UNIVERSITÀ DI PISA

GEORG-AUGUST-UNIVERSITÄT GÖTTINGEN

Ph.D. Program in Legal Science

Curriculum in Private Law

XXXIII Cycle

Co-tutelle with Institut für Arbeitsrecht

der Juristischen Fakultät der Georg-August-Universität

Social platforms: New places and times of (non)fulfillment of working obligations.

A comparative study of the Italian and German legal systems

Ph.D. candidate: Lisa Cetrano

Tutors: Professor Elena Bargelli and Professor Olaf Deinert

Submitted for the degree of Doctor of Philosophy March 2021

A mia nonna

Social platforms: New places and times of (non)fulfillment of working obligations.

A comparative study of the Italian and German legal systems

LIST OF ABBREVIATIONS

ArbG (Arbeitsgericht)

BAG (Bundesarbeitsgericht)

BeckRS (beck-online.Rechtsprechung)

BGH (Bundesgerichtshof)

BVerfG (Bundesverfassungsgericht)

CCTV (Closed-circuit television)

CFR (Charter of Fundamentals Rights of the European Union)

GG (Grundgesetz German Basic Law)

LAG (Landesarbeitsgericht)

SNS (Social network site)

TFEU (Treaty on the Functioning of the European Union)

I&C (information and communication)

LIST OF TABLES

ABSTRACT IN ENGLISH

The communication opportunities offered by social networks tend to support the inclination to let everyone know everything, not infrequently with effects on the work activity. This opens up new scenarios that are no longer clearly distinct from the traditional spaces and times of work and personal life outside work. As a consequence, the position of subordination of the employee is accompanied by the usual condition of weakness of the data subject. This convergence between the status of the employee and that of the data subject requires a multi-level approach. On the one hand, there is the question regarding the protection of privacy within the employment relationship and, on the other hand, the fundamental issue of the boundaries of the employment relationship itself, i.e., the contractually enforceable area. These must be defined in order to clarify what relevance can be given to the apparently private behavior of the employee regarding the fate of the employment contract.

The present study is conceived as a dialogue between the German and Italian legal systems, in the awareness that:

"*In order to get to know the experiences of others, it is necessary to make oneself, as far as possible, a participant in them and to personally experience their atmosphere, with a spirit of great humility and open-mindedness*."

Moccia, Luigi (1994). La "comparazione" come "pedagogia giuridica" nell'opera di Gino Gorla. *Rivista trimestrale di diritto e procedura civile*, 2, p. 592.

ABSTRACT IN ITALIAN

Le opportunità di comunicazione offerte dalle reti sociali tendenzialmente assecondano l'inclinazione a far sapere tutto a tutti, non raramente con conseguenze sull'attività lavorativa. Pertanto, si aprono, di fatto, scenari nuovi e non più nettamente distinguibili tra gli spazi e i tempi tradizionali del lavoro e la vita personale extra-lavorativa. Con la conseguenza che la posizione di subordinazione, propria del lavoratore dipendente, si associa alla condizione abituale di debolezza in cui si trova il titolare dei dati interessati dal trattamento. Questa convergenza tra lo *status* di lavoratore dipendente e quello di *data subject* richiede un approccio multilivello. Da un lato, infatti, si pone la questione in merito alla tutela della *privacy* all'interno del rapporto di lavoro e, dall'altro, il tema fondamentale dei confini del rapporto di lavoro stesso, ossia dell'area contrattualmente esigibile, al fine di chiarire quale rilevanza può essere riconosciuta ai comportamenti apparentemente privati del lavoratore sulle sorti del contratto di lavoro.

Il presente studio è concepito come un dialogo tra l'ordinamento giuridico tedesco e quello italiano, nella consapevolezza che:

"*Per conoscere le altrui esperienze occorre farsene, quanto più possibile, partecipi e viverne personalmente l'atmosfera, con spirito di grande umiltà ed apertura mentale*."

Moccia, Luigi (1994). La "comparazione" come "pedagogia giuridica" nell'opera di Gino Gorla. *Rivista trimestrale di diritto e procedura civile*, 2, p. 592.

