

An unprecedented social solidarity stress test

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Abstract

While much of the emphasis has been on when and how economies may safely re-open due to the coronavirus pandemic, this article studies the undervalued workplace considerations therein. The initial responses of Member States to the pandemic are outlined for the purpose of setting out similarities and distinctions, but also and mostly to foreground an analysis to date of unresolved problems related to work. Important points for continued monitoring are also identified and an overview of some of the employment law considerations in re-opening workplaces are critically assessed. Consequently, teleworking garners particular attention due to its prominent role during the lockdown and its possible growing place in labour law in the near future.

Keywords

Covid-19, income support, essential services, telework, workplace, state intervention

I. Introduction

On 11 March 2020, World Health Organisation (WHO) Director-General Dr. Tedros Adhanom Ghebreyesus declared Covid-19 had reached the level of a pandemic.¹ The announcement date

1. World Health Organisation, 'WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020', www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-11-march-2020.

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marks a convenient point for canvassing and then analysing governments' actions regarding employment. Since that time, there has been a preoccupation with discussions surrounding recession, depression, and other downward economic measurements. Given the amount of money that has been spent in order to maintain a sizeable number of workers while businesses have largely been temporarily closed due to the pandemic, the possibility of austerity measures or tax increases looms. The International Labour Organisation (ILO) estimated in March 2020 that 25 million jobs would be lost due to Covid-19.² The International Monetary Fund (IMF) predicted, in April 2020, the global economy would contract by about 3%,³ with the growth figure amongst advanced economies (such as France, Germany, Italy, the UK and the US) being about -6.1%.⁴ In May 2020, the European Commission estimated a contraction of about 8% in EU GDP, with a 'rebound' of 6% in 2021.⁵ It also forecast the euro area rate of unemployment as approximately 9.5%.⁶

Without getting ahead of the immediate health crisis of Covid-19, this pandemic challenges the status quo regarding employment and the economy in the coming years. Still, the longer-term effects of the pandemic of 2020 lie further ahead than the more immediate planning for a return to work, as well as managing a fluid situation until (if) a vaccine (or pharmaceutical treatment) is developed and widely available. This article focuses on the more immediate planning for a return to work where many uncertainties remain. To further illustrate the point, consider the IMF statement in April 2020 as an orthodox response to the pandemic: 'This crisis will need to be dealt with in two phases: a phase of containment and stabilization followed by the recovery phase.'⁷ A step is missing. The preoccupation with thinking about a time when Covid-19 has passed has meant that we are in danger of overlooking matters of more immediate urgency. An important bridge between containment and recovery is currently underdeveloped and it centres on how countries deal with the work(place) implications of the pandemic. Dealing with the virus at the workplace level must be one essential pillar in any overarching response. It may additionally prompt a reconsideration of the organisation of the workplace and its regulation at the national and European levels.

The workplace requires attention to health and safety considerations which are inextricably linked to the economy. If insufficient steps are taken to limit the virus' spread as individuals return to their workplaces, businesses may again be profoundly impacted and the economic implications extended, with even more far-reaching consequences than anticipated in relation to the lockdown in and around March to May 2020. Equally essential, the role of work in the economy and its purpose when the very health of the population is at stake might need to be reconsidered or at least made an object for further reflection.

The article commences with an overview of measures taken regarding businesses and their workers; calling upon the select country reports which can also be found in this issue. Those pieces summarise the initiatives of Belgium, France, Germany, Ireland, Italy, Luxembourg, Spain, the Netherlands, and additionally, the United Kingdom.⁸ These contributions also offer brief analyses

2. International Labour Organisation, *COVID-19 and the world of work: Impact and policy responses* (18 March 2020).

3. International Monetary Fund, *The Great Lockdown* (April 2020), vii.

4. *Ibid* 5.

5. European Commission, *European Economic Forecast – Spring 2020* (Luxembourg: Publications Office of the European Union, May 2020), 9.

6. *Ibid* 5.

7. International Monetary Fund, *The Great Lockdown* (April 2020), v.

8. An effort has been made to state the law as of 8 May 2020; though some reports have discussed measures passed after that date.

regarding support programmes. Drawing from those submissions, in this piece, country examples are contrasted, and a critical overview of these efforts is offered. The ensuing sections aim to highlight some points for further attention related to what is viewed as a gradual or staggered return to work, as compared to the circumstances faced prior to the pandemic. A concerted effort has been made to factor into the discussion the legitimate concerns of both employees and employers. A role has been played at different levels and stages by social partners in planning, implementing and monitoring measures that have been taken, which includes social dialogue and collective bargaining. However, since the role of trade unions has not been as prominent in all jurisdictions under study, discussion of trade unions is generally muted in this piece and the accompanying national reports. Their opportunities to contribute to government plans vary across the countries discussed herein. The role given to trade unions, especially when contemplating the significant work that has been and will need to be carried out, warrants separate and more lengthy treatment than could be undertaken here.

The final goal of this assessment is to demonstrate that the crisis has revealed some regulatory vacuums with reference to teleworking, while making it essential for many workers without clear (normative) frameworks of at least some basic rights, such as the right to disconnect, an adaptation of the Working Time Directive, and the right of employers to give directions and instructions which may have shifted where teleworking has been introduced. In sum, working from home presents its own challenges for employment regulation.

II. Immediate state responses

The following WHO summation of how Covid-19 may be transmitted hints at the profound challenges faced by states, medical personnel, as well as employers and workers:

When someone who has COVID-19 coughs or exhales they release droplets of infected fluid. Most of these droplets fall on nearby surfaces and objects, such as desks, tables or telephones. People could catch COVID-19 by touching contaminated surfaces or objects, and then touching their eyes, nose, or mouth. If they are standing within 1 meter of a person with COVID-19 they can catch it by breathing in droplets coughed out or exhaled by them. In other words, COVID-19 spreads in a similar way to flu.⁹

Becoming increasingly aware of the disastrous impact Covid-19 may have, states responded at different speeds, depending on the (intensiveness of the) spread of the virus. In the EU, Italy was the first country in Europe to experience a very quick spread of the virus among its population. Hence, Italy's government decided to completely lock down all the activities and movements first within the so-called 'red zone', i.e. the area where the very first cases were detected and where the virus started and quickly spread. Progressively, such measures were extended to broader areas until 9 March 2020, the date on which the entire country was 'locked down',¹⁰ resulting in severe restrictions to leaving the place of residence except to provide for food and medicine, to work

9. World Health Organisation, 'Getting your workplace ready for COVID-19' (19 March 2020), 1. <https://apps.who.int/iris/bitstream/handle/10665/331584/WHO-2019-nCov-workplace-2020.2-eng.pdf?sequence=1&isAllowed=y>.

10. Lockdown has been a relatively uniform term until efforts to re-open businesses around May 2020. There have been essential businesses/services that continued. There has been divergence amongst countries around the world regarding this classification (with one example being construction). Amongst the countries discussed here, lockdown has been fairly uniform since late March 2020 when most retail stores shifted to online sales, food stores remained open, and public transit remained available.

(under certain conditions) and for emergencies.¹¹ A further move consisted of shutting down any non-essential economic activity as of 22 March 2020.¹²

Similar actions could be observed in many countries.¹³ Germany, with its first reported case of Covid-19 at the end of January 2020, took its first measures on 12 March 2020, concentrating on preparing hospitals for the increase in demand for intensive care and ventilation capacity by, where medically justifiable, postponing in principle all plannable admissions, operations and interventions. Other actions at federal level followed suit: a comprehensive package of measures to mitigate the economic effects of the coronavirus, followed various other measures including the use of short time work (13 March 2020) and restricting cross-border free movement (15 March 2020). More particular actions were taken at federal state level. On 27 February 2020, the Netherlands announced its first officially known Covid-19 patient. Three weeks later, on 17 March 2020, the government adopted an ‘Emergency Jobs and Economy Package’. As is the case in many countries, general measures were taken to protect public health including the prohibition of events such as sporting events, concerts or festivals and the closure of public places such as museums, theatres, sports clubs, bars, cafés and restaurants. Shops, marketplaces and public transport could only remain open if the relevant hygiene measures had been sufficiently complied with (e.g., observing the 1.5-metre distance rule). Gatherings in groups in public spaces had been banned and large events were prohibited, people worked from home and schools were closed. Spain declared a state of emergency on 14 March, prohibiting all educational, recreational, cultural, sports and commercial activities. Later on, due to the worsening of the pandemic’s spread, all non-essential activities were also suspended. Unlike in other countries, the spread of the coronavirus was much slower in Luxembourg, with its first reported case on 1 March 2020. Nevertheless, Luxembourg decided to take steps from 16 March 2020, closing schools, non-essential public services and universities. By declaring a state of emergency, the parliament has been allowed to undertake special measures to face the pandemic.¹⁴ On 28 February 2020, Ireland reported its first case of Covid-19.¹⁵ The Irish Government moved to a ‘delay’ phase on 12 March 2020, with social distancing and self-isolation for those with symptoms.¹⁶ By 28 March 2020, a lockdown was in place affecting all but essential businesses and movement for food and medical appointments.¹⁷ Some of these measures have been partially or entirely suspended or softened in many countries. As from the beginning of May, certain activities have been reopened and citizens have been allowed to move without the restrictions imposed during the lockdown. Many workers have come

11. Decree of the President of the Council of Ministers of 9 March 2020.

12. Decree of the President of the Council of Ministers of 22 March 2020 and Decree of the President of the Council of Ministers of 10 April 2020. See Marco Biasi’s article on Italy in this volume.

13. Though most did, not all countries participated in the lockdown, such as Sweden. For further information on Sweden see Caroline Johansson, ‘Covid-19 and Labour Law: Sweden’ (2020) 13 *Italian Labour Law E-Journal*, <https://doi.org/10.6092/issn.1561-8048/10774>.

14. See Luca Ratti’s article on Luxembourg in this volume.

15. Raidió Teilifís Éireann (RTÉ), ‘All those in close contact with Covid-19 patient ‘notified’ (28 February 2020), www.rte.ie/news/ireland/2020/0228/1118104-coronavirus-ireland.

16. Department of Health, ‘Statement from the National Public Health Emergency Team - Thursday 12 March’, www.gov.ie/en/press-release/96eb4c-statement-from-the-national-public-health-emergency-team (12 March 2020).

17. Rory Carroll, ‘“Stay home”: Varadkar announces sweeping two-week lockdown’ *The Guardian* (27 March 2020). www.theguardian.com/world/2020/mar/27/stay-home-varadkar-urges-irish-in-drastic-lockdown. See also the article on Ireland in this volume.

back to work, where specific health and safety measures have been adopted; while many others have carried on working from home or continue to have their employment relationships suspended.

While the above summation offers minor hints as to what steps states have undertaken, the key question regarding why states acted when they did and what effect this had will likely be posed of each government at a later stage. Albeit important, this will not be discussed further here. Instead, two primary responses that are relevant in a labour law context have been largely deployed: social distancing – consisting of state-wide policies including mandatory remote working (where available) coupled with stay-home instructions while avoiding meeting people with whom you are not sharing a home – and income support for individuals through state-administered schemes.

