responsibility in performing work, so to increase the relevance of performance-oriented job evaluation and remuneration policies.

The amended text of the Government draft bill, which was enacted as Law No. 81/2017, is the result of a mix of the provisions originally contained into the two drafts.

6.1 The legal definition of agile work, its juridical qualification and the principle of consensus.

The declared purposes pursued by Law No. 81/2017, whose articles 18-23 regulate agile work, according to the term preferred by the legislator, are identified, such as in the previous collective agreements, in increasing companies' competitiveness as well as facilitating employees' work-life balance.

Agile work is defined as “a peculiar execution mode of the employment relationship agreed by the parties, encompassing forms of organisation by stages, cycles and objectives, without strict time and place constraints, possibly involving the use of technological tools for carrying out the work activity. Work is performed partly inside the company premises and partly outside, without a fixed location, provided that the maximum weekly and daily working time established by statutory law and collective bargaining are respected” (Article 18, paragraph 1).

The qualifying element of the agile work performance is constituted by the *flexibility in time and space of its execution*, consequent to the possibility of carrying it out “without strict time and place constraints”. The so-called space and time de-structuring of the work performance is further characterized by mobility, which means that part of the work activity is performed in a place other than the employer's premises, which remains indeterminate and interchangeable, while working time flexibility has to be set in compliance with maximum weekly and daily working time established by statutory law and collective bargaining. The use of technological tools is considered only as a possibility. In this regard, the choice of the

legislator is consistent with the organizational studies on smart working, which do not attribute a qualifying value to the use of technology, but only a supporting function.

Agile work is, therefore, subordinate work,⁷⁴ remote work, not necessarily supported by technological tools, which allows the employee a space of “organizational autonomy” in managing the time and place of his/her work performance. Therefore, the agile worker carries out flexible work as to the time and place of its performance, which *may* involve the support of ICT tools and *can* be inserted in organisational contexts structured by “stages, cycles and objectives”. It is mainly within the latter organisational patterns that the performance-oriented dimension of agile work can be appreciated.

According to the legal definition, agile work has been qualified either as a peculiar mode to perform subordinate work⁷⁵ or as a *species* of the *genus* telework.⁷⁶

These two alternative solutions rely on the different interpretation of the mobile character of agile work, which can be *performed partly inside the company premises and partly outside, without a fixed location*, compared to the definition of telework offered by the EU social partners’ Framework Agreement of 2002 and confirmed by the Intersectoral Agreement of 2004 reminded above.

Agile work should be distinguished from telework because the latter is carried out outside the employer’s premises *on a regular basis*, which means, according to some authors, permanently outside the employer’s premises. On the contrary, in the view of other authors, agile work should be considered as a – already known⁷⁷ - form of telework, in particular alternating telework, provided that the “regularity” of the work performance is interpreted in terms of temporal continuity of its execution, which shall be not merely occasional.⁷⁸ This view is supported by a significant number of collective agreements, as it has been noted above at section 4.

However, another interpretative proposal –preferable indeed, in our view - to make a distinction between telework and agile work can be suggested, focusing more on the use of technological devices than on the mobility of the work performance. Using ICT tools, in

⁷⁴ Critical remarks in Nappi S., *Riforma del lavoro autonomo, lavoro agile e altri esercizi stilistici parlamentari di una legislazione incompiuta*, in *Il Diritto del Mercato del Lavoro*, 2017, 214-15; Levi A., *Il lavoro agile nel contesto del processo di destrutturazione della subordinazione*, in *Rivista Giuridica del Lavoro*, 2019, I, 25 ff.

⁷⁵ Pinto V., *La flessibilità funzionale e i poteri del datore di lavoro*, in *Rivista Giuridica del Lavoro*, 2016, I, 366; Allamprese A., Pascucci F., *La tutela della salute e della sicurezza del lavoratore «agile»*, in *Rivista Giuridica del Lavoro*, 2017, I, 315; Donini A., *Nuova flessibilità spazio-temporale e tecnologie: l’idea del lavoro agile*, in Tullini P. (ed.), *Web e lavoro. Profili evolutivi e di tutela*, Giappichelli, Torino, 2017, 78 and 89; Bolego G., *Commento all’art. 18, l. n. 81/2017*, in De Luca Tamajo R., Mazzotta O. (eds.), *Commentario breve alle leggi sul lavoro*, Kluwer-Cedam, Padova, 2018, 3129; Martone M., *Lo smart working nell’ordinamento italiano*, in *Diritti Lavori Mercati*, 2018, 311.

⁷⁶ Mazzotta O., *Lo statuto del lavoratore autonomo ed il lavoro agile*, in *Il quotidiano giuridico*, 1 febbraio 2016, <http://www.quotidianogiuridico.it/documents/2016/02/01/lo-statuto-del-lavoratore-autonomo-ed-il-lavoro-agile>; Tiraboschi M., *Il lavoro agile tra legge e contrattazione collettiva: la tortuosa via italiana verso la modernizzazione del diritto del lavoro*, in *Diritto delle Relazioni industriali*, 4, 2017, 38; Peruzzi M., *Sicurezza e agilità: quale tutela per lo smart worker?*, in *Diritto della Sicurezza sul Lavoro*, 1, 2017, 2 ff., <http://ojs.uniurb.it/index.php/dsl/article/view/960/904>.

⁷⁷ Gaeta L., *Il telelavoro: legge e contrattazione*, in *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 1995, 552.

⁷⁸ Pascucci P., *La tutela della salute e della sicurezza sul lavoro*, Aras Ediz., Fano, 2014, 60.

fact, is a qualifying element for telework,⁷⁹ while it is not necessary to perform agile work. Being aware of the conventional value of the notion of remote work as work done outside the company premises, telework and agile work certainly share this feature and therefore they can be both considered as *species* of the *genus* remote work, which appear sometimes overlapping, at certain conditions.⁸⁰ More precisely, this is the case when agile work is performed through mobile devices – which happens quite often – then it can be also qualified as alternating telework.⁸¹ As a consequence, when agile work is performed as ICT mobile remote work it will fall (also) under the scope of telework regulation and benefit from the more favourable protections guaranteed on the workers' side.

In conclusion, it can be said that the legal definition of agile work includes a wide range of ways of carrying out the work performance, depending on the degree of space-time flexibility and productivity goals actually adopted in the organizational context, as well as the use of technological tools. This means that both the mere reproduction of the ordinary work procedures in a place other than the company premises, as well as the performance of work with a high degree of mobility, connectivity and productivity – or, to put it differently, in a genuinely “smart” way - can be identified as agile work, according to the legal definition of it.

For both telework and agile work the employee's consent is necessary and cannot be circumvented to transform the ordinary mode to perform work.

As far as agile work is concerned, the general legal framework has been established by Law No. 81/2017, while leaving to the parties of the employment contract to determine a wide range of working conditions. More precisely, the so-called agile work pact⁸² has to define: how the activity is performed outside the employer's premises, especially concerning times and places and, in particular, the rest times and the technical and organisational measures necessary to ensure the employee's disconnection (Article 19, paragraph 1); how the employer's directive, disciplinary and control powers have to be exercised, due to the difficulties of putting them in action when the employee is not physically present and because of the need of complying with the prohibition of remote surveillance (Article 21); what the tools used by agile workers are, considering that, when the technological devices are provided by the employer, he is responsible for their proper functioning and safety (Article 18, paragraph 2). This agreement does not replace the employment contract but is parallel to it;

⁷⁹ As stated in art. 2, par. 1, lett. b) of the Presidential Decree n. 70/1999, for the public sector, and in art. 1 of the Intersectoral Framework Agreement of 2004, for the private sector (*see above* at section 4).

⁸⁰ Santoro Passarelli G., *Lavoro eterorganizzato, coordinato, agile e il telelavoro: un puzzle non facile da comporre in un'impresa in via di trasformazione*, in *Diritto delle Relazioni Industriali*, 3, 2017, 789; Casillo R., *La subordinazione “agile”*, in *Diritti Lavori Mercati*, 2017, 10; Sartori A., *Il lavoro agile nella pubblica amministrazione*, in Zilio Grandi G., Biasi M. (eds.), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, Kluwer-Cedam, Padova, 2018, 486.