ABSTRACT IN GERMAN

Die Kommunikationsmöglichkeiten, die soziale Netzwerke bieten, unterstützen tendenziell die Neigung, jeden alles wissen zu lassen, nicht selten mit Folgen für die Arbeitstätigkeit. Dadurch eröffnen sich neue Szenarien, die nicht mehr klar zwischen den traditionellen Räumen und Zeiten der Arbeit und dem persönlichen Leben außerhalb der Arbeit zu unterscheiden sind. Infolgedessen geht die Position der Unterordnung des Mitarbeiters mit dem üblichen Zustand der Schwäche des Datensubjekts einher. Diese Annäherung zwischen dem Status des Mitarbeiters und dem des von der Datenverarbeitung betroffenen Subjekts erfordert einen mehrstufigen Ansatz. Es stellt sich nämlich zum einen die Frage nach dem Schutz der Privatsphäre innerhalb des Arbeitsverhältnisses und zum anderen die grundsätzliche Frage nach den Grenzen des Arbeitsverhältnisses selbst, also dem vertraglich einklagbaren Bereich, um zu klären, welche Relevanz dem scheinbar privaten Verhalten des Arbeitnehmers für die Zukunft des Arbeitsvertrages beigemessen werden kann.

Die vorliegende Studie ist als Dialog zwischen dem deutschen und dem italienischen Rechtssystem konzipiert, in dem Bewusstsein, dass:

“Um die Erfahrungen fremder kennenzulernen, ist es notwendig, sich so weit wie möglich zum Teilnehmer an ihnen selbst zu machen und ihre Atmosphäre persönlich zu erleben, mit einem Geist großer Demut und Aufgeschlossenheit.”

Moccia, Luigi (1994). La “comparazione” come “pedagogia giuridica” nell’opera di Gino Gorla. *Rivista trimestrale di diritto e procedura civile*, 2, p. 592.

INTRODUCTION

1.1 PRELIMINARY REMARKS

The universal success of social network sites ("SNSs") has ended up satisfying employers' tendencies to collect as much information as possible about employees or candidates. The employment relationship has always been characterized by so-called "information asymmetry",[1] a concept developed in economic science to describe the trend of one market agent gaining more and more information about the other contracting parties while disclosing as little as possible about themselves.[2] Nowadays, employers are able to obtain a substantial amount of information about employees or candidates (concerning lifestyle, personal opinions, or even political and sexual orientations) simply by typing their names into a search bar on the net, with the consequence that the relationship between the employer and the employee is further compromised by "added informative value", that is, an unbalanced amount of information that the employer, in the digital context, is able to obtain about the employee.[3] On the basis of this information, the employer is very often persuaded to take measures, which he or she would not otherwise have taken regarding the future course of the employment relationship, affecting the procedures of selection, management, and termination of the employment relationship.[4]

[1] Phlips, L. (1988). *The economics of imperfect information*. Cambridge; New York: Cambridge University Press, pp. 122-133; Spence, M.A. (1974). *Market Signaling: Informational transfer in hiring and related screening process*. Cambridge, Massachusetts: Harvard University Press, pp. 1-4. The author considers the job market a paradigmatic example in which the market agents, i.e., the employer and the applicants, do not have all the information they would like to have about the other. Indeed, during the recruitment phase, the employer has no certainty about the effective capabilities of the candidates, although some so-called "market signals" guide him or her in the choice. The author defines these "market signals" as personal qualities that can influence other people's opinions about oneself. During the hiring phase, the employer must infer information about the applicants from signals such as outward appearance, level of education, skin color, and gender of the candidate. The latter, in turn, will in many cases try to change these "market signals", for example, by wearing his or her best suit.

[2] Del Punta, R. (2019). Social media and workers' rights: What is at stake? *International Journal of Comparative Labour Law and Industrial Relations*, 35(1), p. 84.

[3] Tullini, P. (2009). Comunicazione elettronica, potere di controllo e tutela del lavoratore. *Rivista italiana di diritto del lavoro*, 3(1), p. 350.

[4] Rota, A. (2017). Rapporto di lavoro e "big data analytics": Profili critici e risposte possibili. *Labour & Law Issues*, 3(1), p. 39. doi:10.6092/issn.2421-2695/6861

Recent judgements by European and American[5] judicial authorities are increasingly deciding about hypotheses of dismissal due to an employee's online off-duty conduct. In particular, the courts are called to establish whether a dismissal based on an employee's online personal information is legitimate or not (an example could be an inappropriate comment, photo, or like on Facebook and Twitter).[6] With the ever-increasing popularity of social networks (and of "virtual reality" in general), employers are gradually becoming more capable of obtaining a *"broad array of employee's personal data*",[7] and this leads to a sociological and legal debate about the meaning and implications of the employee's digital reputation.