In this section, social distancing is not separately discussed because it pervades each of the sub-topics below. The discussion commences with a synthesis of the income support plans undertaken by the countries under study. Engagement with work that has continued during the lockdown follows the section on income support. It is an engaging topic for there is a refreshing change in perspective on essential work precipitated by the pandemic. Extending the attention to essential workers, health and safety issues offer a stark reminder of the peril those in this cohort face when they go to work.

A. Income support

Across the states, similar income support¹⁸ arrangements have largely been devised to assist businesses and workers: a temporary wage subsidy, unemployment allowance, means to assist working parents, sick pay and assistance for the self-employed.¹⁹ On the whole, the aim of these plans has been to provide some income for residents²⁰ who support themselves through paid work. None of the schemes have purported to provide 100% income replacement; nor have they assured continued employment after the measures have ceased. For those who have lost their positions due to the pandemic, some governments have amended unemployment allowances (increasing rates and eliminating waiting periods). Some workers remain engaged and carry out their duties at home or on-site if they are an essential service. Workers from the cohort who are unable to work due to Covid-19 (as well as those who have care responsibilities related to family members suffering from the symptoms of the virus or childcare obligations due to the closure of schools) may also avail themselves of the related sick pay provisions. The extension of income support to the self-employed warrants attention given the rise in self-employment and work characterised as such.

i. Temporary wage subsidy. Overall, many governments have incentivised employers to retain their workers instead of dismissing them due to the consequential downturn in trade with the temporary closure of non-essential businesses. While the ultimate aim of a temporary wage subsidy has been

18. Income support would seem to fit within the first objective of ILO Recommendation 205 (Employment and decent work for peace and resilience). Further elaboration is found in: ILO, *ILO Standards and Covid-19* (23 March 2020), vers.1.2.

19. To comply with the EU state aid rules, Member States' income replacement measures are considered as compatible with the EU's internal market, being qualified as 'aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State' (Art. 107(2)(b) TFEU) or as 'aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State' (Art. 107(3)(b) TFEU). See further https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html.

20. Residents is used here to note that foreign or non-citizen workers have also been impacted.

to sustain as much of the workforce as possible, some countries, such as Italy, Spain, Luxembourg and the Netherlands, encouraged the employers to retain staff at least for a certain period, by extending worker retention schemes funded by public money, and at the same time by prohibiting dismissal or imposing a prohibition on dismissal as a precondition to receiving the wage subsidy. Italy and Spain adopted restrictions on individual and collective dismissal procedures for economic reasons. Italy prohibited individual dismissals on economic grounds and collective layoffs from 17 March 2020 to 17 May 2020, as well as suspending decisions on those that were already pending. Spain declared all dismissals made on economic or force majeure grounds null and void. Employees covered by the Luxembourg scheme cannot be made redundant for economic reasons. Whether these countries will experience a wave of redundancies at a later stage forms an important question seeking a critical answer.

Income support as a temporary wage subsidy for workers (also identified as a job retention scheme) is available from governments providing money to qualifying businesses that retain their workers. It seems that two different systems exist, with the UK on one end of the spectrum and all other countries dealt with in this contribution on the other end. Wage subsidies, with the exception of the UK, can be granted if companies have had to (temporarily) reduce a minimum amount of working hours. Overall, it seems that some Member States have simplified access to temporary wage subsidy schemes (Germany, Belgium,²¹ Italy,²² Spain,²³ France,²⁴ Italy).²⁵ Although access to the schemes has been eased, employers may be required²⁶ or a reduction in the employees' gross wage 10% within one month of a given company (department) (at least 10% of the remuneration of one third of the employees in Germany)²⁷. Scrutiny may be properly directed at the decision to exclude a reduction in working hours from CJRS eligibility. From August 2020, the UK Government will permit some form of part-time work to be performed under its wage subsidy scheme. Note, though, that this scheme is set to expire at the end of October 2020.²⁸ 'Furlough', in the UK, has been defined as applying to those 'employees who have been asked to stop working, but who are being kept on the pay roll'.²⁹ Early in the furlough period, accommodation/food services

21. See further, Frank Hendrickx, Simon Taes, and Mathias Wouters' article on Belgium in this volume.

22. Ordinary Wage Guarantee Fund (*Cassa Integrazione Guadagni Ordinaria*).

23. Temporary suspension of employment (*ERTEs*, '*Expedientes de Regulación Temporal de Empleo*'). In addition, companies in Spain were granted extraordinary exemptions from their Social Security obligations. See further, Manuel Antonio García-Muñoz Alhambra's article on Spain in this volume.

24. See further, Tatiana Sachs' article on France in this volume.

25. Derogatory Wage Guarantee Fund (*Cassa Integrazione Guadagni in Deroga*). See further, Marco Biasi's article on Italy in this volume.

26. An example is the Irish Emergency Measures in the Public Interest (Covid-19) Bill 2020, s.28(1)(3)

27. The Irish approach is a bit more intricate. Technically the temporary wage subsidy in Ireland operates like the CJRS in the UK. However, Ireland has schemes available for a reduction in working hours, depending upon workers' situations. So, there is support in Ireland for reduced hours, but it does not operate in a manner similar to that of other EU Member States discussed herein. For further details, see the report on Ireland in this volume.

28. Her Majesty's Treasury, 'Chancellor extends furlough scheme until October' (12 May 2020), www.gov.uk/government/news/chancellor-extends-furlough-scheme-until-october.

29. Daniel Ferguson, 'FAQ: Coronavirus Job Retention Scheme' CBP 8880 (House of Commons Library, London) (9 April 2020), 8. On its first day, 185,000 firms submitted claims for the CJRS, with 1.3 million employees being furloughed: HM Revenue & Customs Twitter feed https://twitter.com/HMRCgovuk/status/1252616495407992834?mc_cid=18b23520d5&mc_eid=%5bUNIQID.

(40%)³⁰ and construction (30%) industries comprised the majority of furloughed employees in UK businesses which continued to trade.³¹ The education and information/communication technologies sectors in the UK had the lowest numbers of furloughed workforces.³²

Income support levels differ among the Member States, although some increased the support. Employees in Ireland initially received up to 70% of take-home pay per month;³³ increased to 85% for the lowest paid (those earning up to EUR 24,400).³⁴ This figure is 80% in Germany (87% for employees with children, both paid under the condition that it does not exceed 12 months)³⁵ and Luxembourg (on the condition that it does not exceed 1.022 hours in total per year, is not less than the statutory minimum wage and not more than 250% of that wage). The UK also provides 80% of take-home pay to a maximum of GBP 2,500 per month.³⁶ In the Netherlands, an employer experiencing a 100% decrease in turnover is entitled to a subsidy of 90% of the wage sum (i.e. the wage for social insurance purposes up to a maximum of EUR 9,538 per employee per month) over the period between 1 March 2020 and 31 May 2020.³⁷ If the decrease in turnover is lower, the subsidy will be reduced accordingly.³⁸

While wage subsidies may help in avoiding bankruptcies, a question persists as to whether, in some cases at least, this will only postpone dismissals to some point in the near future. Thus, countries which offer both options of income support as a wage subsidy and unemployment without any restrictions to the use of redundancies or dismissals will be of particular interest in assessing whether employers have made a decision to retain staff or to immediately reduce staff (thereby putting workers on unemployment allowance). This depends on the dismissal law protections in place and/or the business (sector) itself; with some countries having introduced particular prohibitions at least in the short-term, and what the expectations are in terms of re-opening. What may arise is that income support bridges the gap until employers make determinations regarding staff; at which point the redundancy regime may be affected. Notably, the size of workforces will likely be trimmed, in some sectors more than in others,³⁹ because of the

30. Where 81% of businesses in this industry had temporarily closed or ceased trading: Office of National Statistics, 'Furloughing of workers across UK businesses: 23 March 2020 to 5 April 2020' (23 April 2020), 5.

31. *Ibid* 3.

32. '[B]usinesses that continued trading, with 3% and 6% of furloughed staff respectively, and in businesses that had temporarily ceased trading, with 13% and 24% respectively': *Ibid* 7.

33. Department of Business, Innovation and Enterprise, 'Government announces National Covid-19 Income Support Scheme' (24 March 2020), <https://dbei.gov.ie/en/News-And-Events/Department-News/2020/March/24032020.html>.

34. Department of Finance, 'Minister Donohoe announces update to the Temporary Wage Subsidy Scheme to ensure greater staff retention and links between employer and employee' (15 April 2020), www.gov.ie/en/news/c3e1eb-minister-donohoe-announces-update-to-the-temporary-wage-subsidy-sche.

35. Bundesfinanzministerium, 'Kurzarbeitergeld in der Coronakrise' (23 April 2020), www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Schlaglichter/Corona-Schutzschild/2020-03-19-Beschaeftigung-fuer-alle.html. Initially, the benefit paid by the Federal Employment Agency (*Bundesagentur für Arbeit*) covered 60% of the net loss of wages and 67% for employees with children.

36. Her Majesty's Treasury, *The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction* (15 April 2020), [7.1].

37. The decrease in turnover can take place in a different period, see eligibility.

38. See Hanneke Bennaars' article on The Netherlands in this volume.

39. Sectors that most likely will experience a long-term disruption with bankruptcies and layoffs: entertainment, tourism, restaurants, transportation, and aviation.

sense of uncertainty that pervades. Indeed, some businesses may close permanently (as some have already).⁴⁰

Arguably, income support delays many questions regarding future employment (including force majeure, where an employee is unable to attend at work due to quarantine, self-isolation, sickness, public transit shutdown or the diminishing of those services). Not all Member States, however, are adopting income support through employers. In Belgium, the state has increased the allowance for employees who are temporarily unemployed due to force majeure or economic reasons to 70% (up from 65%) until 30 June 2020. Still, the triggering of force majeure clauses deserves monitoring as this situation develops.

ii. Unemployment allowance. For those employees who have lost their jobs due to Covid-19 or where there is no temporary wage subsidy, unemployment payments may be available. Not all workers that are part of the temporary wage subsidy will, and can, automatically be retained. However, retaining a workforce with significant state subsidies in place must be viewed as a significant step in recognising the concerns in increasing unemployment figures and payments. Thus, there are foreseeable difficulties where a large pool of workers seeks employment simultaneously, competing for what are likely to be fewer available positions as workplaces return to business. Particularly problematic is the situation of atypical workers, such as fixed-term and on-call workers, whose employment relationship has come to an end.⁴¹ For them, wage subsidies are not available and even though, in theory, unemployment benefits may be available, often the legal conditions are framed so narrowly so that they are not yet eligible. Overall, decreases in unemployment rates will not be uniform across the EU due to the uneven effect of Covid-19 on Member States, coupled with existing vulnerabilities.

In Luxembourg, despite the prohibition to dismiss employees covered by the *chômage partiel* income support scheme, as of 31 March, 18,398 unemployment claims had been processed by the Luxembourgish employment agency, showing an increase of 17.5% in comparison to last year. Consequently, the Luxembourg government extended all unemployment benefits for the duration of the pandemic crisis and conditionalities have been softened.⁴² Belgium has liberalised its use of temporary unemployment during the pandemic. As Hendrickx, Taes, and Wouters explain in this volume:

Temporary unemployment provides for a mechanism whereby, in cases where an employment contract needs to be temporarily interrupted (suspended) for economic reasons or for reasons of force majeure, an employer is allowed to suspend the work activities as well as the payment of wages, while the employee concerned is entitled to an unemployment benefit borne by the social security system.