⁸¹ To support the proposed interpretative solution the “regularity” of telework shall be considered as referred to the temporal continuity of the work performance. Moreover, it has to be reminded that, in the public sector, the Framework Agreement of 23 March 2000 expressly consider the possibility to perform telework in alternate mode.

⁸² Andreoni A., *Il lavoro agile nel collegamento negoziale*, in *Rivista Giuridica del lavoro*, 2018, 105; Gramano E., *L'accordo sul lavoro agile: forma e contenuto*, in Zilio Grandi G., Biasi M. (eds.), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, Kluwer-Cedam, 2018, 509 ff.; Dagnino E., Menegotto M., Pelusi L.M., Tiraboschi M., *Guida pratica al lavoro agile dopo la legge n. 81/2017*, Adapt University Press, Modena, 2017, 37 ff

it can be concluded for a fixed or indefinite period and it is possible to terminate it with prior notice (Article 19, paragraph 2)

The agile work pact is signed in order to allow companies and workers to adapt agile work to their specific needs.⁸³ However, it is quite peculiar and even surprising how much the legislator is confident on the contracting parties, who should be able to reach a balanced composition of their respective interests, notwithstanding the unequal negotiating powers they enjoy.⁸⁴ The overestimated role recognised to the individual agreements implies some risks, concerning first of all how ascertain that the worker's consent is true⁸⁵, but also how to avoid discrimination when defining working conditions. A good example to consider in this respect is the right to disconnect, which will be addressed below at section 6.2.2. It is hardly convincing that the technical and organisational measures necessary to ensure the disconnection of the worker from the technological work tools require individualised regulation. On the contrary, the right to disconnect, like other aspects of agile work, can be better regulated through collective bargaining, which, although ignored by the legislator, is always guaranteed by the constitutional provision on trade union freedom (Article 39 of the Italian Constitution).⁸⁶

6.2. Some critical issues about agile work.

Digital technologies and, above all, the hyper-connectivity that can result from their use represent a potential *threat to the workers' physical and mental health*. The workers are, in fact, exposed to peculiar pathologies such as techno-stress, technological addiction, burnout.⁸⁷

Digital devices allow workers to be always-on and therefore constantly at disposal of the employer, blurring the boundaries between professional and personal life, in contradiction with the very purpose to which remote work is assumed to be oriented. At this regard, the

⁸³ Martone M., *Il lavoro agile nella l. 22 maggio 2017, n. 81: un inquadramento*, in Zilio Grandi G., Biasi M. (eds.), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, Kluwer-Cedam, 2018, 465; Proia G., *L'accordo individuale e le modalità di esecuzione e di cessazione della prestazione di lavoro agile*, in Fiorillo L., Perulli A., *Il Jobs Act del lavoro autonomo e del lavoro agile*, Giappichelli, Torino, 2018, 183.

⁸⁴ Cuttone M., *Oltre il paradigma dell'unità di luogo, tempo e azione: la revanche dell'autonomia individuale nella nuova fattispecie di lavoro agile*, in Gruppo Giovani Giuslavoristi Sapienza (eds.), *Il lavoro agile nella disciplina legale, collettiva e individuale*, Working Paper C.S.D.L.E. «Massimo D'Antona» *Collective Volumes*, 6, 2017, 47-60.

⁸⁵ Riccio A., *L'accordo di lavoro agile e il possibile ruolo della certificazione*, in Gruppo Giovani Giuslavoristi Sapienza (eds.), *Il lavoro agile nella disciplina legale, collettiva e individuale*, Working Paper C.S.D.L.E. «Massimo D'Antona» *Collective Volumes*, 6, 2017, 61 ff.

⁸⁶ Recchia G., *I rinvii al contratto collettivo nel lavoro agile tra ambiguità normative e ragionevole implementazione dell'istituto*, in *Argomenti di diritto del lavoro*, 2018, 1501.

⁸⁷ Eu-Ohsa, *Key trends and drivers of change in information and communication technologies and work location*, Luxembourg, Publications Office of the European Union, 2017, <https://osha.europa.eu/en/tools-and-publications/publications/key-trends-and-drivers-change-information-and-communication/view>; Popma J., *The Janus face of the 'New Ways of Work'. Rise, risks and regulation of nomadic work*, ETUI Working Paper, 7, 2013, <https://www.etui.org/Publications2/Working-Papers/The-Janus-face-of-the-New-ways-of-Work-rise-risks-and-regulation-of-nomadic-work>.

concept of *time porosity*⁸⁸ has been adopted, to indicate the mutual interference and overlap between working and personal time, which can give rise to personal and family conflicts.

Finally, the pervasiveness of technologies exposes the worker to *new forms of control* by the employer, which require the identification of new ways of balancing the protection of the legitimate interests of the latter to the correct fulfilment of the work performance and the defence of company assets with the protection of the worker's freedom, dignity and privacy.

All these issues, ignored by the company collective agreements that first regulated this working method, were instead dealt with by Law No. 81/2017, even if with a few provisions, which require to be integrated, as already mentioned, by the agile work pact on the execution of the work performance outside the company premises.

The critical issues highlighted require an in-depth analysis of the protections that the agile worker can benefit from, with particular reference to the protection of his/her health and safety, the recognition of a right to disconnect and the limits to the exercise of the employer's power of control.

6.2.1. Health and safety.

Regarding health and safety obligations, it is worth mentioning that the employer must inform the agile worker and the workers' representatives by written statement, at least on annual basis, about all general and specific risks connected with the execution of working tasks outside the company premises (Art. 22, par. 1).

However, the employer does not comply with all his health and safety obligations towards the agile workers solely by fulfilling this duty of information. Agile workers shall also benefit from the universal protections foreseen by Legislative Decree N. 81/2008, albeit with the necessary adjustments required by the fact that agile work is performed in part outside the company premises, "without a fixed location"⁸⁹.

In particular, the protections provided to remote work with visual display units by Art. 3, par. 10, Legislative Decree No. 81/2008 shall apply every time agile work is performed using technological devices. The legal provision expressly refers to teleworkers recalling the legal and contractual sources which regulate their work (*see above*, par. 2.1-2.2.), while including in its scope of application all forms of remote work executed by means of ICT connections and on a regular basis.

Due to the interpretative option accepted for the qualification of agile work, as a species of the genus remote work, partially overlapping teleworking, there is no obstacle to include it within the scope of Art. 3, c. 10, as the conditions identified by the law are fulfilled. The on line connection will exist, in fact, every time the agile work is carried out with the use of technological tools, while the execution of the work performance partly inside and partly outside the company premises does not affect its continuity.

⁸⁸ Genin E., *Proposal for a Theoretical Framework for the Analysis of Time Porosity*, in *International Journal of Comparative Labor Law and Industrial Relations*, 2016, Vol. 32, Issue 3, 280 ff.

⁸⁹ Malzani F., *Il lavoro agile tra opportunità e nuovi rischi per il lavoratore*, in *Diritti Lavori Mercati*, 2018, 28-29.

Finally, agile workers are entitled to protection against injuries at work and occupational diseases depending on the risks connected to the work performed outside the company premises as well as against accidents occurred during the normal round trip route from the place of residence to the one chosen to work outside the employer's premises, provided that the latter is chosen on the basis of the work performance or work-life balance needs and meets reasonableness criteria (Art. 23).

6.2.2. The right to disconnect.

The regulation of the right to disconnect offers a good example of the ambiguities of the Italian legal framework.⁹⁰

From a comparative perspective, it is worth considering that the right to disconnect is usually regulated by collective agreements, even when the legislator intervened on this subject: in France, the *Loi du Travail* of 8 August 2016 provides that the right to disconnect must be negotiated with trade union representatives; in Spain, the Organic Law of 5 December 2018, n. 3 defers the implementation of the right to disconnect to collective agreements at sectoral or company level. On the contrary, in Italy, the “technical and organizational measures necessary to ensure that the worker can disconnect from digital devices” shall be defined through the individual negotiation between the employer and the employee (Article 19, paragraph 1, Law No. 81/17).

The former collective agreements on smart working did not put in place specific mechanisms to control and even prevent the continuous connection of the workers, so it is certainly important that this problem has been taken into account by the legislator. However, deferring to the individual autonomy the regulation of the disconnection measures could weaken their implementation. Indeed, the right to disconnect is no more than formally stated by the law, without providing for specific tools that may be used for its implementation. As a consequence, it cannot be avoided that agile work may be performed without properly ensuring protection to the workers in order to face the *time porosity*.