In light of this, the impact that the employee's virtual activity can have on the employment relationship is becoming more and more manifest. It would be reductive to consider the sharing of information on social media equivalent to the publishing of opinions in the press, especially because the exponential use of SNSs both during and outside the working hours[8] is having a disruptive effect

[5] Historically, in the United States, the employment relationship is deeply inspired by the principle of *laissez-faire* and the principle of contractual autonomy, by which to the employer is given wide margins within which to exercise his or her managerial power. Precisely for this reason, in the matter of privacy in the employment relationship, the legislators of some states have only recently intervened to protect workers. See Finkin, M.W., Krause, R. & Okuno, H.T. (2015). Employee autonomy, privacy, and dignity under technological oversight. In M.W. Finkin & G. Mundlak (Eds.), *Comparative labor law* (p. 164-165). Cheltenham, Northampton: Edward Elgar Publishing.

[6] To mention only a few cases: in 2009, the Court of Rome considered lawful the dismissal of a well-known Italian airline hostess, pornographic material of whom was accessible on the Internet and easy to find by typing the name of the airline and the noun "hostess" (Court of Rome 28 January 2009, in *Massimario di giurisprudenza del lavoro*, 5/09, p. 324, with comment of C. Pisani, (2009). *La hostess "allegra": licenziamento per inidoneità morale*); in 2015, the Court of Ivrea considered rightful the dismissal of an employee who had insulted his colleagues and his employer through a Facebook post on his Facebook page (Court of Ivrea 28 January 2015, resolution n. 1008, in *Il Lavoro nella giurisprudenza*, 2015, 8-9, pp. 838-843, with comment of P. Salazar (2015). *"Facebook" e licenziamento per giusta causa: quando si travalicano i limiti del privato influendo sul rapporto di lavoro*); the Baden-Württemberg Regional Labor Court of Appeal ruled in a judgment of 14 March 2019 that the dismissal of an employee who had accused a colleague of rape in a WhatsApp conversation with other colleagues was justified (LAG Baden-Württemberg 14 March 2019 – 17 Sa 52/18, in *Betriebs-Berater*, 40, pp. 2364-2368, with comment of B. Weller (2019). *LAG Baden-Württemberg: Außerordentliche Kündigung wegen übler Nachrede per Whatsapp*).

[7] Sprague, R. (2011, February 28). Invasion of the social networks: Blurring the line between personal life and the employment relationship. *University of Louisville Law Review*, 50, 3. Retrieved from https://ssrn.com/abstract=1773049.

[8] The daily use of social media is always trending upwards, and most of social media's users, particularly teenagers, share very private aspects of their identity as photos, videos, and texts concerning their habits, experiences, and political views. Most of the time, the shared information can then rebound from one user to another and become viral, or at least available to an indefinite number of people, with evident negative consequences when the person who accesses it is an employer. Barnes, S.B. (2006). A privacy paradox: Social networking in the United States. *First Monday*, 11(9), p. 4. doi: https://doi.org/10.5210/fm.v11i9.1394; Marcus, B., Machilek, F. & Schütz, A. (2006). Personality in cyberspace: Personal web sites as media for personality expressions and impressions. *Journal of Personality and Social Psychology*,

on the quantity and quality of personal information shared on the network.[9] The terms and conditions of use of one of the most popular social networks, such as Twitter, clearly warn the user that "*Twitter is public and Tweets are immediately viewable and searchable by anyone around the world*".[10]

The main legal issue that arises from the cases referred to above concerns the employee's data protection within the employment relationship. Specifically, when any information (i.e., "personal data") relating to the employee as an identified or identifiable natural person (i.e., "data subject") is available and processable by the employer, the employee's condition is twofold, as both an employee and data subject, with the consequence that the contrast between the employer and the employee increases.[11] In other words, the usual position of weakness in which the data subject is placed is accompanied by the inherent subordination's position of the employee,[12] and this convergence between the two different *statuses* of employee and data subject requires a multilevel approach. For instance, with regard to consent to data processing, the *"employees are seldom in a*

90(6), p. 1018; Zimmer, M. (2010, December). But the data is already public: On the ethics of research in Facebook. *Ethics and Information Technology*, 12(4), pp. 313-325. doi: https://doi.org/10.1007/s10676-010-9227-5; Spiekermann, S., Krasnova, H., Koroleva, K. & Hildebrand, T. (2010). Online social networks: Why we disclose. *Journal of Information Technology*, 25(2), p. 109. doi:10.1057/JIT.2010.6; Katsabian, T. (2018, March 29). Employees' privacy in the internet age - Towards a new procedural approach. *Hebrew University of Jerusalem Legal Research Paper*, 18-19, p. 20. doi: https://dx.doi.org/10.2139/ssrn.3152404.

