

## THE DIGITALISATION AND THE EMPLOYMENT RELATIONSHIP

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### **Abstract**

*This paper is a review of some possible consequences that digitization has on the employment relationship. Thus, were considered the need to clarify the division of responsibilities between man and technology, the importance of training and professional conversion and aspects related to the redefinition of performance assessment and responsibility, in cases where there is a significant involvement of technology in the execution of job duties. Platform work was also considered.*

**Keywords:** *digitalization, employment, platform work, telework.*

The concept of the industry and the relating labour relations have been changing and evolving since the first industrial revolution (industry 1.0) until nowadays, when digitalisation and artificial intelligence create a revolution which is different in scale, scope and complexity from any that have come before, industry 4.0 [1]. The successive industrial revolutions were characterised by a massive shift of jobs from the primary sector (agriculture) to the secondary sector (manufacturing) and further to the tertiary sector (services), question which opens the debate about the characteristics, opportunities and risks of the quaternary sector [2]. Frey and Osborne [3], two Oxford researchers, have forecasted in 2013, based on statistics and job taxonomies from the USA markets, that jobs threatened by digitalisation would represent about 40 per cent of existing jobs. An OECD study [4] has found some more optimistic results, stating that jobs at high risk of substitution by computers and robots represent an average of 9 per cent in 21 selected OECD countries (including 16 EU countries). During the past three years, digitalisation was enhanced by pandemic, which had a huge impact on labour market, in 2021 half of restructuring being attributable to COVID-19 [5]. Digitalisation requires and offers flexibility from and for the employees, in an era where agile working seems to be the future. Agile working is based on decentralized methods of work, the employees being empowered to succeed with minimal restraint and maximum responsibility in a flexible

environment and relationships. The main issues characterising the agile working are time, space, collaboration and even role, which are combined to optimize performance and deliver best in class value.

The agile working, the smart working, the working from anywhere, the telework are part of the new vocabulary related to work and employment relationship and require knowledge and skills that shall be built before starting to provide the actual work. The characteristics of these new forms of work are still in progress and only the telework has a definition under Romanian law [6]. The law no. 81/2018 regulating the telework defines it as the form of work organization through which the employee, on a regular and voluntary basis, fulfills the specific duties of the function, occupation or job that he holds in a place other than the workplace organized by the employer, using information and communication technology. This definition is consistent with the approach of ILO, which envisaged that „telework is a subcategory of the broader concept of remote work. It includes workers who use information and communications technology (ICT) or landline telephones to carry out the work remotely. Similar to remote work, telework can be carried out in different locations outside the default place of work. What makes telework a unique category is that the work carried out remotely includes the use of personal electronic devices” [7]. Or, the use of personal electronic devices may require advanced information and communications technology skills. Therefore, by training, the employer opens the opportunity for the employees to access jobs that follow the industrial development and trend. Moreover, performing an ICT job is also a matter of wage level, since workers in jobs with advanced information and communications technology skills needs benefit from an hourly earnings premium of about 3.7% compared with those in jobs with basic ICT skills needs [8].

In order to have access to the new forms of work and to enhanced digitalised tasks, the employees need to get the relating knowledge and skills. Under Romanian law, any employee has the right to be trained (Article 39 para. 1 lett. g of the Labour Code) and the employer shall ensure the participation of every employee to vocational training, at least once every two years, when it has at least 21 employees or at least once every three years, when it has less than 21 employees (Article 194 para. 1 of the Labour Code). Moreover, the expenses related to such vocational training shall be borne by the

employers. An employer with more than 20 employees shall develop and apply annual vocational training plans, after consulting the trade union or, as the case may be, the representatives of the employees. One of the main objectives of the vocational training of the employees stated by the Labour Code (Article 192 para. 1) are accommodating the employee to the requirements of the job or workplace (lett. a); updating the knowledge and skills specific to the job and workplace and improvement of the vocational training for the basic occupation (lett.c); and acquiring advanced knowledge, modern methods and procedures, necessary for the professional activities (lett. e). Although the general legal framework of vocational training is established, there are no instruments to encourage the efficient implementation of these provisions. The training remains at the level of the employer, who, depending on the interest of the employees and their representatives, can manage it more or less efficiently. In view of the need to bring the workforce to the level of knowledge required by digitization, a more resourceful training system like, for example, the French one, could be taken over in Romania. One of the components of the training system refers to the employer financial contribution to a budget dedicated to the development of the employee's skills - „the personal training account”. The personal training account can be used by the employee throughout the entire working life (including during periods of unemployment) to take qualifying or certifying training. Therefore, the training budget follows the employee and enhance his motivation to acquire knowledge and skills. Moreover, according to the same French training system, the state could finance the professional conversion of employees of the companies which are changing sector, experience a sustainable decline in their activities or experience recruitment needs in sustainable professions (as it is the case of French Transitions collectives (TransCo) of Fonds National pour l'Emploi).