With regard to the qualification of the right to disconnect, is still controversial whether it should be considered either as a new kind of worker's digital right, linked to “hyper-connectivity”, or simply a specification of the worker's right to rest-time.

The main problem arising with reference to the right to disconnect concerns its effectiveness. In this regard, it is useful to include it into the measures to protect the workers' health and safety, as a technological version of the right to rest, which is foreseen at EU

⁹⁰ Dagnino E., *Working Anytime, Anywhere' and Working Time Provisions. Insights from the Italian Regulation of Smart Working and the Right to Disconnect*, in *E-Journal of International and Comparative Labour Studies*, Volume 9, No. 3, September-October 2020; Id., *Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata*, in *Diritto delle relazioni industriali*, 4, 2017, 1024 ff.; Alessi C., Barbera M., Guaglianone L. (eds.), *Impresa, lavoro e non lavoro nell'economia digitale*, Cacucci, Bari, 2019; Zucaro R., *Il diritto alla disconnessione tra interesse collettivo e individuale. Possibili profili di tutela*, in *Labour & Law Issues*, vol. 5, no. 2, 214-233.

level⁹¹ and by national laws, as a right-duty of the worker which implies a corresponding obligation for the employer.

According to this interpretative approach, the regulation of the right to disconnect is linked to rest time and the obligation of the employee to be at disposal of the employer. Therefore, the minimum level of disconnection can be considered equivalent to the 11 hours of daily rest. However, referring to this provision is not enough to solve the problem of limiting the obligation of the agile worker to be available to be reached by the employer beyond the limits of working time. This purpose could be better satisfied through the on-call and/or stand-by service regime, including the related economic treatment.⁹²

Beyond this hypothesis, the worker will have the right to disconnect from the technological tools and interrupt contacts with the employer (not responding to emails, turning off the mobile phone, etc.), without thereby incurring the non-fulfilment of the work performance and suffering disciplinary sanctions as a consequence.

According to a different interpretative hypothesis, which highlights the potential prejudice that unlimited availability causes to the personal sphere of the worker, the right to disconnect should be placed among a new generation of human rights, the so-called digital rights, as an expression of the right to privacy.⁹³ The right to disconnect should therefore be defined as the worker's right to prevent the employer intruding on his/her personal life. This right would thus be connected to the value of dignity and the needs of its protection and could consequently benefit, in terms of effectiveness, from the supervisory action of the Privacy Authority.

Another crucial point to consider concerns the aims pursued by the legislator in regulating agile work. According to Art. 18, par. 1 Law No. 81/2017, agile work has been fostered in order to increase competitiveness and facilitate work-life balance.⁹⁴ In addition, the 2019 budget law (Law No. 145/2018) has stressed the function of agile work as a work-life balance tool, since the employer is obliged to recognise priority to requests of performing agile work coming from women being in their three years after the end of maternity leave as well as of workers who are parents of disable children (Art. 1, par. 3-bis Law No. 81/2017).

However, the legal regulation does not foresee any condition or limitation to guarantee that the individual agreement on agile working actually pursues the goal of work-life balance and facilitates its accomplishment; it is assumed, instead, that better possibilities of reconciliation are the natural and virtuous result of this way of working.

In this respect, it is worth considering that regulating agile work merely through individual negotiation, along with the possibility to terminate the agreement with no substantive reason (but simply respecting the notice term, even if extended for disabled workers), could be more

⁹¹ Articles. 3 ff., Directive n. 2003/88/CE.

⁹² Altimari M., *Il diritto alla disconnessione: un "vecchio" diritto ineffettivo?*, in Occhino A. (ed.), *Il lavoro e i suoi luoghi*, Vita e Pensiero, Milano, 2018, 181 ff.

⁹³ Ray J. E., *Le droit à la déconnexion, droit à la vie privée au XXI siècle*, in *Droit social*, 2002, 939 ff.; Poletti D., *Il c.d. diritto alla disconnessione nel contesto dei «diritti digitali»*, in *Responsabilità Civile e Previdenza*, 2017, 1, 7 ff.

⁹⁴ Di Meo R., *Il diritto alla disconnessione nella prospettiva italiana e comparata*, in *Labour & Law Issues*, 2017, vol. 3, n. 2, 17; Sena E., *Lavoro agile e diritto alla disconnessione: l'incidenza delle nuove tecnologie sulle modalità di esecuzione della prestazione di lavoro*, in *Il Diritto del Mercato del Lavoro*, 2018, 245.

penalising especially for caregivers. The predictability of the changes of the pattern or organization of working time, in fact, is particularly important for these workers.

Dealing with parents caring of their children during the pandemic (*infra*, par. 7), a recent provision has expressly recognised the right to disconnect as such, providing for any negative consequences on the employment contract or remuneration to be excluded. The employer and the employee can agree on specific measures or on call/stand by regime (Art. 2, par. 1 *ter*, Decree Law 13 March 2021, No. 30 converted with modification by Law 6 May 2021, No. 61).

6.2.3. Employer's power of control.

The agreement signed between the employer and the employee shall also regulate the employer's power to direct and control the work performance outside the company premises (Art. 21).

In particular, electronic surveillance shall be exercised within the limits foreseen by Art. 4, Law No. 300/1970, as amended by Art. 23 of the Legislative Decree No. 151/2015.

The new provision includes in the area of the lawful exercise of the employer's power of control – regardless of any trade union or administrative filter – the case of remote control over the fulfilment of the work performance carried out through the (technological) “tools used by the employee to do his/her work and the instruments for recording accesses and attendance” (art. 4, c. 2).

Agile work falls within the scope of this provision when it is performed with the support of digital devices.⁹⁵

In order to allow the employer to make use of data and information collected thanks to the technological tools used by the employee to do his/her work, Article 4, paragraph 3, requires that the employee is informed about how data are collected and control is carried out.

In case of agile work such information is usually provided for or even negotiated with the agile work pact.⁹⁶

In this regard, a relevant role could be played by collective bargaining at national level in order to identify principles and criteria on the collection and management of data. These rules could constitute the common regulatory framework for agile work pacts, thus ensuring equal treatment and privacy protection for all agile workers, with reference to the work performed outside the company premises.

Moreover, according to the Italian Privacy Code the regulation on remote surveillance (Article 4 Law No. 300/1970) applies to teleworking (and agile work), as long as the confidentiality of the worker is respected (Article 114 Legislative Decree No. 196/2003).

⁹⁵ Bellavista A., *Il potere di controllo sul lavoratore e la tutela della riservatezza*, in *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, Zilio Grandi G., Biasi M. (eds.), Kluwer-Cedam, Padova, 2018, 627 ff.

⁹⁶ Mainardi S., *Il potere disciplinare e di controllo sulla prestazione del lavoratore agile*, in Fiorillo L., Perulli A. (eds.), *Il Jobs Act del lavoro autonomo e del lavoro agile*, Giappichelli, Torino, 2018, 222.

As a consequence, the employer must exercise the power of control respecting not only labour law provisions, but also all the principles concerning worker's data protection (e.g. transparency, appropriate measures, etc.), taking into account the ruling of the Privacy Authority. These decisions can be found in the guidelines relating to the respect of privacy in the employment relationship and in the specific provisions regarding, for example, e-mail use or geolocation,⁹⁷ which is a particularly relevant issue in the case of agile work.

7. Agile work during the Covid-19 pandemic.

The spread of smart working in Italy is being monitored by the Observatory of the Politecnico of Milan since 2012. The latest survey prior to the spread of the Covid-19 pandemic, presented in 2019 on the basis of the data of the year before, highlighted a phenomenon that was still limited, but growing, although mainly in big companies, and with a high potential for development in SMEs and public administrations.

During the pandemic, the use of remote work has been exponentially intensified, as it has proved to be a suitable tool for protecting health and safety in the workplace without compromising - or at least not seriously - business continuity and public services efficacy.