[9] Del Punta, R. (2019). Social media and workers' rights: What is at stake? *International Journal of Comparative Labour Law and Industrial Relations*, 35(1), pp. 79-80.

[10] Twitter Privacy Policy. Retrieved from https://twitter.com/en/privacy?lang.

[11] Rota, A. (2017). Rapporto di lavoro e *big data analytics*: profili critici e risposte possibili. *Labour & Law Issues*, 3(1), p. 39. doi:10.6092/issn.2421-2695/6861; Simitis, S. (1977). Datenschutz im Arebitsrecht. *Arbeit und Recht*, p. 97. Retrieved from www.jstor.org/stable/24017884; Zanelli, P. (1985). Nuove tecnologie, riservatezza, diritto d'informazione. *Rivista italiana di diritto del lavoro*, I, pp. 89-125.

[12] For this reason, serious concerns have arisen about the protection of fundamental personal rights in relation to the diffusion of big data analysis on the basis of the potential discriminatory practices to which an increased availability of personal data could lead, and this perspective has begun to take hold more and more in the doctrine. Mantelero, A. (2015). Rilevanza e tutela della dimensione collettiva della protezione dei dati personali. *Contratto e impresa. Europa*, 1, pp. 141-142; Maggiolino, M. (2017). Concorrenza e piattaforme: tra tradizione e novità. In G. Colangelo & V. Falce (Eds.), *Concorrenza e comportamenti escludenti nei mercati dell'innovazione* (pp. 69-70). Bologna, il Mulino; Ruotolo, G.M. (2018). I dati non personali: l'emersione dei *big data* nel diritto dell'Unione europea. *Studi sull'integrazione europea*, 1 (XIII), pp. 104-105. Retrieved from https://www.studisullintegrazioneeuropea.eu/Scarico/Rivista%20Studi%200118.pdf; Rota, A. (2017). Rapporto di lavoro e *big data analytics*: profili critici e risposte possibili. *Labour & Law Issues*, 3(1), p. 36. Retrieved from http://labourlaw.unibo.it.

position to freely give, refuse or revoke consent, given the dependency that results from the employer/employee relationship".[13]

In this respect, the digital revolution is deeply affecting the world of work, calling into question the most recent notions of privacy as a right to data protection.[14] Unsurprisingly, part of the more circumspect doctrine considers inherent in the mechanisms of data analysis the risk of "*new discriminatory practices and the attack on the fundamental freedoms and informational self-determination of the person through the big data and the technical mechanisms of analysis*".[15]

Indeed, the European legislator, with the enactment of Regulation 2017/679/EU, has testified to his awareness of the necessity of a specific discipline with reference to the processing of personal data in the working environment.[16] Specifically, the European legislator has provided a common regulation in the field of data protection for all Member States, and thus also for the two legal systems considered by the present study: the German one and the Italian one, which have two different backgrounds regarding the employee's privacy protection, even though a common root brings them together.

[13] Article 29 Data Protection Working Party, Opinion 2/2017 on data processing at work (17/EN WP 249) (adopted on June 8, 2017), p. 4. Retrieved from https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=610169.

[14] The immediate reference is to the so-called "big data analysis", intended as the result of a scientific and technological process capable of combining, on the one hand, the processing of a large amounts of data from different sources and, on the other, the increasing speed of network connections. Visconti, R.M. (2016). Valutazione dei *Big data* e impatto su innovazione e *digital branding*. *Il Diritto industriale*, 1, p. 46; De Mauro, A., Greco, M. & Grimaldi, M. (2014, September). What is big data? A consensual definition and a review of key research topics. *AIP Conference Proceedings*, 1644(1), pp. 98-99. doi:https://doi.org/10.1063/1.4907823; Rota, A. (2017). Rapporto di lavoro e *big data analytics*: profili critici e risposte possibili. *Labour & Law Issues*, 3(1), p. 34. doi:10.6092/issn.2421-2695/6861.