And so, in Belgium, the government's action has effectively interpreted temporary unemployed due to force majeure in a flexible manner; one that carries implications which may be interpreted as limited to the pandemic situation. Germany's short-time work regulations are accustomed to large numbers because of its success during the 2008/09 economic crisis. Preliminary data from the Irish Central Statistics Office suggests that the preponderance of workers (283,037) passed through the

40. The restaurant chain Carluccio is one example. See *In the Matter of Carluccio's* [2020] EWHC 886 (Ch), where the court held that super-priority payments were to be made to furloughed employees in the circumstances.

41. See Hanneke Bennaars' article on the Netherlands in this volume.

42. See Luca Ratti's article on Luxembourg in this volume.

unemployment payment, compared with 25,104 individuals treated under the temporary wage subsidy.⁴³ By 15 April, this figure increased to 43,000 companies.⁴⁴ For April 2020, the Irish unemployment rate (treating all Covid-19 unemployment payment recipients as unemployed) was 28.2%.⁴⁵ The Irish Government's increase of 15% (from 70% to 85%) for the temporary wage subsidy of lower wage workers suggests its level of concern regarding the disparity in figures.

If we extrapolate from the Irish data and the figures remain in this proportion, a more profound challenge emerges because state incentives to retain workers through temporary wage subsidies as opposed to termination due to the pandemic will not have yielded a significant uptake which was part of their aim. While payments at the lower end may have been less than what workers would have received in unemployment allowance, the fear must be deeper. It speaks to the uncertainty businesses have in the immediate future and how this sentiment guides their cautious approach to the immediate circumstances.⁴⁶ Employers that immediately turned to trimming their workforce may have taken long-term decisions (how to keep a business running with a proper amount of staff) more quickly. While this might be justified by their plight, it remains to be seen what impact this may have on the labour market in general.

Those who do not find positions remain dependent upon the state until such time as they can find work. The temporary wage subsidy represents more than just the state taking significant action in rare circumstances. The subsidy signifies a linkage between industry and government that betrays the limitations of free market governance. Additionally, it underscores, only a few years after the Great Recession, how dependent countries have become upon the globalised economic framework.

iii. Sick pay. Eligibility for sick pay ranges from those with Covid-19 to those required to self-isolate due to exhibiting symptoms. An employee suffering from the coronavirus is released from the obligation to work⁴⁷ and remains entitled to remuneration paid by the employer in full for a period of up to six weeks if s/he has fallen ill through no fault of their own.⁴⁸ Like in Germany and Italy, there have been no specific new measures or amendments made regarding rules on sick pay in the Netherlands. Therefore, under Dutch law, and this is quite exceptional from a comparative view, the employer is, by statute, obliged to pay employees on sick leave for a period of 2 years. During that period, employees are entitled to 70% of their salary up to a maximum of 70% of the maximum day wage (currently EUR 219.28 gross per day). On the other hand, in Ireland, this payment has been increased to EUR 350 per week and the waiting period until benefits may be accessed has been waived (a six-day wait period).⁴⁹ In the UK, Statutory Sick Pay of GBP 95.85 per week has been available for employees for up to 28 weeks from

43. www.cso.ie/en/csolatestnews/pressreleases/2020pressreleases/pressstatementliveregistermarch2020.

44. www.gov.ie/en/news/c3e1eb-minister-donohoe-announces-update-to-the-temporary-wage-subsidy-sche.

45. The Central Statistics Office, 'Press Statement Monthly Unemployment April 2020' (8 May 2020), www.cso.ie/en/releasesandpublications/er/mue/monthlyunemploymentapril2020.

46. On this point, the IMF wrote in *The Great Lockdown*, 4: 'There is extreme uncertainty around the global growth forecast because the economic fallout depends on uncertain factors that interact in ways hard to predict.'

47. Para. 275(1) and (3) Civil Code.

48. Para. 3(1) 1 Continued Payment Act, *Entgeltfortzahlungsgesetz*.

49. Department of Business, Innovation and Enterprise, 'Illness Benefit for COVID-19 absences', www.gov.ie/en/service/df55ae-how-to-apply-for-illness-benefit-for-covid-19-absences.

employers,⁵⁰ from the first day of illness without the waiting period (for illness arising on or after 13 March 2020).⁵¹

iv. Support for the self-employed. Income support for the self-employed indirectly recognises the increasing prevalence of self-employment in the 21st century. Many countries offer such support, albeit at different levels. While the UK is offering 80% income support to this cohort of workers, the payment system is not going to be ready until June 2020. Irish self-employed individuals may be eligible for the Covid-19 Pandemic Unemployment Payment of EUR 350 or the temporary wage subsidy, depending upon their circumstances. In Belgium, self-employed persons may be eligible for a bridge-right (*droit-passerelle*) amounting to financial support up to EUR 1614.10 per month. In Italy, self-employed workers and seasonal workers were granted an extraordinary allowance of EUR 600 for the months of March and April 2020. Self-employed workers in Luxembourg have been granted a special sum aimed at responding to the lack of liquidity as a direct consequence of the pandemic crisis.⁵² Similarly, in the Netherlands, self-employed persons can apply for income support, depending on the self-employed person's previous income and his household situation, to a maximum of EUR 1,500 (net) per month for a period of three months between March and August. In addition, self-employed persons can apply for a loan for business capital to a maximum amount of EUR 10,157, with a lower interest rate and the possibility to ask for postponing repayment. Support for the self-employed, however, does not seem to avoid the issue that has characterised the 'gig' or platform economy, where employment status has been a frequently litigated issue (often with Uber being the defendant enterprise).⁵³

Offering support for the self-employed constitutes a significant step; principally with regard to the ongoing discussion on differentiating between dependent and independent workers,⁵⁴ the latter bearing their own business risks and remaining responsible to take care of periods of illness and without having work. Given the many uncertain factors stemming from the pandemic relating to work, it is not possible to give a clear statement on the exact meaning of this support measure nor what it might mean for the future. Income support for this cohort may stem from an extended view of assistance to businesses, where self-employed persons should equally be helped by the state. Self-employed persons have been similarly distressed by their financial situation as those who are unemployed.⁵⁵ Still, it remains to be seen to what extent this step becomes an entry point for treating the self-employed more like workers. On the point, the European Commission's urging of Member States, when implementing new law or adopting existing implementations to keep in mind stifling innovation and smothering SMEs or micro-employers, should be not be overlooked.

v. Rights for working parents. The current coronavirus crisis has involved increasing the burden on those employees and self-employed persons who have children requiring care. With schools and

50. 'Statutory Sick Pay (SSP)', www.gov.uk/statutory-sick-pay.

51. Coronavirus Act 2020, c.7, s.40; The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020, S.I. 2020/374, s.2.

52. See Luca Ratti's article on Luxembourg in this volume.

53. The French Court of Cassation (Labour Chamber)'s decision of March 2020 is a more recent example: Cass Soc, 4 mars 2020, Appeal no. S 19-13.316.

54. For a recent decision on this point see the Canadian decision in *Canadian Union of Postal Workers v Foodora Inc*, 2020 CanLII 16750 (ON LRB).

55. Eurofound, 'Living, working and COVID-19 First findings – April 2020' 8.

childcare facilities being closed to the majority of the workforce, except for those in critical jobs, many are juggling working from home with organising home-schooling or home care. Parents in Germany who need to take care of their child(ren) can be released from the duty to work.⁵⁶ This applies to children aged under 12.⁵⁷ It is not in all cases that (nearly) full-time childcare is required, meaning that employees, under German law, for the insignificant amount of time they need childcare, may be entitled to having the agreed remuneration paid by the employer.⁵⁸ In addition, childcare is a reason for unpaid leave of absence and receiving sickness benefits under social law.⁵⁹ Furthermore, from 30 March 2020, a new benefit is available, aimed at compensating for loss of wages and paid by government agencies in case schools or childcare facilities have been closed for reasons of infection control.⁶⁰ Not having special measures in the Netherlands, parents either need to take special leave, which is particularly short in time, or regular (or, as is in the UK, unpaid)⁶¹ leave.

B. Work during the lockdown/isolation period

Two categories of workers fall under this heading: those who can work remotely (i.e. teleworking) and therefore continue to perform their contractual obligations; and those who have been recognised as essential workers. In addition to treatment here, those working remotely also warrant further consideration in the third part of this article under the heading teleworking.

i. Teleworking. Dealing with Covid-19 has involved a huge increase in the proportion of people working from home⁶² as many individuals in non-critical office jobs have carried on throughout the ‘lockdown’ period in their homes.⁶³ Individuals who moved to teleworking largely had previous experience with this form of work; though approximately 24% of workers had turned to teleworking for the first time.⁶⁴ Prior to the pandemic, there were many employers that were hesitant to allow remote working, for reasons of lack of control or reduced levels of commitment.⁶⁵ Covid-19 may have contributed to a change of view as it worked well for many workers. Following data collected by Eurofound, in 2015, approximately on average one fifth of workers

56. Para. 275(3) Civil Code.

57. Para. 45(1) and (4) Social Code V.

58. Paras. 611a(2) and 616 Civil Code.

59. Para. 45 Social Code V.

60. Para. 56(1a) Infection Protection Act, *Infektionsschutzgesetz*.

61. www.citizensinformation.ie/en/employment/employment_rights_and_conditions/leave_and_holidays/parental_leave.html

62. Eurofound wrote that the increase in teleworking was more than a 30% increase, with ‘above 50% in Luxembourg, the Netherlands, Belgium and Denmark, and 40% or more in Ireland, Sweden, Austria and Italy’: Eurofound, ‘Living, working and COVID-19 First findings – April 2020’ 5.

63. The European Commission announced, to mention one example, as of 16 March, all staff in non-critical functions will move to telework. Those, however, in critical functions will continue to be present at work, working in shifts. See European Commission, ‘Coronavirus: Measures introduced for Commission staff’ (12 March 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_445.

64. Eurofound, ‘Living, working and COVID-19 First findings – April 2020’ 6.

65. Oscar Vargas-Llave, Irene Mandl, Tina Weber & Mathijn Wilkens, ‘Telework and ICT-based mobile work: Flexible working in the digital age’ (New forms of employment series, Publications Office of the European Union, Luxembourg 2020) 42, available at: www.eurofound.europa.eu/publications/report/2020/telework-and-ict-based-mobile-work-flexible-working-in-the-digital-age.

teleworked.⁶⁶ Eurofound discovered that there have been enormous differences among the EU Member States, with Denmark at the upper end and Italy at the lower end of the spectrum. Apparently, this diversity may be attributable to ‘a combination of factors, such as a country’s affinity for technology; the availability and quality of its technological infrastructure; management culture and the drive for higher productivity within companies; and employees’ needs for spatial and temporal flexibility to balance work demands with family commitments and other personal responsibilities.’⁶⁷

Clearly, teleworking is available to those working in businesses that did not need to close down or did so only, to some extent, due to a drop in orders. Of course, a matter of concern here is the situation of those on whom a double workload was imposed, namely, working remotely and taking care of their children concurrently. It is expected that working remotely while communicating with colleagues and clients or customers via the internet, may continue after Covid-19. Notably, this puts women at a particular disadvantage, for they continue to have primary responsibility for child and elderly care.⁶⁸ Day-care has been mostly made available to essential workers only, to secure the continuation of essential services.