According to a study published by the Bank of Italy, the percentage of remote workers increased as a result of the pandemic from 1.4 percent in the second quarter of 2019 to 14.4 percent in the same period of 2020; the number of involved workers increased from less than 200,000 to 1.8 million. The research shows how the increase in remote working has particularly affected women, workers in larger companies and sectors whose jobs are most suitable for being carried out remotely. These data suggest an ambivalent interpretation, as on the one hand they reveal what potential of widespread use smart work has, but on the other hand they highlight the risk that in the post-pandemic period its use could produce segregating effects with respect to some categories of workers. According to the same survey, compared to those who have not worked remotely, on average the employees who have benefited from agile work have achieved a higher monthly salary, due to the greater number of hours worked, and have made less use of the Temporary Support Scheme (*cassa integrazione guadagni*) to mitigate unemployment.⁹⁸

7.1 In the private sector.

The rules introduced by the Italian legislator since the outbreak of the Covid-19 pandemic, with a view to enhancing the capacity of agile work to operate as a swift and effective measure to prevent the spread of the infection, have gradually given rise to a special regulatory regime

⁹⁷ Vademecum privacy e lavoro 2015.

⁹⁸ Depalo D., Giorgi F., *Il lavoro da remoto in Italia durante la pandemia: i lavoratori del settore privato*, Banca d'Italia, Note Covid-19, 22 January 2021, https://www.bancaditalia.it/pubblicazioni/note-covid-19/2021/Nota_Covid_1_DPDFG.pdf.

which deviates significantly from the standard, with regard to both the establishment and the functioning of agile work arrangements.⁹⁹

“Pandemic agile work” has taken two main forms:¹⁰⁰

1) the general form, applicable for the whole duration of the state of emergency (repeatedly extended by the government), can be activated by a unilateral order of the employer following simplified formal requirements. Pursuant to the introduction of this form of “facilitated remotization”, a protocol for the containment and prevention of the diffusion of Covid-19 in the workplaces, concluded by the social partners on 24 April 2020 and updated on 6 April 2021, recommended to reorganize the work operations in agile mode whenever the characteristics of the job and the activity so permitted;

2) a special form, reserved to particular categories of workers that, as a consequence of the pandemic, found themselves particularly exposed to risks for their health or to increased caring responsibilities. The list of targeted workers has changed through time, with some categories being included or excluded in force of subsequent provisions. Generally speaking, the legislator addressed the following categories: disabled workers, workers with immunodeficiencies, workers who are cohabitant with a family member belonging to one of the aforesaid categories, workers in other conditions of health vulnerability that may increase the risk of being affected by Covid-19; parents of children under the age of 14 affected by school closures. This special form has been qualified as a “right”, insofar as the employer is obliged to accept every request coming from an eligible worker. However, the employer’s position is mitigated by the condition that the remotization needs to be compatible with the inherent characteristics of the job and with the needs of the organization: which brings to doubt about the possibility to qualify the worker’s position as a “right” in a strict sense.

It is easy to note that the “pandemic agile work” deviates from one of the main assumptions of the standard agile work scheme (and of telework as well), i.e. the principle that activation of this form of flexibility should be voluntary for both the worker and the employer. Although the severity of the reasons and the circumstances that led to this legislative choice is undeniable, still a significant body of research (including the works mentioned above in section 1) shows that the abrupt and unilateral shift to remote work may cause a negative impact on the quality of work and the well-being of workers. This is particularly true if, as in the Italian experience, the enhanced unilateral power is concentrated on the moment of the activation of agile work, without being counterbalanced by any specific

⁹⁹ Alessi C., Vallauri M. L., *Il lavoro agile alla prova del Covid-19*, in Bonardi O., Carabelli U., D’Onghia M., Zoppoli L. (eds.), *Covid-19 e diritti dei lavoratori*, Ediesse, Roma, 2020, 131 – 152; Biasi M., *Brevi spunti sul lavoro da remoto post-emergenziale, tra legge (lavoro agile) e contrattazione (smart working)*, in *Lavoro e Previdenza Oggi*, 2021, 3; Brollo M., *Smart o Emergency Work? Il lavoro agile al tempo della pandemia*, in *Il Lavoro nella Giurisprudenza*, n. 6, 2020, 553-570; Senatori I., *Il lavoro agile in cerca di identità. Cronaca legislativa di un quadriennio travagliato (2017-2020)*, in Basenghi F., Di Stefano L., Russo A., Senatori I. (eds.), *Le politiche del lavoro della XVIII Legislatura: dal Decreto Dignità alla gestione dell'emergenza Covid-19*, Giappichelli, Turin, 2020, 57 – 90; Spinelli C., *Lo smart working al tempo del coronavirus*, in *Labor*, 2021, Vol.1, 115-133; Tufo M., *Il lavoro agile emergenziale: un mosaico difficile da ricomporre tra poteri datoriali e diritti dei lavoratori*, in *Rivista Giuridica del Lavoro*, 2021, Vol. 1, 41-60.

¹⁰⁰ The normative framework has developed progressively since March 2020, with a stratification of measures that followed the evolution of the pandemic. The updated reference is to the Law Decree No. 30 of 13 March 2021, converted into Law No. 61 of 6 May 2021, and Law Decree No. 52 of 22 April 2021. The archive of the measures enacted by the Government and the Parliament can be consulted at: <https://www.gazzettaufficiale.it/dettaglioArea/12>.

accountability of the employer for the supervision on the implementing phase and the risks that may stem from it (like self-isolation, the difficulties in managing the worker's own schedules and targets and the collapse of the work-life divide), with the result of shifting those burdens on the worker.

7.2 In the public sector.

As a consequence of the worsening of the health emergency and the succession of the urgent government decrees, which led to inevitable repercussions of the supervening legislation on the activity of public administrations, agile work was declared the ordinary way of carrying out work in the public sector (Ministry Public Administration Directive No. 2/2020).

During the pandemic and because of it, agile work has been operating (and is still so) in the public sector according to derogatory rules foreseen by the emergency legislation, significantly departing from the standard provided for by Law No. 81/2017. First of all, the aims pursued are different. Agile work has become the preferred way to perform work given that it guarantees at the same time workers' health and safety protection and the continuity of public services activity. Moreover, agile work is indeed home-working during this time, because work is performed at the worker's domicile (on a permanent or alternate basis, depending on the varying severity of the pandemic and the public health orders consequently adopted by the Government). Finally, to adopt agile work is no more necessary to sign agile work pact, but it is on the unilateral power of the public administration to decide about it, which is the most relevant change in agile work regulation (Art. 87, par. 1, lett. b, d.l. n. 18/2020, converted by Law No. 27/2020).

In order to make it easier to transform the ordinary work performance in agile work, so to extend its use, the workers are allowed to bring their own digital devices, and in this case the public administrations are neither responsible for their good functioning and security¹⁰¹ (Art. 87, par. 2), nor obliged to give the workers appropriate written information¹⁰² (Art. 87, par. 1, lett. b)¹⁰³.

In the Summer of 2020, as the circulation of the virus was reduced, a gradual return to performing work on site was planned, postponing the identification of further organizational methods, to be adopted in relation to the evolution of the epidemiological situation, to any subsequent decrees of the Minister for Public Administration (Art. 263, par. 1, Law Decree No. 34/2020, conv. by Law No. 77/2020).

However, the flexibility of time and place of work does not seem near to be overcome as a relevant way of carrying out the work performance for civil servants, well beyond the mere need for distancing still in progress because of the Covid-19 pandemic. This approach can be unequivocally inferred from the regulatory provision which prescribes the obligation for

¹⁰¹ Article 18, par. 2, Law. No. 81/2017 does not apply in this case.

¹⁰² Written information prescribed by Art. 22-23, Law No. 81/2017 does not apply during the pandemic.

¹⁰³ Russo M., *Emergenza lavoro agile nella P.A.*, in *giustiziacivile.com*, 17 March 2020.

the public administrations to draw up the Organizational Plan for Agile Work (POLA), as a section of the Performance Plan, after consulting the trade unions, by January 31 of each year (Art. 263, par. 4-bis, Law Decree No. 34/2020, converted by Law No. 77/2020, which amended Art. 14, Law No. 124/2015).¹⁰⁴

The resurgence of the coronavirus that manifested in the Autumn of 2020 inspired the Decree of the Minister for Public Administration of October 2020,¹⁰⁵ which, pending the definition of the POLA, on the one hand, has aimed at enhancing the unilateral prerogatives of the public managers, to which entrusts the definition of the organizational methods for carrying out agile work (Article 3) and, on the other hand, with reference to industrial relations, has recalled the Protocol on health and safety of 24 July 2020, which, at point 8, establishes that “pending a specific contractual definition of the flexible employment relationship, public administrations shall ask the trade unions for advice pursuant to the current contractual regulations”.