Some other matter that should be taking into consideration in relation to the digitalisation of work is the rigorous description of the content of the job duties in the context of the current shift from the traditional work task, where the human factor was predominant, to the industry 4.0 tasks, where the AI and information and communications technology acquire a significant importance in the performance of work. Since a task may be carried out in a close interdependence between man and technology, the job description should provide detailed information of the nature of the tasks, specifying the

degree of responsibility of each component, human and technological. If in traditional work the human factor uses or controls the machine, in the new technological reality the non-human element acquires the right to impose a certain behaviour or certain decisions on the human factor. To give a rather simplistic example, a bus driver shall be obliged to follow the instructions given by a software application which provides real-time driving directions based on live traffic updates. The will of the employee is limited to the execution of the information obtained through the technology and any deviation should be thoroughly motivated. In this new human-technology relationship, at least two aspects must be rethought, namely the assessment of the employee's performance and the employee's responsibility.

Under Romanian law, the employer is entitled to establish individual performance objectives, as well as the evaluation criteria for their achievement (Article 40 para.1 lett. f of the Labour Code). When the tasks are individual, the performance assessment follows the rules set by the legal and organisational psychology studies. But digitalisation created new forms of tasks and working arrangements. In the cases when the employee's activity relies on the AI or highly digitalised programs, the performance assessor shall determine with more proficiency and technical knowledge the amount of performance (or lack of performance) generated by the technology used. Therefore, the evaluation criteria should take into consideration the double input, human and technological, in achieving each task.

Regarding the employee's liability, regardless whether it is of criminal, patrimonial or disciplinary liability, it is to be demonstrated that the deed was committed by the employee, freely, as a result of a volitional process that he controlled.

Digitization also brings other changes in the field of labour relations, resizing the traditional employee-employer relationship. One of these changes is already on the market and has generated intense legislative and judicial debates - the platform work, which is the subject of a European directive proposal. According to the proposal, the platform work is defined as „means any work organised through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform and the individual, irrespective of whether a contractual relationship exists between the individual and the recipient of the service” [9]. The platform worker would be, according to the proposed directive, any person

performing platform work who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in the Member States with consideration to the case-law of the Court of Justice. Under the Romanian applicable law, there are no specific provisions regulating this specific work arrangement. An employer and an employee are obliged to choose between indefinite and limited duration employment contract, for full time or part time, in rather inflexible limits established by the individual employment contract whose contents are set by the Labour Code. The regulation of platform work must therefore be carried out through special provisions, adapted to the reality of the relationship between the parties. Under the proposed directive, the platform work involved three types of actors, namely the digital labour platform, the person performing platform work (who can be a platform worker or not) and the recipient of the service.

A digital labour platform can be any natural or legal person providing a commercial service which meets all of the following requirements: (a) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application; (b) it is provided at the request of a recipient of the service; (c) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location. In order to prevent the artificial expansion of labour relations over commercial relations, the organisation of work performed by the individual shall constitute not merely a minor and purely ancillary component, but a „necessary and essential component”, which is similar to the characteristics of the employment relationship.

However, the directive aims to protect the employee and the work relationship, in the sense that it establishes a legal presumption of employment relationship. At the core of this legal presumption is the notion of *controlling the performance of work*, which means that the employee's subordination to the employer is maintained as a fundamental element of the employment relationship.

Under the proposed directive, controlling the performance of work shall be understood as fulfilling at least two of the following:

(a) effectively determining, or setting upper limits for the level of remuneration;

- (b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
- (c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;
- (d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
- (e) effectively restricting the possibility to build a client base or to perform work for any third party.

The delimitation will not always be easy to achieve, since a number of the previously mentioned criteria are also used in the field of commercial relations, where the specifics of the activity require a control of one contractual partner over the other. For example, it is specific to the franchise contract that the franchisor has a significant control over how the franchisee respects rules regarding the relationship with customers, the quality of services, working hours, etc.

Regulation of the platform work is necessary and urgent, since over 28 million people in the EU work through digital labour platforms [10] and in 2025, their number is expected to have reached 43 million [11]. A report [12] based on the comprehensive analysis of more than 320 judgments and administrative decisions on the classification of platform workers in the sixteen European countries where such decisions have been up to and including August 2022 pointed out the difficulty to draw overall conclusions on dominant patterns in national case law. The causes are multiple, from the heterogeneity of platforms and the scarcity of case law on some platform types to the inconsistency of the judicial assessment in many countries.

The short presentation above shows that the transition to industry 4.0 has significant effects on the employment relationship and that the legislator must provide employers and employees with the necessary legal means to adapt the employment contract to the realities that characterize the activity in the enterprise. For their part, employers must ensure that their employees can make the transition to 4.0 workers, providing adapted professional training and, where appropriate, professional conversion.

Employees must adapt to the new realities of work and acquire the knowledge and skills that will allow them to carry out the new types of work, such as agile or smart work.

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