If it is a means of working that is here to stay for an increasing number of employees, even after the pandemic, teleworking blurs the boundaries between work and non-work time, thereby warranting particular attention. Illustrating the complexity of the issue, privacy rights, as protected by Art. 8 ECHR as well as data protection rights, extensively regulated by the GDPR, need to be addressed and assessed properly. This is even more the case where tools are used to trace and track the productivity and location of employees.

Italy introduced ‘agile work’ in 2017⁶⁹ and defined it as a way to perform the employment contract where the employee might carry out his or her duty inside or outside the employer’s premises and without the rigid respect of the working time regulation, with the exception of those limitations imposed by the law or by collective bargaining agreements on the maximum duration of the working activity. It is up to the parties of the employment contract to mutually agree on agile work and determine some basic conditions, within the limits set by the law. The situation in Germany is comparable. Working from home can be instructed by the employer if it has been collectively or individually agreed. It is questionable, though, whether, in case no agreement exists, the employer is entitled to instruct employees based on its right to ‘reasonable discretion’. So far at least, there has been no right for employees to work from home, except where employees cannot be protected efficiently at their current workplace (e.g. due to a medical condition). Of course, in many countries, due to coronavirus, it has been the established practice for employers to, as much as is possible, send workers home to work from there. With the spread of the virus, the Italian Government strongly recommended the recourse to agile work in the private sector where possible, making it lawful even without a previous individual agreement with the employee. Also, in Luxembourg and Spain, the government pushed to increase the recourse to teleworking during

66. Eurofound, ‘COVID-19 could permanently change teleworking in Europe’ (23 March 2020), www.mynewsdesk.com/eurofound/news/covid-19-could-permanently-change-teleworking-in-europe-397966.

67. *Ibid.*

68. Miriam Kullmann & Elisabeth Greif, ‘Time to Wonder: Covid-19 and the Risks of Home Office’ *Regulating for Globalization Blog* (21 April 2020), http://regulatingforglobalization.com/2020/04/21/time-to-wonder-covid-19-and-the-risks-of-home-office/?doing_wp_cron=1587567347.7276721000671386718750.

69. Maurizio Del Conte & Elena Gramano, ‘Looking to the other side of the bench: the new legal status of independent contractors under the Italian legal system’ (2018) 39 *Comp Lab. L. & Pol’y J.* 579.

the pandemic. No particular rules exist in the Netherlands. Apart from negative experiences, teleworking has also brought positives: some employees seem to be more productive; there is more time due to the (temporary) disappearance of daily commuting. The present may be the time to open the discussion on introducing a right to teleworking for employees, as is being discussed in Germany (where it returned to the agenda due to Covid-19).⁷⁰ It might be difficult to get a political consensus on this issue, for one, because some employers might experience or perceive negative repercussions if they cannot ‘control’ their workforce. Nevertheless, such a right might be a valuable addition that benefits workers.

ii. Essential workers

Labour law has long known the term ‘essential services’ as a phrase relating to public sector work and the prohibition on certain areas of public service being shut down by strike action. Essential services are required, in such circumstances, to continue to operate with a reduced staff. The 2020 pandemic expanded what constitutes essential services. Around the world there has been no fixed definition, but essential services have largely included health services, food stores (including deliveries), pharmacies, banks, public transport, police, and government offices related to the crisis (such as health and the treasury). Of those named, workers at food stores stand out because these are not skilled positions (requiring some level of training) and are not known for high levels of remuneration. And yet, these front-line workers – the workers who stock shelves, provide fresh food, and operate cash registers – may perhaps be the most visible in this challenging situation.⁷¹ Recognition of their contribution has been noted by public figures, but has also come in more tangible forms such as pay increases and use of state-provided childcare.⁷²

Although an extended discussion would divert from the present topic, it is valuable to note that the term ‘essential services’ does not mean one type of worker, but instead denotes a wide-range of contributions from across the workforce. Essential workers usually are defined by listing a range of activities, as has been done in the German Covid-19 Working Time Regulations⁷³ which allows extending working days up to 12 hours, if necessary to maintain public safety and order, provide health care and nursing care, and services of general interest or to supply the population with essential goods. In addition, there is a growing attention to the female side of the crisis, as nurses and supermarket staff (high numbers of which are women) fight in the front lines against the virus. However, at the same time, it appears that closures and layoffs hit female-dominated sectors harder, such as tourism and retail. It follows

70. E.g. Sybille Haas, ‘Recht auf Heimarbeit’ *Süddeutsche Zeitung* (27 April 2020), www.sueddeutsche.de/wirtschaft/arbeitswelt-recht-auf-heimarbeit-1.4889842; Arbeit und Arbeitsrecht, ‘Kommt der gesetzliche Anspruch auf Home-office?’ (8 January 2019), www.arbeit-und-arbeitsrecht.de/schlagzeilen/kommt-der-gesetzliche-anspruch-auf-home-office/2019/01/08.

71. Several Canadian grocers increased pay for workers (up to CAD 2 per hour) in recognition of the important contribution made: ‘4 major Canadian grocers give front-line workers a raise during COVID-19 pandemic’ *CBC News* (23 March 2020), www.cbc.ca/news/canada/nova-scotia/sobeys-grocery-loblaw-metro-wages-pay-raise-covid-19-1.5506935.

72. Jim Vertuno, ‘Grocery workers are key during the virus. And they’re afraid’ *PBS Newshour Weekend* (5 April 2020), www.pbs.org/newshour/health/grocery-workers-are-key-during-the-virus-and-theyre-afraid. The United Food and Commercial Workers union has been engaged in on-going discussions on these matters with employers in both Canada and the US.

73. COVID-19-Arbeitszeitverordnung.

from data compiled by the European Institute for Gender Equality (EIGE) that, within the EU, 76% of the healthcare workers are women.⁷⁴

C. Health and safety for (essential service) workers

Directly related to essential services, but not only, a topic that warrants separate treatment is health and safety at work for these individuals. The World Health Organisation has outlined some preventative measures within workplaces that can diminish the spread of the virus.⁷⁵

There have been some remarkable news reports about the dearth of protective equipment for this cohort, whether medical personnel⁷⁶ or other workers.⁷⁷ A fundamental principle must be that workers do not go to work to become ill. The tragic passing of Belly Mujinga, a rail worker in London, must serve as a lasting example of the risk faced by workers during the lockdown.⁷⁸ Within the context of Covid-19, personal protective equipment (PPE) not only protects healthcare personnel from contracting the virus, but it also aids in stemming the spread of the virus. And yet, many workers remain persistently exposed to the risk of contracting Covid-19. While not all exposed workers die as a result, this should not be the benchmark. There are many unknowns presently. Regrettably, there have also been quite troubling comments from politicians insinuating (if not stating) that healthcare workers, for example, were over-using protective equipment.⁷⁹

A particular issue that requires attention in this context is countries relaxing working time regulations for particular groups of employees. It must be seen whether these relaxations have a long-term effect or not, but so far it seems they are rather exceptional. Quite specifically, to secure the supply of essential goods, such as food and medication, the Dutch driving time and rest period regulations have been relaxed, resulting in a daily maximum driving time of 11 hours instead of 9 hours, a weekly maximum driving time of 60 instead of 56 hours, a two-weekly maximum driving time of 96 instead of 90 hours, and a weekly rest period starting 7 days after the last weekly rest instead of 6 days. Furthermore, at the request of certain sectors, the Secretary of State of Social Affairs and Employment has exempted some demands within the Health and Safety Act regarding certificates that are necessary to perform some tasks. The exemptions are valid until 31 August 2020. Comparable working regulation extensions have been made available in Germany for essential services, principally in the healthcare sector. In general, employees can be contractually

74. Eszter Zalan, 'Women hit hardest by corona economic crisis', *EU Observer* (23 April 2020), <https://euobserver.com/coronavirus/148155>.

75. World Health Organization, 'Getting your workplace ready for COVID-19' (19 March 2020), 2. <https://apps.who.int/iris/bitstream/handle/10665/331584/WHO-2019-nCov-workplace-2020.2-eng.pdf?sequence=1&isAllowed=y>.

76. Claire Press, 'Coronavirus: The NHS workers wearing bin bags as protection' *BBC News* (6 April 2020), www.bbc.com/news/health-52145140.

77. Katie Johnston, 'As more grocery store workers die, employees call for better protection' (7 April 2020), www.bostonglobe.com/2020/04/07/business/more-grocery-store-workers-die-employees-call-better-protection.

78. Transport Salaried Staffs' Association, 'Death of a ticket office worker' (12 May 2020), www.tssa.org.uk/en/whats-new/news/index.cfm/death-of-a-ticket-office-worker.

79. US President Donald Trump wondered aloud about the theft of protective equipment from hospitals: 'Maybe worse than hoarding': Trump implies hospital staff stealing masks – video' *The Guardian* (30 March 2020), www.theguardian.com/world/video/2020/mar/30/maybe-worse-than-hoarding-trump-implies-hospital-staff-stealing-masks-video. The UK Health Secretary (Matt Hancock) was quoted as stating that protective equipment in hospitals must be treated as a 'precious resource' because '[t]here's enough PPE to go around, but only if it's used in line with our guidance.' 'Coronavirus: "Herculean effort" to provide NHS protective gear' *BBC News* (11 April 2020), www.bbc.com/news/uk-52248423.

obliged to work overtime, but they can also be required to perform work beyond the contractually agreed working hours if there is a risk of unavoidable damage.⁸⁰ A newly adopted law introduced due to the pandemic allows additional exceptions to maintain public security and order, health care and nursing as well as services of general interest.⁸¹

Whether it is a hospital worker or a grocery store clerk, the risk of contracting the virus may be more perilous where workers have access to neither health plans provided through employers nor universal health care. Compounding the problem, many workers do not have ‘sick pay’ which would permit workers who have symptoms to stay home (as medical advice has directed). Without ‘sick pay’, individuals must choose between earning an income in order to maintain what they have or lose that pay (at least).

In the course of securing the health and safety in particular of those employees that provide essential services, a situation that has caught widespread media attention is the outbidding of states, in particular within the US, overbidding each other for personal protective equipment, *inter alia*, resulting in manufacturers phoning state governors to inform them about another having outbid them to push the price up.⁸² These scenarios have not only occurred in the US. A shipment of N95 masks by 3 M heading to Germany from China was diverted because, it was reported, the American President outbid them.⁸³ These examples are quite worrisome if the scarcity of PPE, key to protecting those on the frontline in combating the coronavirus crisis or those that secure other essential services, means that they can only be bought for an excessively high price. One may seriously question whether this illustrates some of the perils of an unfettered free market.