Trade unions have harshly criticized this decree, as it would withhold regulatory competences from collective bargaining to leave them to the discretionary power of the public managers. Trade unions, in particular, have claimed the regulatory role of collective bargaining with reference to all aspects that pertain not to the organizational structures but to the agile employment relationship.

During the first stage of the pandemic emergency trade unions' claims were promoted in relation to the most controversial aspects related to the economic and regulatory treatment to be applied to agile workers.¹⁰⁶ These claims emerged with particular reference to overtime and leaves, the attribution of meal vouchers,¹⁰⁷ the responsibility for the use of ICT equipment, data protection and privacy issues, the right to disconnect.

The legitimate request of the unions to negotiate the discipline of agile work is also grounded on the structure of the sources of law in the public sector, which leaves a limited space for intervention to individual autonomy, substantially restricted to the genetic phase of the employment relationship, due to the principle of equal treatment that public administrations are required to observe towards their employees (art. 45, Legislative decree No. 165/2001).

After the last political crisis, a new Government has been appointed under the leadership of the Prime Minister prof. Mario Draghi, which has entrusted the Ministry for the public administration to prof. Renato Brunetta. He had already held this role in the past, during the

¹⁰⁴ Caruso B., *Tra lasciti e rovine della pandemia: più o meno smart working?*, in *Rivista Italiana di Diritto del Lavoro*, 2, 2020, I, 215 ff.; Esposito M., *Smart Work e pubblico impiego: patti chiari, agilità lunga*, in Martone M. (ed.), *Il lavoro da remoto. Per una riforma dello smart working oltre l'emergenza*, La Tribuna, Roma, 2020, 147 ff.; Saracini P., *Lo Smart Working nel settore pubblico*, in Carabelli U., Fassina L. (eds.), *Smart Working: tutele e condizioni di lavoro*, Ediesse, Roma, 2021, 87 ff.

¹⁰⁵ In force till 30 April 2021 according to the Decree of the Minister for the Public Administration 20 January 2021. The unilateral power to order agile work by the public administration is now stipulated by art. 11 bis Decree Law 22 April 2021, n. 52 converted by Law 17 June 2021, No. 87 expiring on 31 December 2021.

¹⁰⁶ In this regard, it has to be reminded that the Law No. 81/2017 provides that agile workers must be ensured an equal treatment, from an economic and regulatory point of view, with respect to their on-premises colleagues performing the same tasks (Article 20).

¹⁰⁷ Trib. Venezia 8 July 2020, see Spinelli C., *Lavoro agile emergenziale e diritto al buono pasto*, in *Rivista giuridica del Lavoro giurisprudenza news*, 2021, n. 2.

economic crisis of 2008, earning a reputation as a detractor of public employees and opponent of trade union organizations. However, looking at the programmatic lines of action the Minister intends to take on in a so hard historical phase for our country, and particularly to the “Pact for innovating work in the public sector and social cohesion”¹⁰⁸ he has signed with major trade unions, a different approach seems to have been adopted, according to which future investments in agile work for public administrations can be expected.

Nevertheless, the first measures put in place appears contradictory. On the one hand, the fundamental role of collective agreements in defining a common regulatory framework for agile work pacts,¹⁰⁹ with regard to the right to disconnect and training in particular, has been recognised by the Ministry Directive regarding the next collective bargaining session for public administrations. On the other hand, according to the amendments to the POLA regulations, the percentage of workers to be involved in agile work have been reduced (Art. 11 bis, Law Decree 22 April 2021, No. 52 converted by Law 17 June 2021, No. 87). More precisely, the POLA must identify the methods of implementing agile work by providing that at least 15 percent (instead of 60% as foreseen before) of employees who carry out activities compatible with this method may use it; if the Plan is not adopted due to the inertia of the public administration, the use of agile work must in any case be allowed to at least 15% (instead of 30%) of employees who so request.

Now it is on trade unions to live up to the challenge, being aware of the necessity to combine, when agile work is concerned, the collective dimension of representation with the protection of the actual needs of workers considered as individuals.¹¹⁰

8. Agile work in collective bargaining (private sector).

8.1. Levels of collective bargaining.

As it was pointed out in another section of this essay, the concept of “agile work” was originally elaborated by a number of pioneering company agreements, which inspired the enactment of Law No. 81 of 2017. Therefore, it comes by no surprise that the epicentre of the contractual regulation of this form of work, in case a collective regulation does exist (which is not statutorily requested, as it was pointed out above), normally lies at the company level.

One may argue that the normative construction of agile work responds to a need to maximise the flexibility of the organizational solutions, bypassing the boundaries set by the “institutionalized” framework of telework. In fact, as it was previously noted, a number of

¹⁰⁸http://www.governo.it/sites/governo.it/files/PATTO_INNOVAZIONE_LAVORO_PUBBLICO_COESIONE_SOCIALE_txt.pdf

¹⁰⁹ Zoppoli L., *Dopo la digi-demia quale smart working per le pubbliche amministrazioni?*, WP C.S.D.L.E. “Massimo D’Antona” n. 421/2020.

¹¹⁰ On the possible adoption by social partners of regulatory schemes combining collective interest mediation and the acknowledgement of individual needs, in the conceptual framework of the “capability approach”, see Senatori I., *The Irresistible Rise of Occupational Welfare in Italy: From Social Innovation to Regulatory Challenges*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 2017, Vol. 33, No. 4, 441 – 462.

recent company agreements expressly claimed the intention of addressing a subject matter other than telework, and the assumption that, by so doing, they would not be covered by the relevant framework regulations.¹¹¹ Nonetheless, it may be interesting to note that other company agreements, concluded until the early '10s, attempted to increase the flexibility of the standard telework arrangements while continuing to operate in the context of the established European and national provisions.¹¹²

The comparative analysis of the contents of the two regulatory models may explain whether such divergence is justified on legal and organizational grounds. A marked difference between the two groups may demonstrate that a deviation from telework rules was substantively necessitated by specific organizational needs that the scheme of telework was unsuited to meet. The issue will be addressed further in the next sub-sections. However, the chronological proximity between the first group of agreements and the new legislation of 2017 also indicates that the law has not only been influenced by these bargaining experiences, but has reinforced their effectiveness and their purpose, as it has been pointed out in section 5.1 above. In this way, one may argue, the law has accelerated the erosion of the scope of telework regulations.

It must be also pointed out that lately, in the wake of the COVID-19 experience, a significant bargaining activity on agile work has been observed at higher levels. For instance, the signatory parties of the national agreement for the metalworking sector, renewed on February 5th 2021, agreed to entrust a bipartite commission with the task to lay down a specific regulatory framework, addressing in particular the issues of disconnection, privacy, the use of electronic equipment and trade union rights of agile workers. Similarly, specific sectoral frameworks on agile work, containing principles and guidelines to be implemented at the company level, have been established in telecommunications (30 July 2020), food processing (31 July 2020) and insurance sectors (21 February 2021). They address topics like the eligibility for remote work, the appropriateness of remote workplaces, the organization of working time and the allocation of equipment and accessory costs.

This new circumstance suggests that the abrupt acceleration in the adoption of agile work, due to the pandemic, may have increased the attention for this instrument and the problems that stem from it, highlighting the opportunity to establish a common regulatory floor at a more general bargaining level. It may also indicate an intensification of the attention for the issue from trade unions, normally better inclined towards multi-employer bargaining models than their employer counterparts. This would represent a shift from the experience of the past, when the initiative for the introduction of agile work has been mainly driven by the companies, as the preambles of several agreements indicate.

¹¹¹ E.g. Cedacri 14 April 2016 (ICT); Alba Leasing 2018; Banca Sella 2017; Findomestic 2017; Credito cooperativo 2020, all of them belonging to the finance sector. See above, section 1.

¹¹² E.g. the ENEL agreement mentioned above, with reference to the organization of time patterns and the rotation between remote and on-site activity; similarly Nestlé 2010, Sara 2013.