[15] Tullini, P. (2016). Economia digitale e lavoro non-standard. *Labour & Law Issues*, 2, p. 6. doi: 10.6092/issn.2421-2695/6489; Kim, P.T. (2017, April 19). Data-driven discrimination at work. *William & Mary Law Review*, 58(3), pp. 860-861. Retrieved from https://ssrn.com/abstract=2801251.

[16] In the previous Directive 95/46/EC, no specific rules were laid down for the processing of workers' data. Indeed, the awareness of the need to protect the right to data protection even in the employment context has matured only in recent years. At the European level, before the adoption of the Regulation 2017/679/EU, other initiatives were taken in order to promote the protection of the worker's right to privacy within the employment relationship, including: Opinion 2/2017 on the processing of personal data in the employment context issued by the Independent EU Advisory Body on Data Protection and Privacy (article 29 Data Protection Working Party so called WP29); the European Parliament's exhortations to the European Commission regarding the drafting of a legislative proposal on the "protection of privacy at the workplace" (European Parliament Resolution on the First Report on the Implementation of the Data Protection Directive 95/46/EC, COM(2003) 265 – C5-0375/2003 – 2003/2153(INI), in GUCE, C 102E of 28.4.2004, number 33).

That is clearly reflected in Regulation 2017/679/EU, which regards the processing of personal data in the context of employment as a specific processing situation requiring peculiar provisions "*to ensure the protection of the rights and freedoms of employees, in particular for the purposes of the recruitment, the performance of the employment contract, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship*".[17]

As highlighted by Article 88 of Regulation 2017/679/EU, the employee's right to data protection must cover a wide timeframe of the employment relationship, starting from the recruitment phase, when the employment relationship has not even been established[18] and ending when the employment relationship terminates. This extended protection reflects a sophisticated vision of personality, a result of an evolution of German case-law,[19] according to which the right to express one's own personality must be guaranteed by sufficient privacy protection within and outwith contractual performance.[20] In other terms, the new technological context suggests the need to safeguard the employee's person not only inside the working environment, considered in a

[17] Art. 88 of General Data Protection Regulation 2017/679/EU.

[18] A recent study has shown that 80% of employers are used to conducting online searches on social networks of candidates during the hiring and recruiting phase. This trend, called "potential employee vetting", raises several legal issues, even if formally, the employer is not legally required to justify a candidate's rejection. See Sprague, R. (2011, February 28). Invasion of the social networks: Blurring the line between personal life and the employment relationship. *University of Louisville Law Review*, 50, pp. 4-5. Retrieved from https://ssrn.com/abstract=1773049; Cross-tab (2010, January). Online reputation in a connected world, p. 5. Retrieved from https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf; Oberwetter, C. (2008). Bewerberprofilerstellung durch das Internet - Verstoß gegen das Datenschutzrecht?. *Betriebsberater (BB)*, 29, p. 1562.

[19] Finkin, M.W. (2010). Some further thoughts on the usefulness of comparativism in the law of employee privacy. *Employee Rights & Employment Policy Journal*, 14, p. 14.

[20] Del Punta, R. (2019). Social media and workers' rights: What is at stake? *International Journal of Comparative Labour Law and Industrial Relations*, 35(1), p. 83.

strict sense but also the need to rethink the borders of the employment relationship since the purpose of the most common technologies is to break down these spatial and temporal borders.[21]

A neglected aspect of the impact of these new technologies on the employment relationship concerns the consequent repercussions on the "borders" of the contractual relationship itself, with the risk of the phenomena of the "*colonization of the extra-company life of the worker*".[22] Digitalization has undoubtedly facilitated the accomplishment of work duties, but it has also conveyed new, direct or indirect, forms of control, not only over working time and working performance but also over aspects of the employer's private life.[23] Today, job tasks can be carried out with the support of new technologies far away from workplaces and outside of working hours, without temporal or spatial limits, and frequent occasions of reciprocal permeability between private and working life and even increasingly common cases in which one leads to the end of the other.

The analysis of the present dissertation will therefore be focused around those "extra-work" spaces that go beyond the formal, contractual employment relationship, in so far as they are temporally and spatially distant from the place and times of work, occurring within the personal and private life of the worker.[24] It cannot be omitted in this regard that due to the direct professional

[21] In these terms, the phenomenon of the so-called "smart work" gives concrete expression to the elimination process – launched by the new technologies' use within the world of work – of spatial and temporal components of the employment relationship as it is traditionally considered.