III. Returning to work: Opening Pandora’s box?

There has been no grand re-opening of Europe in the sense of a complete return to ‘normalcy’ (if returning to what was before is wished for at all) at one time. Instead, as governments have initiated a process of returning to pre-pandemic business, there will be a staggered return to work. The plan may be premised on a tiered approach to essential services and needs, coupled with maintaining distance amongst workers and patrons. It may be that the safest option for countries is to maintain social distancing protocols until a vaccine is found and can be globally distributed and administered. However, pressure to re-open economies rendering a uniform response, as has been the case in the lockdown phase, is unlikely. EU Member States are not expected to conform to one plan of action. Given the differing factors within Member States, such as the pace at which the virus spread as well as the size and composition of national economies, a uniform approach should not be viewed as a negative.

This section identifies key points regarding workplaces returning to normal. Guiding these considerations are trepidations about the many variables on which we do not have much clarity,⁸⁴

80. Para. 241(2) Civil Code.

81. Para. 14(4) Working Time Act.

82. E.g. Lauren Feiner, ‘States are bidding against each other and the federal government for important medical supplies – and it’s driving up prices’ *CNBC* (11 April 2020), www.cnn.com/2020/04/09/why-states-and-the-federal-government-are-bidding-on-ppe.html.

83. Bryan Pietsch, ‘3 M denies German officials’ allegations that a mask shipment was diverted to the US in “an act of modern piracy”’ *Business Insider* (3 April 2020), www.businessinsider.com/3m-mask-shipment-to-berlin-germany-diverted-united-states-report-2020-4?r=DE&IR=T.

84. The IMF characterised the matter in *The Great Lockdown*, 9, in this way: ‘Even after the severe downgrade to global growth, risks to the outlook are on the downside. The pandemic could prove more persistent than assumed in the

such as the pandemic's resilience, which would then stretch existing income support plans, begging the question of what limitations there may be for states. Information on practices put in place amongst those essential services (particularly health services and public transit) that continued during the lockdown period will be essential in determining a safe approach to re-opening businesses. At present, this data has not been widely released. And so, the following focuses on those workplaces that have been temporarily shut in response to the pandemic with an emphasis on considerations in re-opening workplaces. Differing opinions regarding the conditions under which workplaces may be re-opened suggest there may be a question as to whether this can be effected without sufficient testing capacities⁸⁵ and personal protective equipment for healthcare personnel in place. To oversimplify the matter, those focused upon economic considerations have been testing the limitations of the advice provided by those preoccupied with public health concerns. The premise followed here is to rely upon public health advice which would require sufficient testing capacity coupled with safe levels of personal protection equipment to be in place prior to a re-opening that would see large cohorts of the population returning to work. If these safety measures are not in place, then a wider range of possibilities must be contemplated as well as the potential for another lockdown that may not be so uniform.⁸⁶

A. Health & safety at work

As workers return to their workplaces, there is a question as to whether each individual will need to establish for their employer that they are not only symptom-free of Covid-19, but that they are also not an unknowing carrier of the virus. How would this be carried out, especially if a persistent challenge has been understanding the causes of the virus and its transmission; not to mention the availability and the processing of tests? Understandable concerns weigh on employers because they have, not least based on EU law,⁸⁷ an obligation to establish and maintain a safe workplace. Aside from a right to remove oneself pursuant to Art. 13 of ILO Convention 155,⁸⁸ the Charter of Fundamental Rights of the European Union⁸⁹ requires this of employers: 'every worker has the right to working conditions which respect his or her health, safety and dignity'.⁹⁰

baseline. Moreover, the effects of the health crisis on economic activity and financial markets could turn out to be stronger and longer lasting, testing the limits of central banks to backstop the financial system and further raising the fiscal burden of the shock. Of course, if a therapy or a vaccine is found earlier than expected, social distancing measures can be removed and the rebound may occur faster than anticipated.'

85. Testing capacities include: a steady supply of tests to detect and treat individuals who have Covid-19; contact tracing of those diagnosed with the virus; and treatment of those identified as having the virus through tracing.

86. This means that, without state intervention, measures to address increased infections within workplaces may be various. There may be no particular number of infections within one workplace that will necessitate closure or other steps. Workplaces operating under different parameters will, among other things, likely contribute to a sense of anxiety and confusion.

87. E.g. Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183/1.

88. Occupational Safety and Health Convention, 1981 (No.155). It is a question as to whether Covid-19 would constitute an occupational disease if contracted at work, pursuant to ILO Recommendation 194 - List of Occupational Diseases Recommendation, 2002, or if it falls within the 'regulatory gap' spoken of biological hazards discussed in ILO, *ILO Standards and Covid-19* (23 March 2020), vers.1.2, 16.

89. *Charter of Fundamental Rights of the European Union* [2012] OJ C 326/391.

90. Art. 31 of the *Charter of Fundamental Rights of the European Union*.

Workers, too, have obligations which are directly related to those held by the employer, such as complying with safety measures.⁹¹ Once workers are back on-site, they also participate in maintaining safe work environments. The World Health Organisation has outlined some preventative measures within workplaces that can diminish the spread of the virus: ‘Make sure your workplaces are clean and hygienic’; ‘Promote regular and thorough hand-washing by employees, contractors, and customers’; ‘Promote good respiratory hygiene in the workplace’.⁹² On 24 April 2020, the European Agency for Health and Safety at Work issued non-binding guidelines to keep a healthy and safe workplace, in which it outlined some issues employers should address when workers return to the workplace as well as where workers remain teleworking.⁹³

Bearing the above framework in mind, the orthodox meaning of safety has been a workplace free from physical hazards to the health of employees (and visitors). Yet, safety has expanded as a collective term including mental well-being (i.e. freedom from harassment or bullying). Covid-19 adds the obligation of ensuring a workplace that is safe for workers upon resumption of normal business. In this respect, to use a benchmark of a workplace that is free of the virus would be implausible given the many unknowns about Covid-19 and its transmission. To meet the on-going obligation of a safe workplace⁹⁴ means that employers will likely need to provide preventative tools such as hand sanitiser, sanitising wipes for equipment (such as keyboards, telephones), and perhaps even masks and gloves. Where employers decide to oblige their workers to keep a minimum distance of 1 to 2 metres from the next person, the question remains what this means in terms of the number of workers being able to return to their place of work, especially where people share offices or work in open office spaces. It is particularly the latter where non-full-time working staff may be disadvantaged; for employers might decide to give preference to the ‘standard workers’ as they work, quantitatively speaking, more.⁹⁵ There is also a practical difficulty: countries in which wearing masks and gloves has become mandatory when entering stores usually advise that masks should be replaced after each visit. Would this mean that after each walk to the printer or the bathroom, masks and gloves have to be replaced? And, what should workers do if their employer refuses to provide masks? Can they stay away from the workplace without experiencing retaliation? Put otherwise: should workers have a right to work at home so as to avoid any danger, i.e. the virus, to which they might be exposed?⁹⁶

91. The ILO speaks to the intermingling of obligations between employers and employees in ILO, *ILO Standards and Covid-19* (23 March 2020), vers.1.2, 12: ‘Workers are responsible for cooperating in the fulfilment by their employer of the OSH obligations placed on them, complying with the prescribed safety measures, taking reasonable care for the safety of others (including avoiding exposing others to health and safety risks), and use safety devices and protective equipment correctly.’

92. World Health Organisation, ‘Getting your workplace ready for COVID-19’ (19 March 2020), 2. <https://apps.who.int/iris/bitstream/handle/10665/331584/WHO-2019-nCov-workplace-2020.2-eng.pdf?sequence=1&isAllowed=y>.

93. European Agency for Health and Safety at Work, ‘COVID-19: Back to the workplace - Adapting workplaces and protecting workers’ (24 April 2020), <https://osha.europa.eu/en/highlights/covid-19-back-workplace-safe-and-healthy-conditions>.

94. The International Labour Organisation has released a video with tips for businesses remaining open during the pandemic: www.ilo.org/global/about-the-ilo/multimedia/video/institutional-videos/WCMS_740609/lang-en/index.htm. These measures will likely be adaptable as more workplaces open.

95. Further considerations include the use of common areas such as lunch facilities and rest rooms. These areas may need to be organised in a manner that will be unfamiliar to many workers.

96. The answer is in the affirmative in Ewan McGaughey, ‘Ten things the government can do right now to prevent a Corona depression’ *Institute for Employment Rights* (20 March 2020), www.ier.org.uk/comments/ten-things-the-government-can-do-right-now-to-prevent-a-corona-depression.

Commencing back-to-work protocols constitutes one of the many challenges employers face. In order to meet the aforementioned obligations, employers may seek information from workers and/or employ other actions such as taking workers' temperatures. These carry data protection, privacy and discrimination questions which are discussed separately below. Here, the focus is on health and safety alone. The ensuing discussion assumes that testing is not widely available (as has been the case) and has been limited to only those who have symptoms *and* have been referred for a test.⁹⁷

Employees may be asked to establish that they are symptom-free before being permitted to return to the workplace. This may take the form of an employee signing some sort of declaration and providing that to the employer. This may or may not be binding upon employees; putting aside individuals who are not truthful which may possibly be treated as an instance of gross misconduct permitting the employer to immediately terminate employment. Employers may request medical documentation. If employees have been treated for Covid-19, employers may require them to establish that they are symptom-free. Again, this would seem to be a challenging matter to prove. An ILO Recommendation seems to permit employers taking this step, albeit it very much depends on the domestic labour regulations and whether social partners and/or works councils have a say in this too.⁹⁸

Steps such as taking employees' temperatures may also be contemplated. Questions remain regarding data protection implications regarding this act (discussed in the next sub-section). The first matter is who can take employees' temperatures: the employer? Or must this be conducted by medical personnel? This may be a question of how a 'medical act' is defined in Member State law. If it is defined broadly,⁹⁹ employers may be precluded. A conservative approach would be to have medical personnel undertake this. However, the pandemic has significantly stretched healthcare resources, thereby rendering this a perhaps impractical default. Frank Hendrickx, Simon Taes and Mathias Wouters argue that employers may do so in their preventative capacity.¹⁰⁰ Using body temperature as a benchmark has been reinforced by the World Health Organisation (WHO) advice to employers: 'anyone with even a mild cough or low-grade fever (37.3 C or more) needs to stay at home.'¹⁰¹ And yet, one of the more disconcerting points emerging from news reports of Covid-19 must be transmission from individuals who exhibit no symptoms. Some hesitation is put forward here in terms of solely relying upon body temperature as a rule in return to work. It may be a factor in permitting employees back on-site, but a 'normal' temperature does not preclude the spread of the virus. Temperature taking is therefore an imperfect measure, yet may be viewed as a step paired with other preventative measures in workplaces.