8.2. Rationale. The economic and social functions of agile work. The legacy of Covid-19.

Collective agreements generally claim in their preambles the ambition to promote productivity and work-life balance by means of a new organization of work based on time and space flexibility. The same purpose is stated by the fundamental statutory source of agile work (article 18, law n° 81/17, where, to be precise, the word “competitiveness” is used instead of “productivity”), but that was also present in the archetypal model of telework. Differently from the latter, however, many agile work agreements place a particular emphasis on the capacity of agile work to bring about a new “philosophy” of the employment relationship, rooted in the “responsibilization” of workers, their self-achievement and the development of a result-oriented attitude and a condition of mutual trust.¹¹³

The social and economic functions attached to this form of work are normally explained to be complementary and mutually reinforcing. In fact, an engaged and committed worker, who is also permitted to organize autonomously the execution of his/her work activity, is expected to increase his/her wellbeing and, because of that, to provide a more efficient and productive contribution to the company.¹¹⁴

In addition to the list of purposes directly stemming from the legal definitions, a number of agreements mention other expected positive outcomes of agile work, such as the reduction of the environmental impact and the cost-saving opportunities for companies that may downsize their office spaces.¹¹⁵ Furthermore, building on the pandemic experience, agile work has been presented in some cases as a means to re-organize promptly the production process in case of a public emergency.

Hence it seems possible to conclude that in the intention of the social partners, and beyond the purposive statements of the law (which the players feel themselves authorized to interpret broadly), agile work embodies the nature of a flexible organizational tool that can be adjusted to serve an open catalogue of different needs. In this sense, the experience of agile work does not differ from that of telework, whose implementing sources have followed in practice the same flexible approach.

It must be also pointed out that, while the agreements normally do not indicate expressly a hierarchy between the objectives stated in their preambles, the closer analysis of their substantive provisions often permits to infer specific inclinations.

A recurring feature is the inclusion of agile work into the broader context of “company welfare” policies. In these cases, flexible time and space arrangements form part of the set of initiatives and instruments aimed at improving the wellbeing of workers and their protection from social risks. They are often targeted to specific categories, such as caregivers and disabled persons, who are granted a priority in the access to this form of flexibility.¹¹⁶

¹¹³ E.g. HBG Online gaming 3 February 2020, trade and services sector; FCA 12 March 2018, Automotive/Metalworking).

¹¹⁴ E.g. Coop Alleanza 3.0 16 December 2020, trade and services.

¹¹⁵ E.g. Poste Italiane 18 December 2020.

¹¹⁶ E.g. Hera, energy and chemical sector, 4 June 2020; Poste Italiane 18 December 2020; Coop Alleanza 3.0, trade and services, 16 December 2020.

Interestingly, however, the pandemic does not seem to have accentuated the “welfaristic” interpretation of agile work by collective bargaining. Of course, the legislation enacted to tackle the health emergency had an impact. In fact, the law introduced special eligibility criteria (which however do not correspond to a “right” to work remotely in a strict sense, as every request is subject to approval by the manager, pursuant to a technical assessment on the material possibility to execute the job remotely) in favour of workers particularly exposed to risks for their health or affected by precautionary measures such as the closure of schools and day care centres. Likewise, company agreements concluded since the second half of 2020 continue to pay attention to the needs of “special” categories of vulnerable workers, for instance entitling them to extra days of remote work¹¹⁷ or to a priority access to the instrument.¹¹⁸

Nevertheless, the same agreements cited above advocate a widespread and “structural” use of agile work, as a part of a strategy aimed at reshaping the organization of work on a permanent basis. In this sense, it may be argued that the “mass experiment” carried out throughout the year 2020 has convinced both companies and trade unions of the potential, and to some extent the irreversibility, of the shift towards the flexible organizational patterns enabled by modern technologies. The impression is confirmed by the progressive removal from collective agreements of certain eligibility criteria that were common in the pre-pandemic experience, and that expressed the idea of agile work as a “niche” HR instrument serving a retention purpose, like the provisions that reserved the option to work remotely to employees with a minimum seniority or with permanent contracts.

8.3. Definitions and structural elements of agile work.

One significant discrepancy exists between the statutory definition of agile work and the concept assumed by collective agreements: while the use of technological equipment is merely possible and not strictly necessary according to the law, the agreements consider it as a prerequisite. For instance, the text signed at Coop Alleanza 3.0 on 16 December 2020 describes the innovation of work organization, encompassing the adoption of agile work arrangements, as functionally linked to the introduction of social collaboration instruments like Office 365. And indeed, all the main problems that the agreements aim at handling, such as workers’ surveillance and the right to disconnect, result from the massive use of remote communication technologies in the work process.

The other statutorily constitutive elements, that receive a detailed regulation in the agreements, are the rotation between remote and on-site activity (meaning that work shall not be executed remotely on a permanent basis) and the absence of a predetermined workplace when the activity is performed outside the premises of the company.

As for the first element, the implementing solutions obviously vary case by case. Normally the rotation is planned on a weekly basis, meaning that each week the work must be

¹¹⁷ The TIM agreement signed on 4 August 20 grants this prerogative to pregnant women, parents and oncological patients.

¹¹⁸ Poste Italiane 18 December 2020.

performed in part on premise and in part remotely. In some circumstances a maximum number of days of agile work is fixed, whose entity is largely dependent on company-specific circumstances.¹¹⁹

It is worth pointing out that such a “dynamic” character of agile work represents more a theoretical than a factual difference with telework. In fact, as it has been observed in the previous section, several company agreements concluded in the context of telework regulations had already introduced some degree of alternation between remote and office-based activity. However, a quantitative distinction remains between the two modalities, since normally agile work arrangements allow for fewer days of remote work in the same reference period.

With regard to the characteristics of the workplace, the critical issue addressed by collective bargaining concerns the selection of the location assigned for the execution of the performance and the extent of the freedom of choice granted to the agile worker. The idea that the loose definition provided by the law may entail the absolute liberty to work “anywhere”, including fancy landscapes and leisure sites, is sharply contradicted by a series of implicit end expressed limitations identified by collective agreements (let aside the exceptional restrictions that characterized the “forced homework” of the pandemic period).

These limitations come as a result of the responsibility placed on the agile worker to cooperate in ensuring a safe and productive performance, in line with the qualitative standards of the job. In fact, almost every agreement stipulates the workers’ obligation to guarantee that the chosen venue fits with the requirements given for health and safety and data security purposes. Furthermore, the location should be placed at such a distance as to permit the agile worker to return promptly to the company’s premises in case an unexpected occurrence (such as the permanent failure of the technical equipment) forbids to continue the remote execution of the performance.

In some cases, the texts predetermine the typology of admitted locations, which may include private facilities at the disposal of the worker as well as co-working spaces and venues controlled by the company, other than the “official” workplace. Several agreements expressly rule out the possibility to execute the work activity from public and open space locations.¹²⁰ And although the employer has not the power to order a specific choice, in many cases the agreements invest the worker with a duty of prior communication that amounts indirectly to granting the former a limited but significant margin of interference.¹²¹

Thus, the spatial “agility” theoretically attached to this form of work is substantially reduced under the pressure of this web of parameters, and, again, the difference with the operational features of the “classic” telework appear to be smaller in practice than the wording of the law would authorize to presume.

¹¹⁹ For instance, the agreement signed at Italiana assicurazioni, insurance sector, on 20 February 2019 provides for a maximum of 8 days per month; the Alba leasing agreement, finance sector, 2018, only 2 days per month)

¹²⁰ E.g. Alba Leasing 2018.

¹²¹ E.g. Poste Italiane 23 January 2019.

8.4. Organization of the work performance.

The principle that the agile worker should be free to self-organize his/her time patterns is enshrined in the legislation, as it has been pointed out above. The lack of time constraints is expressly mentioned as one of the possible (although not necessary) elements of an agile work arrangement, except for the obligation to respect the maximum work hours prescribed by law and collective agreements.