[22] Napoli, M. (1980). *La stabilità reale del posto di lavoro*. Milano: Franco Angeli, p. 177.

[23] Sitzia, A. (2013). *Il diritto alla "privatezza" nel rapporto di lavoro tra fonti comunitarie e nazionali*. Padova: CEDAM, pp. 1-8; Chieco, P. (2000). *Privacy e lavoro. La disciplina del trattamento dei dati personali del lavoratore*. Bari: Cacucci, pp. 23-30.

[24] In this regard, recent studies have estimated that the time spent managing the work mailbox (company and institutional, i.e., in the private and public sectors) outside the working hours is much longer than the holiday-period available (especially with more exposed groups, such as the category of younger workers, who admit that they often wake up during the night to check work e-mails). This phenomenon is obviously the result of the times in which we live, and if, at a theoretical level, the essential value of time is undisputed as the only truly scarce and non-renewable resource, this is increasingly being indirectly sacrificed by the daily use of technologies in the performance of employment relationships. Dewey, C. (2016*). How many hours of your life have you wasted on work emails?* Try our depressing calculator. *The Washington Post.* Retrieved from https://www.washingtonpost.com/news/the-intersect/wp/2016/10/03/how-many-hours-of-your-life-have-you-wasted-on-work-email-try-our-depressing-calculator/; Poletti, D. (2017). Il c.d. diritto alla disconnessione nel contesto del «diritti digitali». *Responsabilità civile e previdenza*, 1, p. 16.

and personal implication of the employee's individuality (and even in his or her entire corporeal presence[25]), the new technologies' impact frequently calls into question several fundamental and personal rights, as well as the private law foundation of the employment relationship.[26]

In conclusion, the topic of the present study is the result of a series of remarks about the current world of work, which is experiencing some radical transformations prompted by the almost constant combination of man and digital technologies in the performance of duties. This process has crucial repercussions on the dynamics and physiognomy of the subordinate employment relationship, which indirectly revitalize old, but never concluded, themes of debate within the civil and the labor law doctrine.

1.2 RESEARCH QUESTIONS

The phenomenon concerning employer's choices on the grounds of workers' information gained on the network involves several legal matters with critical implications for the civil law related basis of the employment relationship. Courts dealing with cases of dismissals due to online off-duty conduct and reviewing the legality of the employer's decision and the facts and circumstances on which the proposed measure is based must maintain a balance between opposing interests, such as: the employer's power of control and respect for the employee's personal life, with reflections on the extent of the obligations levied on the employee him/herself.

[25] Mengoni, L., Proto Pisani, A. & Orsi Battaglini, A. (1990). L'influenza del diritto del lavoro su diritto civile, diritto processuale civile, diritto amministrativo. *Giornale di diritto del lavoro e relazioni industriali*, 7(45), p. 6. It can be argued that contemporary labour law, historically identified from the moment it developed its own regulation categories, came to light when the majority doctrine became aware of the fact that the employment relationship, unlike the common obligatory relationships, is not only about the "having" but about the "being" of the debtor. This intuition originated with Philipp Lotmar (for further reading: Lotmar, P. (1902). *Der Arbeitsvertrag nach dem Privatrecht des deutschen Reiches*. Leipzig: Duncker & Humblot, p. 7) and was well expressed by the illustrious Italian civil law scholar Santoro Passarelli in the following words: "*if all the other contracts concern the having of the parties, the employment contract till concerns the having for the employer, but the being for the worker*" (Santoro Passarelli, F. (1961). Spirito del diritto del lavoro. In F. Santoro Passarelli (Ed.), *Saggi di diritto civile*. Napoli: Jovene, p. 1071).

[26] Colapietro, C. (2017). Tutela della dignità e riservatezza del lavoratore nell'uso delle tecnologie per finalità di lavoro. *Giornale di diritto del lavoro e delle relazioni industriali*, 155, p. 442.