Obvious questions arise regarding employees who upon returning to work show symptoms and are then found to have Covid-19. Given how little is known about this coronavirus, it would be hard to establish that subsequently diagnosed employees have breached a declaration; as there have been reports of numbers of people who show no symptoms and have been subsequently found to have the virus. There are also liability questions. Based on health and safety regulations such as

97. It remains unclear if an antigen test can establish that a human can organically fight off Covid-19.

98. Occupational Health Services Recommendation, 1985 (No. 171), para 11(1)(c).

99. It has been contended that Belgian law may be an example of such a broad definition: Pieter Pecinovskiy, 'FAQ: Coronavirus and Belgian employment law' (7 May 2020), www.vow.be/node/173/

100. Frank Hendrickx, Simon Taes, Mathias Wouters, in this volume.

101. World Health Organisation, 'Getting your workplace ready for COVID-19' (19 March 2020), 2. <https://apps.who.int/iris/bitstream/handle/10665/331584/WHO-2019-nCov-workplace-2020.2-eng.pdf?sequence=1&isAllowed=y>.

Directive 89/391/EEC, employers are obliged to take the necessary measures while workers have to comply with them. But what happens to workers who, knowingly or not, have been infected with Covid-19 and go to work? Without having any symptoms, it will take some days for this to be discovered and the virus could easily spread among staff. Who is liable then, and what would this mean where a Member State made a Covid-19-free workplace a precondition for being eligible for (further) financial assistance to keep the business running and workers employed?

B. Data protection, privacy & discrimination

For labour law purposes, the classification of this health issue as one of data protection or privacy is not clear. The ILO sets out Recommendations relating to the protection of workers' privacy¹⁰² and personal data.¹⁰³

Given the wide scope of the term 'personal data' as defined in Art. 4 of the General Data Protection Regulation (GDPR), the matter may be considered one of data protection, particularly a 'special category' of personal data.¹⁰⁴ Art. 9(1) of the GDPR prohibits processing of health data, but Art. 9(2) outlines some bases upon which such data may be lawfully processed. The GDPR requires the explicit consent of the employee, which has been refined from that set out in the 1995 Directive, to processing their medical information. The processing of such data must also conform to the principles set out in Art. 5 of the GDPR, including purpose limitation as well as lawfulness, fairness, and transparency. To be lawful, processing may be undertaken pursuant to one of Art. 6(1)(c)-(f). Additionally, Art. 9(2)(b) GDPR (processing of data for the purposes of carrying out obligations and exercising specific rights in employment) may be relied upon. Alternatively, employers may invoke Art. 9(2)(i) GDPR (processing is necessary in the public interest); though this step may be stronger if there is government guidance suggesting such actions be taken.¹⁰⁵ This option was endorsed by the 'Statement on the processing of personal data in the context of the COVID-19 outbreak' released by the European Data Protection Board (EDPB) on 19 March 2020.¹⁰⁶ It declared that the processing of personal data by the employer might be necessary to comply with health and safety measures in the workplace and made explicit reference to derogations through Articles Art. 9(2)(c) and 9(2)(i) of the GDPR, as well as Recital 46 of the Regulation which refers to the control of an epidemic.¹⁰⁷

Additionally, being required to reveal a diagnosis may constitute an intrusion upon an individual's privacy, as protected under Art. 8 ECHR.¹⁰⁸ Which recourse to take may be a matter of establishing whether both routes are viable under national law and if they are, whether or not there

102. Occupational Health Services Recommendation, 1985 (No. 171), para 11(2).

103. Occupational Health Services Recommendation, 1985 (No. 171), para 14 discusses and the requirements relating to disclosure of this information.

104. Article 9.

105. Council of Europe Convention 108+ as well as the 'Recommendation CM/Rec(2019)2 of the Committee of Ministers to member States on the protection of health-related data' should also be kept in mind.

106. https://edpb.europa.eu/sites/edpb/files/files/news/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf.

107. Though the EDPB identified Art.9(1)(i) and (c), Recital 46's reference to serving interests may bring subsections (d),(e) into consideration.

108. See for a brief overview of the distinction between privacy and data protection: Juliane Kokott & Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR' (2013) 4 Int'l Data Priv. L. 222-228.

are any limitations regarding awards. It should be borne in mind that given the fledgling state of the GDPR, uncertainties remain.

Differential treatment must also be contemplated. Individuals with a young family or with caring responsibilities for elderly parents may be more susceptible to contracting Covid-19. Out of necessity, they must be the individuals to leave home in order to obtain food and medical supplies. They may also be depended upon to clean items brought into the home from outside (in order to follow guidance regarding the wiping down of groceries). It may be that either males or females carry out these responsibilities, but historically this work has been performed by females.¹⁰⁹ And so, steps that target those who have been in contact with identified sufferers of Covid-19 or who may have experienced symptoms may be indirectly discriminatory.

A vivid discussion relates to the opportunity to adopt so-called ‘contact-tracing apps’ that would allow governments and citizens – employers included – to know if and when a certain individual was located in the proximity of an infected person. The debate goes much beyond concerns upon the employees’ position, but rather concerns citizens and their relationship with their own governments and, even further, the legitimacy of the subjects (in some cases private companies) which are in charge of the development of those apps and that might end up collecting relevant data, including sensitive personal data. The discussion so far seems to be polarised between pro-privacy and pro-public health concerns. Public debate leaves little space, if any, to reflect upon nuances. Interestingly, the EDPB Statement of 19 March 2020,¹¹⁰ reads: ‘Public authorities should first seek to process location data in an anonymous way (i.e. processing data aggregated in a way that individuals cannot be re-identified), which could enable generating reports on the concentration of mobile devices at a certain location (“cartography”). Personal data protection rules do not apply to data which has been appropriately anonymised’. It further specifies that when the process must necessarily involve non-anonymous data, Art. 15 of the ePrivacy Directive¹¹¹ might come to hand as it enables Member States to adopt measures that restrict rights and obligations established therein when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences.

The explicit reference by Art. 15 of the Directive to core state prerogatives (national security, public security, defence, etc.) as possible justifications to narrow those rights ensured by that Directive might be read as an obstacle for governments to completely outsource the development and running of ‘contact-tracing apps’, as the ‘violation’ of the privacy rights in this respect might be conducted only by public bodies for the purpose of pursuing public fundamental interests. Therefore, the ultimate and sole responsibility relies on governments which might be the only entities accessing data for the sole purpose of public health issues. This observation might not be comforting, but could be used as an argument to oppose any attempt to entirely outsource the functioning of those tracing systems with the high risk of misuse by privates or employers to detect information to be used for different purposes than those indicated by Art. 15 (commercial purposes first, but control on employees could also be foreseen).

109. The ILO identified the responsibilities imbalance between the genders as a matter for concern: ILO, *ILO Standards and Covid-19* (23 March 2020), vers.1.2, 18.

110. https://edpb.europa.eu/sites/edpb/files/files/news/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf.

111. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). The ePrivacy Regulation remains a matter of discussion.

C. Teleworking

In response to the pandemic, the role of the EU has largely been limited to finances. On 23 March 2020, Ministers of Finance agreed on the possibility to enforce the general escape clause of the European fiscal framework, allowing Member States to break the limits to national budgets by augmenting the national debt in order to face the economic consequences of the pandemic. The European Central Bank (ECB) on 18 March commenced a EUR 750 billion Pandemic Emergency Purchase Programme (PEPP), to provide financing conditions to react to the economic shock. Significant debate continues regarding the opportunity to share part of the future national debts, through so called euro-bonds or corona-bonds, as news media referred to them, in order to make such debt more solid and attractive for public and private investors.

However, there is scope for a larger part. The EU has the capacity to regulate in the area of working conditions and this competence has been enacted on different occasions (in areas such as parental leave and working time). With so many workers taking up their duties at home during the lockdown period in addressing the pandemic of 2020, there is an opportunity for a normative intervention on telework (this term is used interchangeably with remote, agile or home work). Indeed, the massive recourse to teleworking in many states to allow a certain continuation of working activities while ensuring social distancing represents a good chance to observe unresolved and shared problems related to forms of remote working. With no aim to reach easy conclusions, some parameters to evaluate such regulatory issues are discussed in this section.¹¹²

i. From a Pandemic to a new workplace. With state-enforced social distancing including teleworking,¹¹³ the prospect of making telework a longer-term arrangement remains possible. While the pandemic of 2020 directs efforts regarding telework, it should be recalled that the European Social Partners concluded a Framework Agreement on Teleworking on 16 July 2002.¹¹⁴ At that time, telework was viewed as ‘both as a way for companies and public service organisations to modernise work organisation, and as a way for workers to reconcile work and social life and giving them greater autonomy in the accomplishment of their tasks.’¹¹⁵ This statement remains an important guiding ethos. The Social Partners’ definition of telework operates in a similar manner: ‘TELEWORK is 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 employers’ premises, is carried out away from those premises on a regular basis.’¹¹⁶ The Agreement has been variously implemented within Member States.¹¹⁷

112. The following is viewed as building upon the earlier work in the area including 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) (15 February 2017).

113. Teleworking is envisioned as an employee (engaged under an employment contract, and not a self-employed individual) working from home as a fixed location. These employees may be directly hired for telework or move to telework at some point during the life of the employment contract. As was the concern of the European Social Partners in devising their Framework Agreement on Teleworking, no new employment status should arise from teleworking.

114. The European social partners ETUC (and the liaison committee Eurocadres-CEC), UNICE, UEAPME and CEEP were signatories to the Agreement.

115. *Ibid* 31.

116. *Ibid* 32.

117. European Commission, ‘Report on the implementation of the European social partners’ Framework Agreement on Telework’ COM(2008) 412 final (2 July 2008).

Of more immediate pertinence, the elaboration in the previous section regarding returning to work and the health and safety considerations in the midst of a pandemic gives teleworking greater impetus. Even with a staggered return to work, the challenge for businesses will be safely welcoming workers back on-site. Workplaces that could continue during the lockdown with workers based at home may be in a more favourable position to transition back to full on-site attendance at a slower rate. The workplaces which cannot operate in this manner may need to function with reduced staff, not only for business reasons but also for safety. If this were to be the case, many may expect another rise in demand for state-based income support. It remains a question as to whether this will materialise and, if so, in what form.

With teleworking, family constitutes one of (at least) the most important considerations. Teleworking exposes a significant divide between those who have family (children or older parental) or other caring obligations.¹¹⁸ Even with a return to school, family responsibilities carry the potential of displacing the work day insofar as work not completed by school's end may be put off to the night time. When considering, for example, performance standards, there would be a foreseeable challenge to a negative review of one teleworker who also has family responsibilities as compared to another who does not.

ii. Threshold issues for teleworking. Teleworking falls under the umbrella term 'smart working', which includes flexible working time and location arrangements. Smart working generally depends upon enabling digital technologies. It is said to open up income-earning opportunities for a range of individuals such as parents of school-age children. Smart working is an important tool in the Europe 2020 goal of increasing employment levels to 75% (those aged between 20-64) by 2020. Given the pandemic, telework in particular has become a relied upon middle ground of continuing work (where possible) as countries are largely in a lockdown situation. Indications are that telework possibilities may continue to increase after a lockdown and beyond even the pandemic itself.¹¹⁹

Drawing from the Belgian legislation on telework, the distinction between structural and occasional telework offers a beneficial starting point. In the lockdown phase of addressing the pandemic, the capacity for occasional teleworking under the Workable and Flexible Work Act¹²⁰ has been utilised. After several consecutive weeks of such 'occasional' teleworking, the question as to whether it has become temporarily structural in the short-term arises.¹²¹ This distinction remains important in the Belgian context because, amongst other items, it triggers certain obligations. While the threshold for the triggering of these obligations can be difficult, the distinction prompts a question regarding the persistence of teleworking: is it occasional and not defined (an opportunity that can be used by mutual agreement of employer and employee) or is it regular in some manner.