The same element is also reaffirmed by collective bargaining.¹²² The texts present the inherent flexibility of the instrument, linked to the (predicted) eclipse of the “old-fashioned” means to measure the value of work (like time), as a pathway to the accomplishment of a better work-life balance and all the other functions embodied in this form of work.¹²³

However, such a broad theoretical potential is counterbalanced in practical terms by the restrictions that collective agreements normally lay down. Indeed, only a few texts provide for the total synchronization of the remote performance (same hours and distribution as on-premise workers).¹²⁴ The majority of them allow for the free allocation of the activity within a given reference time (normally the 8-20 span), in which the agile worker is basically permitted to adopt an intermittent and discontinuous schedule. However, such flexibility is usually mitigated by the obligation to remain available for calls and to stay on duty in certain time slots.¹²⁵ It is a matter of speculation to understand whether this outcome is the result of the perduring technical need to guarantee some degree of time coordination in the organizational processes, or whether it represents a way to exercise control on the remote performance, lacking equivalent means (technological or cultural). Whatever the reason, the empirical implementation of time patterns in agile work does not seem to differ extensively from the most flexible experiences that have been observed in the case of telework.

It is worth noting that some agreements design multiple models of agile work featuring different work patterns, that range from the most rigid (totally synchronized) to the most flexible solutions (detached and self-organized performances), depending on the characteristic of the job, its functional linkage with the organization or the preference of the worker.¹²⁶

A remarkable experience is the agreement recently concluded at Bayer (pharmaceutical sector) on 21 February 2021, covering the employees of the Milan plant. It provides for an overall reorganization of work patterns based on the lack of rigid schedules. The new scheme applies equally to the performances executed on the premise and remotely. In this sense, the agreement is worth mentioning because it shows that the relationship between new technologies and organizational models entails opportunities and challenges that go beyond

¹²² Aimo M., Fenoglio A., *Alla ricerca di un bilanciamento tra autonomia organizzativa del lavoratore e poteri datoriali nel lavoro agile*, in *Labor*, 2021, Vol. 1., 25-58; Cairoli S., *Tempi e luoghi di lavoro nell'era del capitalismo cognitivo e dell'impresa digitale*, Jovene, Naples, 2020.

¹²³ E.g. FCA (automotive) 12 March 2018. Some agreements include agile work in the broader context of “company welfare” policies, e.g. Hera 4 June 2020; Poste Italiane 18 December 2020.

¹²⁴ E.g. Alba Leasing 2018; Monte dei Paschi di Siena 29 May 2017; Findomestic 6 June 2017, finance and banking sector; Hera 4 June 2020.

¹²⁵ E.g. Ducati (automotive) 2018.

¹²⁶ E.g. TIM 4 August 2020; Eataly 15 July 2020.

remote work and can have an “horizontal” impact on the organization and its actors, regardless of the place where the performance is carried out.

The organizational arrangements laid down in the Bayer agreement are based on general criteria such as trust, self-responsibility, a result-oriented culture and the obligation to respect rest periods and maximum work hours as stated in the law. The agreement provides for a set of guidelines to ensure the coordination of work teams and prevent excessive workloads, stress and other side-effects that may have a negative impact on the health of the workers. They include the commitment to reserve only certain time spans during the day for the organization of meetings, to plan breaks between different meetings held at distance, to alternate desk work with moments of physical activity. In accordance with the philosophy that inspires it, the agreement excludes the recording of the start and end time of the work performance. It is questionable, however, whether this provision complies with the ruling of the Court of Justice of the European Union which recommended that the employer should have in place a system for measuring the duration of the work performance, as a consequence of his general obligation to ensure healthy and safe working conditions.¹²⁷

Another distinctive feature of agile work is the organization of the activity performed remotely by stages, cycles and objectives. Although the law refers to it as a mere possibility, this characteristic represents the most ambitious conceptualization of the instrument, the one that embodies the real idea of “smart work” as outlined in the previous sections.

Collective agreements often invoke this concept in their preambles. A smaller number recall it in their normative clauses.¹²⁸ Nonetheless, also in the latter cases it is difficult to discern the provisions that hold a substantive value from those representing a mere rhetorical expedient. In fact, on the one hand most agreements expressly claim that the agile work mode does not alter the entitlement of the employer to direct and control the execution of the work performance: a remark that may seem at odds with the idea of a less hierarchical work organization. On the other hand, given that the shift of the organizational paradigms in the company necessarily depends, in the opinion of its advocates, on the adoption of a result-oriented approach to the work performance, one may expect to find in collective agreements (at least in those aiming at such paradigm shift) a well-structured governance scheme, addressing at least topics such as the definition of measurable targets, the monitoring and evaluation of the activity and (last but not least) the guarantees enjoyed by the worker, such as the possibility challenge and seek redress of the managerial decisions based on the result-based performance assessment. It is worth noting in this regard that the abovementioned European Framework Agreement on Digitalisation of June 2020 emphasized the importance of a sound coordination between the design of the organizational objectives and the other elements of the organization that potentially affect workers’ rights. In particular, it stated that the targets should be realistic, i.e. their accomplishment should not entail the infringement of the maximum working hours.

However, no such well-structured system is present in the collective agreements. Even in the cases that address the issue in the most analytical way, the definition and the assessment

¹²⁷ CJEU, C-55/18, CC. OO., ECLI:EU:C:2019:402.

¹²⁸ E.g. TIM 4 August 2020; Coop Alleanza 16 December 2020; Fincantieri 17 July 2020; Credito Cooperativo 21 September 2020.

of the targets is simply entrusted to the unilateral initiative of the supervisor,¹²⁹ or to an individual agreement with the worker.¹³⁰ The hazard entailed in such small-scale solutions is that they could either be too weak to live up to the challenge (i.e. to promote a real shift towards a result-oriented organization), or amount to a mere transfer of organizational responsibilities from the employer to the workers. In this sense, the fact that most of the surveyed agreements, as indicated above, introduced only a limited flexibility of working time patterns, can be welcomed as a last-resort safeguard for workers against the abrupt and unregulated shift towards a result-based performance assessment.

8.5. Employment conditions, rights and obligations of agile workers.

While teleworkers under both the EFAT and the AI enjoy a full right to equal treatment *vis-à-vis* their standard colleagues¹³¹, the law n° 81/17 uses a slightly different formulation, which may be deemed to authorize a divarication of terms and conditions of employment to the detriment of agile workers. In fact, Article 20 grants agile workers the right to economic and normative conditions “not lower” than those “globally applied” to workers performing the same job exclusively on the premises, pursuant to the provisions of collective agreements signed at the national, local or company level by the comparatively most representative trade unions of the sector.

Nonetheless, this potential discrepancy is mitigated by collective agreements, which generally specify that agile work does not involve any change in the position held by the worker within the organization and in the economic and normative conditions enjoyed by the same.¹³²

In spite of this, an issue has been raised, especially in the wake of the pandemic, with regard to the entitlement of agile workers to specific rights such as meal tickets, the compensation of overtime and short leaves. Collective agreements in the pre-pandemic period usually excluded agile workers from those benefits and compensations, under the assumption that they would be unjustified given the broader organizational autonomy generally enjoyed by those workers. The fact that many post-pandemic agreements have reversed this approach, and now recognize these prerogatives also to agile workers, at least in the cases where the flexibility to organize one’s own schedule is materially limited, may indicate the start of a new bargaining strategy on the trade union side, or the sign of an increased awareness on the material needs of agile workers.¹³³

To the same direction of fairer economic arrangements for agile workers point the provisions of the most recent agreements, that grant them a compensation for the

¹²⁹ E.g. Fincantieri 17 July 2020, metalworking.

¹³⁰ Coop Alleanza 3.0 16 December 2020, Trade and Services.

¹³¹ Article 4 of the EFAT, entitled “Employment conditions”, stipulates that “teleworkers benefit from the same rights, guaranteed by applicable legislation and collective agreements, as comparable workers at the employers premises”.

¹³² E.g. HBG Online gaming 3 February 2020, trade and services sector; similarly Ducati 2018, automotive/metalworking; Hera 2018.

¹³³ E.g. Fastweb 29 September 2020; TIM 4 August 2020.

“infrastructural” costs incurred for the execution of the remote activity.¹³⁴ This can be interpreted as another hint of a progressive reconciliation between the regulations of agile work and telework in terms of equal treatment.

At the current state of technological development, the adoption of digital and remote communication devices in the work organization pose challenges that were not predictable, at least in their intensity, at the time the framework regulations on telework were enacted. Disconnection and surveillance probably are, as it is well known, the issues that require most urgently a new regulatory setting equipped to tackle such challenges.