Specifically, from the employee's perspective, it can be argued that what is on his/her social media profile is precluded to third parties outside the circle of the person's virtual friends. Furthermore, along this line, the contention can be supported that even if the content is inappropriate on a professional level, it must be protected as an exercise of the freedom of expression. The connection of these claims suggests the idea that the employee's personal information that is accessible on the web should be protected as part of the private sphere.[27] This approach finds confirmation in the doctrine according to which the employer's power of control, exercised by the employer through the screening of employee's social network profiles, should not harm the employee's right to privacy. Given this premise, the respect for the employee's private sphere should be increased, especially when the employer monitors the employee's off-duty conduct, which is, by definition, unrelated to the employment relationship and for this reason ineligible as a yardstick of non-compliance with contractual obligations.[28]

Conversely, from the employer's perspective, it can be argued that the employee's online reputation should not damage the company's public image, given that the employee should also behave properly in his/her private life. According to this second thesis, the employee's private life, even if formally distinct from the employment relationship, should be oriented to the employer's interests.[29] This approach finds confirmation in the doctrine according to which as soon as private

[27] There are several studies in sociology and psychology aimed at understanding what human impulse drives the tendency to share private information on social networks. The reasons seem to be numerous: the desire to establish new friendships, to stay in touch with the old friends, and to feel part of a community. Ultimately, it can be said that at the core of social network use, there is a primordial human need to show oneself to the world. From this point of view, sharing one's own information on the network seems to have become a way of crafting one's individual identity. Brandtzæg, P.B. & Heim, J. (2009) Why people use social networking sites. In A.A. Ozok & P. Zaphiris (Eds.), OCSC *Online Communities and Social Computing. Lecture Notes in Computer Science* (vol. 5621). Berlin; Heidelberg: Springer; Nadkarni, A. & Hofmann, S.G. (2012). Why do people use Facebook?. *Personality and Individual Differences*, *52*(3), pp. 243-249. doi:10.1016/j.paid.2011.11.007; Mills, M. (2017). Sharing privately: The effect publication on social media has on expectations of privacy. *Journal of Media Law*, 9(1), pp. 45-71. doi: 10.1080/17577632.2016.1272235

[28] Sanseverino, R.L. (1978). *Diritto del lavoro*. Padova: CEDAM, pp. 395-400.

[29] Colucci, M. (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of view. In R. Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43, pp. 14-16). The Hague/London/New York: Kluwer Law International.

information is shared and becomes potentially publicly visible online, it must be supposed to no longer belong to the employee's private sphere, which could cause damage to the employer. The premise of this hypothesis is that the online off-duty conduct is relevant to fulfilling contractual performance and to the professional evaluation of the employee's competence, both for the instauration of the employment relationship and for the conducting of it.[30]

In the context of the present dissertation, these doctrinal interpretations and other correlated constructions will be analyzed in order to comprehend the conditions under which a dismissal due to online off-duty conduct can be considered lawful. This will be done by examining the current doctrinal and jurisprudential orientations that have arisen in the Italian and German legal systems.

In other words, the question that arises from personal data shared willingly by the data subject is as follows: should the consent of the subject to the data collection and processing be assumed as implicit? Or should the principle of purpose still be regarded as operating, according to which personal data collection and processing can be legitimately carried out only for the reasons the data subject has made the data public?

That said, we should also not underestimate the common image of the SNSs as *"the largest public space that humanity has known"*,[31] which risks widening the boundaries of the employee's contractual obligations by attributing legal relevance to the behaviors performed in off-hours and outside workplaces.[32] In other words, is it legitimate to expect that the employee should behave responsibly in his/her own private sphere (including his/her own social media profiles)? Or, on the

[30] Salazar, P. (2015). "Facebook" e rapporto di lavoro: quale confine per l'obbligo di fedeltà. *Il Lavoro nella giurisprudenza*, (3), p. 291.
[31] Rodotà, S. (2012). *Il diritto di avere diritti*. Roma-Bari: Gius. Laterza & Figli, p. 379.
[32] Forlivesi, M. (2017). Il controllo della vita del lavoratore attraverso i social network. In Tullini P. (Ed.), *Web e lavoro. Profili evolutivi e di tutela* (pp. 45-46). Torino: Giappichelli.

basis of which normative assumption can the working obligation be considered claimable beyond the spatial and temporal border of the employment relationship?

In this situation, it is necessary to comprehend the extent of privacy protection within the employment relationship without disregarding the need to investigate the boundaries of that relationship. Therefore, we must critically inquire into the civil law related concept of the working contract.

1.3 RESEARCH OBJECTIVE

The complexity of the matter at hand requires a multi-level approach in order to grasp not only the legal challenges linked to the easy online accessibility of personal information and its effect on the employment relationship but also to comprehend the peculiarities of the phenomenon, which is primarily social.