Here another problem arises related to the role of the consent of the employee in adopting teleworking arrangements. In a normal context, prior to the pandemic, many countries regulated telework under the condition of an agreement between employer and employee on the decision to

118. 22% of respondents to a Eurofound survey spoke of difficulties when teleworking while also parenting children under the age of 12 during the lockdown: Eurofound, 'Living, working and COVID-19 First findings – April 2020' 7.

119. The present considers only employees working for a company in their 'home' jurisdiction and not working outside of it in another Member State. And so, the implications of teleworking and the Rome I Regulation are not discussed here.

120. Law 5 March 2017 on workable and agile work, *Moniteur Belge* 15 March 2017.

121. A question noted by Frank Hendrickx, Simon Taes, and Mathias Wouters in their assessment of the Belgian measures in this volume.

start teleworking, on the length of such a work arrangement, and on the adoption of technological measures to allow parties to coordinate with each other (such as in Luxembourg, Italy, Belgium). On this point, a fervent debate about teleworking has been raised. Indeed, many governments have strongly recommended or even made mandatory, when possible, teleworking during the pick of the pandemic. These measures might be softened or removed with the slow returning to normalcy. Still, the question on what is the legal position of the employee in this context remains open: is s/he being subjected to an order from the employer to perform his/her duties from home? Is s/he required to agree with that with at least implicit consent? Or, eventually, is s/he entitled to the right to work from home to protect his/her health? On the logistics side, questions include whether or not workers have the proper equipment and space for teleworking. The employer's prerogative to impose teleworking might be legally justified under its obligation to adopt all possible measures to ensure health and safety in the workplace. In the pandemic, this is strictly linked to social distancing and therefore telework could be seen as one of such mandatory measures to protect the health of the workers with which workers must comply. This reasoning, reasonable under exceptional circumstances, such as the spread of a highly contagious virus, might be questioned in the near future as it might compromise work/life balances, private spaces, and burden employees with risks and costs that should normally be borne by the employer.

There has been discussion of businesses reducing their office space as a cost-cutting expenditure measure. Employees would fall into the structural category if they were to continue to meet their work obligations for these employers from home exclusively.¹²² It may be different if working from home was a regular occurrence, but constituted only a fraction of the working week (for example working from a home office every Wednesday).¹²³ This threshold speaks to when certain obligations on employers may be triggered.

iii. Working conditions for teleworkers. Article L. 1222-9 (*Télétravail*) of the French Labour Code gives some tentative guidance because the Code speaks of telework as an option that is occasional; similar to occasional teleworking in Belgium discussed above. As noted, this discussion focuses on telework as structural. Preconditions to telework include the following. Individuals teleworking retain the same rights as those working in the employer's premises. The decision to move in some significant form to telework should be a decision agreed to by both the employer and employee.¹²⁴ There must be some justification¹²⁵ for denying a request to telework by the rejecting party. Rejection may not be grounds by either party to treat the contract as at an end. The employment conditions, rights and obligations applicable to both parties if work were conducted on the employer's premises should be applicable, insofar as they can be, to the teleworking situation. For example, an injury incurred while teleworking should be treated as a workplace accident (bearing in mind any particular role the employee as a teleworker may have had in any physical injury).

122. The regular performance of work from outside of the employer's premises was a part of the European Social Partners' definition of telework: European Social Partners, 'Implementation of the European Framework Agreement on Telework: Report of the European Social Partners' (September 2006), 4.

123. Looking at the Working Time Directive, there is an argument regarding adapting the averaging of time used in the Directive to the teleworking context. For example, in a one-month period, an employee may telework for what amounts to an average of three days per week. For space reasons, this and other variations are not discussed at length here.

124. The voluntariness found in the Belgian Feasible and Flexible Work Act seems apt here.

125. French Code L.1222-9 III.

Where there are new parameters to be determined as a result of teleworking, these should be agreed to by the parties.¹²⁶ Agreement on such new parameters may include:¹²⁷ hours of work (though a default regular work day of 09:00 to 17:00 may be worth prescribing); means of communication with colleague employees as well as the employers' customers; secure means of accessing employer servers from outside of the workplace facilities; privacy, such as monitoring matters;¹²⁸ training; equipment; and collective rights. The Italian legislation on smart working (Law No. 81/2017) requires employers and employees to agree in writing, prior the commencement of teleworking, on some specific aspects, such as the length of the teleworking period, limits for the employer to exercise his/her directive and monitoring powers (to be discussed and agreed with the employee), possible conducts that might be disciplinary sanctioned by the employer, use of technologies, etc.

Teleworking carries the potential for longer working hours. The Italian law specifies that regulations on the maximum length of the working time (daily and weekly) provided by the law and by applicable collective bargaining agreements must be respected, therefore implying that outside such working time framework no working activity can be demanded, and therefore also no use of communication working tools. The French concept of the right to disconnect¹²⁹ (*le droit à la déconnexion*) encapsulates some longer-term considerations of teleworking coupled with health and safety implications. Article 55 under Chapter II 'Adapting the Labour Law to the Digital Age' amended Art. L. 2242-8 of the Labour Code by adding paragraph (7), the right to disconnect.¹³⁰ The ethos behind this right not only focuses on a work/life balance, but also implicates the Working Time Directive.¹³¹

If remote working were to be undertaken, there is also a question of costs. Will employers need to reimburse workers for increased utility expenses (electricity, heating, internet)? Would this be a matter of taking office savings and moving them directly to workers? In Belgium, the National Office of Social Security established a figure of EUR 126.94 as a 'home-office allowance' with a formal telework agreement having been formalised by the parties.¹³² For structural teleworking, some allowance should be set regarding the costs of operating from home.

126. This would be a change from the French Code L.1222-9 II where, absent a collective agreement, a charter drawn up by the employer constitutes a default framework governing teleworking.

127. A number of these points are derived from the European Social Partners' Framework Agreement, 'Implementation of the European Framework Agreement on Telework: Report of the European Social Partners' (September 2006), 31 ff.

128. The precise parameters of, for example, monitoring employees remains an area for further critical consideration: see further David Mangan, 'Beyond Procedural Protection: Information Technology, Privacy and the Workplace' (2019) 44 Eur. L. Rev. 559.

129. The idea originated with a decision of the Labour Chamber of the Court of Cassation, October 2, 2001 n°99-42.727 and was brought into French law through the so-called the El Khomry laws.

130. Other Member States have taken similar steps. See for example, Italy: Senate Act no 2233-B 'Measures to safeguard non-entrepreneurial self-employment and measures to facilitate flexible articulation in times and places of subordinate employment', Art. 19(1).

131. 2003/88/EC.

132. National Social Security Office, 'Coronacrisis: maatregelen voor werkgevers', <https://rsz.fgov.be/nl/werkgevers-ende-rsz/coronavirus-maatregelen-voor-werkgevers/vergoeding-voor-thuiswerk>. The document is not available in English.

IV. A century of anxiety

Hyperbole seems unlikely when considering the implications of Covid-19, so profound is the task of next steps while many uncertainties remain. This final section situates the pandemic of 2020 within a larger workplace context.

Most immediate in memory will be the Great Recession of 2008-2013,¹³³ though the circumstances surrounding the pandemic are expected to be worse, reaching the deepest recession experienced since the 1930s.¹³⁴ In dealing with the economic downturn, some countries turned to liberalising employment protections as a way to stimulate the economy. The UK Government, as one example, doubled the period for qualification for unfair dismissal protection to two years¹³⁵ and halved the minimum 90-day consultation period for dismissals of 100 or more workers.¹³⁶ The UK was not alone. About one-third of OECD countries between 2008-2013 liberalised employment protections.¹³⁷ The overall deregulation aim had been, among other points, to better facilitate the dismissal of workers, in terms of ease and cost, in order to incentivise hiring of new workers. It remains somewhat curious that the emphasis was on job creation and not additionally job retention, where the percentage of individuals taking up these new positions and retaining them¹³⁸ was equally valued. The danger of regression in employment protections increased, as these liberalising protections were viewed as tools in decreasing unemployment figures.¹³⁹ Questions regarding the ‘displacement of Social Europe’ arose,¹⁴⁰ especially when Social Europe had driven much of EU labour law.

The General Director of the European Trade Union Institute (ETUI), Philippe Pochet, has not anticipated a return to such neoliberal strategies.¹⁴¹ It may be argued that the pandemic of 2020 presents very different conditions than the Great Recession; in particular, the capacity for residents to endure austerity. And yet, the idea of replacing rigidities with flexible regulation in order to stimulate the economy remains seductively simple for a mass audience. There will be many voices within EU Member States urging efforts to not only reduce spending deficits, but also to rapidly recoup monies spent in addressing the pandemic’s effect on employment. Moreover, the political factor renders the matter less predictable. Political parties eager to retain governing power will be susceptible to the appearance of strong economic steps.¹⁴² A further factor with Covid-19, trust in

133. An end date of 2013 may be debated as the implications of the economic downturn arguably remained in effect up to the point of the 2020 pandemic.

134. European Commission, *European Economic Forecast – Spring 2020* (Luxembourg: Publications Office of the European Union, (May) 2020), 9.

135. The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989).

136. The Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 (S.I. 2013/763), Art. 3(2).

137. OECD, *Employment Outlook 2013*, www.oecd-ilibrary.org/employment/oecd-employment-outlook-2013/protecting-jobs-enhancing-flexibility-a-new-look-at-employment-protection-legislation_empl_outlook-2013-6-en.

138. Past the threshold for dismissal protections, if any such threshold exists.

139. Stefano Giubboni, ‘The rise and fall of EU labour law’ (2018) 24 *Eur. Law J.* 7, 8.

140. Claire Kilpatrick, ‘The displacement of social Europe: a productive lens of inquiry’ (2017) 14 *Euro. Cons. Law Rev.* 62.

141. Philippe Pochet, ‘Edito#63: The big question is what will happen after Covid-19’ (March 2020), www.etui.org/Newsletters/Edito-63-The-big-question-is-what-will-happen-after-Covid-19

142. On this point, it is wondered if the UK factors into EU considerations insofar as the UK may strive to be light on regulation as compared to the EU.

EU and national governments has fallen ‘dramatically’.¹⁴³ In addition, optimism for the future has dropped significantly in those Member States hardest hit by the coronavirus (Belgium, France, Italy, Spain).¹⁴⁴ The challenge faced by government is daunting. In this last section, the case against the austerity of the Great Recession will be made. Instead, the pandemic compels reconsideration of work and its regulation.¹⁴⁵ While space precludes detailed elaboration, some guiding parameters are discussed below.