With regard to disconnection, the majority of collective agreements adopt a “soft” normative approach, consistently with the recommendations given by the European Framework Agreement on Digitalisation of June 2020. They often stipulate that the worker is entitled to ignore calls and e-mails received outside the working hours.¹³⁵ Nevertheless, they usually refrain from introducing more specific enforcement mechanisms. Only in a few cases the worker is specifically granted a right to log-off and deactivate the work devices.¹³⁶ Interestingly, in one case disconnection is qualified as a right/duty, thus emphasising that the worker, by properly organizing his/her working hours, fulfils his/her obligation to cooperate with the employer for the realization of safe and healthy working conditions.¹³⁷

However, in the majority of cases the signatory parties expressly pursue an alternative approach, claiming the refusal of any sort of automatism (such as the mandatory shutoff of devices and connections at the end of the reference period) and the willingness to promote adequate cultural conditions and good organizational practices, such as the belated delivery of e-mails and the limitation of time slots suitable for holding meetings, for instance avoiding the organization of meetings during lunch breaks.¹³⁸

As far as control and surveillance are concerned, collective agreements that address the issue basically reaffirm the employer’s obligation to respect the limits and conditions set out by article 4 of the Workers’ Statute, which is referred to also in the agile work legislation (article 21, law n° 81/17). Only a few of them expressly commit the employer not to install remote surveillance devices.¹³⁹

Article 4 is indeed the central provision on employee remote surveillance in Italian labour law, but several questions remain open as to its application to the forms of work enabled by digital technologies, such as agile work. Under this provision, remote surveillance is not prohibited *per se*, but it is surrounded by a range of substantive and procedural limitations. The crucial point is that the law itself exempts the equipment directly functional to the execution of the work performance from the limitations that generally operate in case of installation of remote surveillance devices. Therefore, one may argue whether the extensive and in-depth “data analytics” practices (e.g. the measurement of keystrokes), that are becoming increasingly available, and that can be used as a means to indirectly ensure a

¹³⁴ E.g. ING Bank 4 August 2020.

¹³⁵ E.g. Fastweb 29 September 2020, telecommunication sector; Credito Cooperativo 21 September 2020, banking sector.

¹³⁶ E.g., Poste Italiane 18 December 2020.

¹³⁷ Coop Alleanza 3.0, 16 December 2020.

¹³⁸ E.g. TIM 4 August 2020.

¹³⁹ HBG Online gaming 3 February 2020; Findomestic 6 June 2017; Eataly 15 July 2020.

pervasive control on remote workers, fall under this exemption, and to what extent they can be admitted and used for performance appraisal purposes. Lacking straightforward indications from the law, as it has been observed above (section 6.2.3), collective bargaining may represent a powerful source to introduce clarity and bring forward shared solutions, capable of fulfilling organizational needs while containing managerial powers for the benefit of workers' rights. In this sense, the current state of collective bargaining speaks of a missed opportunity.

8.6. Collective relations.

A large number of agreements deal with the possibility for agile workers to exercise trade union rights on the same terms as on-premise workers. The arrangements envisioned for this purpose range from the activation of electronic boards to the participation in trade union meetings via digital platforms.¹⁴⁰

Trade unions and/or works councils are often involved in the periodical monitoring of the implementation of agile work in the company.¹⁴¹ Joint monitoring is indeed the most frequent mechanism, whereas in other cases the same activity is carried out unilaterally by the management with a simple follow-up information to the trade unions.¹⁴²

Except for this general form of involvement, other cases of intervention of workers' representatives in more specific matters concerning the "daily" implementation of agile work in the company are very rare. An example is the agreement signed at Credito cooperativo on 21 September 2020, which provides for the joint examination of the compatibility of the technical characteristics of a job with the remote modality by the management and the trade unions. In other cases, the bilateral bodies established in the company may be activated to the extent that a specific issue related to the implementation of agile work cross-cuts their filed of competence.¹⁴³

9. Conclusions.

As it was explained above, a simplified version of agile work has been allowed by the Italian Government in order to facilitate its use during the pandemic. The pandemic experience has in turn stimulated a still ongoing debate about whether and how the current legal regulation should be amended, and what role industrial relations should play in a renovated regulatory framework.

With a view to the post-pandemic scenario, the observations collected in this essay indicate two possible directions for further research and policymaking: the necessity of a

¹⁴⁰ E.g. ENEL 9 June 2020; TIM 4 August 2020; Fastweb 2020.

¹⁴¹ E.g. Ericsson 7 February 2019; Poste italiane 18 December 2020; Fincantieri 17 July 2020.

¹⁴² E.g. Credito cooperativo 21 September 2020; Hera 2018.

¹⁴³ Like equal opportunities, diversity, health and safety: ENEL 9 June 2020.

more intense and structured action on the collective bargaining front, and the opportunity of a renewed rulemaking intervention at the EU level.

The preliminary step in this direction requires to clarify the difference between the two schemes of agile work and telework. The review of the contractual arrangements on agile work that has been developed above shows that the social partners so far have shown a cautious approach to the most innovative and potentially disruptive (or, to put it differently, “smart”) elements of organizational flexibility that the law encourages to implement, i.e. those related to working time and the result-oriented control of the work performance. On the other hand, some issues that the law leaves largely unsettled, and that would instead require a careful and precise regulation, like remote surveillance and the right to disconnect, still lack a sufficient attention in collective agreements.

As a result, the purported differences between agile work and its ancestor telework seem to shrink in empirical terms. Therefore, the idea that the advent of agile work, as an alternative form of remote work unleashed from the regulatory ties of the “institutionalized” telework, may have been prompted by the “outdated” rigidities of the latter, remains ultimately not demonstrated. Indeed, it was noted above that the general framework of telework did not prevent the social partners, especially at the company level, from experimenting flexible arrangements, particularly with regard to the choice of the workplace, the time schedules and the possibility to alternate on-site and remote performances. Nor the formal-definitory difference concerning the use of technological equipment for the execution of the activity (necessary in telework, only potential in agile work) can be relevant, as digital devices are constantly present in the contractual arrangements of agile work.

One may argue that a more meaningful difference between the two schemes may rather be found in the distribution of costs and responsibilities between employers and employees. As it has been noted, the telework regulations affirm clearly the accountability of the employer on each aspect of the employment relationship whose functional development partially deviates from the standard as a consequence of its remote setting. In this way, the rules restore the normal legal patterns, from workplace safety to equal treatment and the coverage of the maintenance costs. The legal schemes of agile work are looser in this regard: by referring the settlement of various issues to the individual agreement between the employer and the worker, they expose the latter to bear a greater share of the risks. Nonetheless, the most recent collective agreements indicate the first signs of a trend reversal.

It cannot be overlooked, then, that the design and the implementation of a genuinely “smart” work performance require a change of the managerial and organizational approach, which, except in rare cases, does not seem to have been undertaken those who are in charge of it.

Against such background, the review of the Italian experience suggests that an update of the established general framework on telework, far from representing a backward leap, may still be a feasible strategy to adapt the regulatory toolkit to the new conditions stemming from the advancement of digital technologies (e.g. disconnection, control and performance assessment), while at the same time preventing the excessive fragmentation of the terms and conditions applicable to remote work.

A renewed action by social partners at the EU level, aimed at updating the “old” 2002 Framework Agreement, may thus offset the proliferation of “exceptional” experiences prompted by the pandemic emergency at the level of the Member States, and help keeping them within a unitary set of rules and principles.

It should also be considered that the issues that have recently emerged in the agenda for a new regulation of ICT-enhanced remote work, like the right to disconnect and the others that have been repeatedly mentioned above, actually do not affect this form of flexible work alone. They extend in fact to a broader area, that in the long run will likely encompass the majority of employment relationships. This impression is echoed in the “inclusive” approach taken by most recent initiatives undertaken by social partners and lawmakers at the EU level, like the Framework Agreement on Digitalization and the Parliament’s Proposal for a Directive on the right to disconnect.

Therefore, it seems possible to envisage two ways forward: the new regulation of telework could draw from, and align with, the developments that are already being prepared within the EU institutions; or, on the contrary, the reform of telework could represent a laboratory for innovative solutions that could then be extended to other areas of the new “digital labour law”.

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