A. Deepening precarity. The term ‘deepening precarity’¹⁴⁶ embodies the concern put forward here. Prior to the pandemic of 2020, weakening of employment protections had affected a broad portion of the workforce resulting in pervasive vulnerability of workers in general. The unsettling reality now being faced is that of drifting into differing degrees of insecurity (whether it be reduced hours, uncertainty regarding current jobs, redundancy, or future employment prospects). This fear is not unique to any one worker group; concerns enveloping workers more widely that Guy Standing associated with the ‘precaritised mind’.¹⁴⁷ Covid-19 pushes to the forefront the unsettling reality of work’s (as a means of supporting oneself or a family) contingent nature. Deepening precarity is a way to assess next steps (particularly where they affect employment regulation) by considering the perceived benefits of plans, contrasted with the effect of increased exposure to risk. The emphasis is on considering whether a change in regulation will exacerbate current challenges and if so whether the perceived trade-off is in fact a viable outcome.

Overall though, the economic and societal challenges stemming from the pandemic require taking a more systematic perspective to consider the future of work. Living and working in a globalised world has led to a complex web of economic interdependence, where products and parts of products are produced in different countries while being put together in another. The problems instigated by Covid-19 greatly narrowed supply chain capacity; spurring a relational effect on those who depend in various ways on this production line remaining intact, at its customary volume.

i. Essential products. One area stands out as a starting point for this reconsideration: essential products. The question posed is: taking this supply chain discussion into account, do ‘essential materials’ (personal protective equipment (PPE) may be an exemplar) need to be manufactured domestically or at least within the EU for Member State consumption? Costs constituted the primary reason why goods or parts of their production were transferred abroad. Would governments be willing to absorb the higher cost of production of these goods domestically so as to ensure their availability (and continued production) in times of urgent need (which need not be limited to a pandemic). The suggestion here is not to regulate for the next pandemic (keeping in mind that Covid-19 has not ended as a global health challenge at the time of writing). Instead, the premise is

143. Eurofound, ‘Living, working and COVID-19 First findings – April 2020’ 1, 3.

144. *Ibid* 2.

145. Innovations in information technology (including algorithms and artificial intelligence) which preceded the pandemic meant that this task had been underway, though with some diverging concerns.

146. Discussion of the term in more detail is found in David Mangan, ‘Deepening Precarity in the United Kingdom’ in Jeff Kenner, Izabella Florczak and Marta Otto (eds.), *Precarious Work. The Challenge for Labour Law in Europe* (Cheltenham: Edward Elgar, 2019), 58.

147. Guy Standing, *The Precariat* (London: Bloomsbury, 2011), 20.

that preparedness for national health emergencies may not harmoniously fit with approaches that measure decisions based on orthodox views of economic value.

It may or may not be economically effective to produce PPE domestically. And yet, this should not be the sole factor in deciding to do so¹⁴⁸ because Covid-19 has exposed the limitations of the exclusively economic outlook. Sadly, the pandemic revealed the human cost of this particular failing of the global supply chain. The fact that medical personnel became infected just in the course of doing their jobs because of a lack of protective equipment should itself be an indictment of how work has been conducted during the lockdown phase. The ‘bidding war’ for PPE amongst countries and even regions within countries must be a source of remarkable concern because it arose during a pandemic. The underappreciation of the social impact compounds the distressing inventory that can be taken.

ii. Industry 4.0. This last part has been called a century of anxiety because Covid-19 is the second significant concern to face the workplace entering the 21st century. It may be easy to forget that, just before the pandemic, the worry had been the future of work. Whether it was called ‘Industry 4.0’¹⁴⁹ or the Fourth Industrial Revolution,¹⁵⁰ disquiet had increased (and likely remains), as have the prognostications.¹⁵¹ Important contributions to the discussion have been made regarding ‘gig work’¹⁵² and employment status.¹⁵³ However, these are indicators of a larger predicament. The remarkable attention given to technological advances has diverted from the essential considerations of continuities and trajectory; that is, there remain consistent aims discernible in Industry 4.0, but there is also a new question as to their trajectory.

Through the different stages of industrial revolutions, the measurement of efficiency has focused primarily on the economy. A key aim has been reduction in expenditures in order to maximise profit. The term ‘hyperscaling’ (increasing the market potential for a business which is largely data centred) encapsulates not only the business approach to ‘Industry 4.0’, but also the expectations attached. Consider the differences in numbers between two large and important industries, automobile manufacturing and information technology in, respectively, Detroit and Silicon Valley.¹⁵⁴ In 1990, Detroit housed 1.2 million employees, whereas the latter had 137,000 employees in 2014. Both had similar revenues (approx. USD 250 billion). However, Silicon Valley experienced a much higher market capitalisation of USD 1.09 trillion (compared to USD 36 billion in 1990 Detroit). Industry 4.0 has affected one disconcerting change to the workforce: information technology facilitates an unprecedented capacity to diminish the place and number of human workers.

148. The UK Government noted its investigation of this opportunity in ‘Our Plan to Rebuild: The UK Government’s Covid-19 Recovery Strategy’ CP 239 (May 2020), 33.

149. European Parliament, *Industry 4.0: Digitalisation for Productivity and Growth* (September 2015).

150. Klaus Schwab, *The Fourth Industrial Revolution* (Geneva: World Economic Forum, 2016).

151. See for example, Carl Benedikt Frey, *The Technology Trap: Capital, Labor, and Power in the Age of Automation* (Princeton: Princeton University Press, 2019); Daniel Susskind, *A World Without Work: Technology, Automation, and How We Should Respond* (London: Allen Lane, 2020).

152. Valerio De Stefano, ‘The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy’ (2016) 37 *Comp. Lab. L. and Pol’y J.* 471.

153. Jeremias Prassl, *The Concept of the Employer* (Oxford: OUP, 2016).

154. James Manyika & Michael Chui, ‘Digital Era Brings Hyperscale Challenges’ *The Financial Times*, 13 August 2014.

The second point noted at the outset of this subsection is the question of the trajectory of technological innovations. In this fourth industrial revolution, deliberation upon a social dimension must be a higher-rated factor. Certainly, it complicates the measurement of efficiency. The consideration contains angst: will there be sufficient work for humans to earn a living? The question was posed, implicitly, by Queen Elizabeth I in the 16th century to William Lee, and she also provided her answer in the negative.¹⁵⁵

Overall, there have been two opinions regarding the impact on work of technological innovations. There are those who argue that there is a real danger that human work will be largely displaced. Conversely, there are those who believe, as with the preceding ‘industrial revolutions’, that there will remain a place for human labour; that is, human work will be different but continue. The argument here is that the present situation is different from those we have seen before. Those providing ‘intellectual or physical capital’ are the ‘beneficiaries’ of the fourth industrial revolution.¹⁵⁶ Capitalism has progressed on ideas. Now the idea is data. There seems to be a steady supply of the source material. Why the present is different is due to this point: data does not require nearly the same physical labour to fashion it into a consumable product. The argument here does not criticise innovation or seek to stifle it. Rather, the point underscored is simple. There is no massive human workforce required to ‘harvest’ this commodity. There may be new labour created, but uncertainties linger, such as the volume of jobs and for whom. Much of this work has been designed to be automated. And yet, another requirement is the implicit need for consumers in order for data to retain its value. Over time, the reduction in the workforce has been a particular focus, but the corollary role of workers also being consumers (who can afford to be such) has not necessarily garnered equal attention.

To this, we add the pandemic and its implications.

V. Conclusion: Labour is not simply a commodity

Discussions on the ‘future of labour law’ have loomed large for years,¹⁵⁷ addressing issues such as the ‘death of labour law’, broadening the personal scope of employment relationships or establishing in-between categories.¹⁵⁸ What seems to unite many of the contributions that have been made is that labour law has been ‘attacked’: for being inflexible; limiting innovation; its inefficiency;¹⁵⁹ and the need to bring back a more human-centred approach. It is the latter with which we wish to end this contribution.

The *Treaty of Versailles* of 1919, Article 427 states: ‘that labour should not be regarded merely as a commodity or article of commerce.’ This has been a principle of the International Labour Organisation (ILO) since its establishment in the same year. The ILO’s Philadelphia Declaration

155. While it is expected that Queen Elizabeth I was lobbied by affected guilds, this may not have been the sole impetus for her denying William Lee’s patent request as suggested in Carl Benedikt Frey & Michael Osborne, ‘The Future of Employment: How Susceptible are jobs to computerisation?’ (Oxford Martin School, 2013), 7.

156. Klaus Schwab, *The Fourth Industrial Revolution* (Geneva: World Economic Forum, 2016), 16.

157. To mention only oft-referred to academic endeavours: Guy Davidov and Brian Langille (eds.), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006); and Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (Oxford, Oxford University Press, 2011).

158. Briefly discussed in Miriam Kullmann, ‘Work-related Securities: An Alternative Approach to Protect the Workforce?’ (2018) 34 Int’l J. Comp. Lab. L. & Ind. Rel. 395.

159. Overall, the ‘attacks’ mostly address what labour law is not instead of what labour law is and can do. Moreover, the argument often is that labour law should be subordinated to other, economic, interests.

1944 abbreviated this to 'labour is not a commodity'. Labour is not simply a commodity because it incorporates more than just a (quantifiable) market value.¹⁶⁰ And so, it remains a valuable phrase; perhaps more so in 2020.

The pandemic has shown (and will likely further reveal) many important points. Essential workers include those who are employed at grocery stores, who stock shelves at pharmacies, and who make deliveries. There are positive aspects of advances in information technology; as many, but certainly not all, individuals can carry on their work while at home and continue to earn an income.¹⁶¹ Sadly, it has also laid bare the hazards of work, especially when workers are not properly equipped with protective garments. In each of these, there is a financial value affixed. And yet, the pandemic has shown that each person can contribute more than just the financial value of their labour. This is why labour is not simply a commodity. This is also why there is a fundamental need to substantially and thoroughly think of the way forward, for labour law, and for society at large. With the pandemic not having ended and the resulting insecurity, a return to widespread pre-pandemic normalcy is unlikely to quickly arise.

Considering more immediate steps to follow in the short term, some inspiration may be drawn from ILO Recommendation 205 on 'Employment and Decent Work for Peace and Resilience Recommendation'.¹⁶² Acknowledging that a 'universal and lasting peace can be established only if it is based upon social justice' and stressing the respect of 'fundamental principles and rights at work and for international labour standards, in particular those rights and principles relevant to employment and decent work', the ILO recommends its members adopt a phased multi-track approach that, *inter alia*, should aim at preventing crises, enabling recovery, and building resilience. Part of this approach is to offer immediate income protection, as many states have done. Greater difficulty is evident in fostering a local economic recovery so as to get people back to work in a sustainable manner with decent work opportunities, and applying a gender perspective.

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160. Frank Hendrickx, 'Foundations and Functions of Contemporary Labour Law' (2013) 3 Eur. Lab. L. J. 108.

161. Reflecting on the question why there are offices at all, Catherine Nixey, after observing their downside, concludes that it is the relationships with people that make working in an office so valuable. Catherine Nixey, 'Death of the office' *The Economist* (5 May 2020), www.economist.com/news/2020/05/05/death-of-the-office.

162. [www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R205.<!-GQ num="3" content="Please note that this proof represents your final opportunity to review your article prior to publication, so please do send all of your changes now">](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R205.<!-GQ num=)