Although the subject is controversial and the aspects involved are manifold, the crucial concept, which recurs both in relation to the protection of the worker's privacy and in relation to the extent of the work obligation, is one of "borders", as one of the most significant hallmarks of the global reality is the breaking, at least apparently, of spatial and temporal borders. Indeed, one of the underlying themes of the present dissertation is the concept of "borders" between: individual and social, real and virtual, private and public, and regarding the width of the employment obligation itself, outlining what is contractually due and what is not. In the words of Article 29 of the Data Protection Working Party: "*The rapid adoption of new information technologies in the workplace, in terms of infrastructure, applications and smart devices, allows for new types of systematic and potentially invasive data processing at work. For example: […] new forms of processing, such as those concerning personal data on the use of online services and/or location data from a smart device, are much less visible to employees than other more traditional types such as overt CCTV cameras. This raises questions about the extent to which employees are aware of these*

technologies, since employers might unlawfully implement this processing without prior notice to the employees; and the boundaries between home and work have become increasingly blurred. For example, when employees work remotely (e.g. from home), or whilst they are travelling for business, monitoring of activities outside of the physical working environment can take place and can potentially include monitoring of the individual in a private context".[33]

In light of the considerations above, the primary aim of the present research is to comprehend the impact of Regulation 2017/679/EU - which is, at the same time, the result of a process of synthesis between the different legislative experiences of each Member State - on the Italian and German legal systems, with specific regard to the processing of employees' personal data.[34] The substantial difference between the two legal systems under study consists in the divergent legal culture around the concept of privacy within the employment relationship. For these reasons, the research is focused on the differences and the common core of the compared legal systems from the perspective of a desirable legal harmonization. The second aim is to inquire to what extent the legal evolution of the theory of secondary obligations, elaborated within the German legal system, finds parallel developments in Italy.

The research, taking its cue from a historical legal reconstruction of the notion of privacy (in respect of which Regulation 2017/679/EU represents the arrival point of European legislation in the field of data protection[35]), cannot avoid reflecting on the concept of "virtual identity", with the purpose of understanding how the necessary balance between the opposing interests involved in

[33] Article 29 Data Protection Working Party, Opinion 2/2017 on data processing at work (17/EN WP 249) (adopted on June 8, 2017), pp. 3-4. Retrieved from https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=610169.

[34] The General Data Protection Regulation replaces the previous sources of data protection regulations, specifically Directives 95/46/EC, 2002/58/CE, and 2009/136/CE, by implementing the guidelines of the European Court of Justice and the European Court of Human Rights. Ogriseg, C. (2016). Il Regolamento UE n. 2016/679 e la protezione dei dati personali nelle dinamiche giuslavoristiche: la tutela riservata al dipendente. *Labour & Law Issues*, 2, p. 33. Retrieved from https://labourlaw.unibo.it/article/view/6498.

[35] However, as will be illustrated, with many unresolved aspects concerning privacy regulation within the employment relationship.

the cases of dismissals due to online off-duty conduct should operate. In order to comprehend the extent of what "virtual reality" can mean today, it is necessary to become aware of new technologies' progressive demolition of physical boundaries. One needs only to consider how nowadays, long-distance communication is instantaneous, and it is taken for granted that news can travel across long distances.[36]

In this context, thanks to the immediacy, the free accessibility, and sometimes the anonymity of the communication via social media, women and men from all over the world fight against discrimination and oppression, posting evidence of abuses suffered on their social media profiles and drawing the attention of the worldwide community.[37] From that perspective, "*places all around the world are inhabited by the defence of social rights*".[38] Nevertheless, some recent and common news has highlighted the inadequacy of legal remedies in response to rights violations that have occurred exclusively in cyberspace. From that perspective, it seems that cyberspace is the place where rights are both professed more often and more frequently infringed upon.[39] A crucial example concerns the hypothesis of data misuse and unauthorized access, phenomena in

[36] Meyrowitz, J. (1999). *Oltre il senso del luogo*. *L'impatto dei media elettronici sul comportamento sociale*. Bologna: Baskerville. The author conducts research on how electronic media (with specific reference to the television, the radio, and the computer) has transformed the meaning of time and space in social interaction.

[37] By way of example, the social networks Twitter and Facebook played a key role during the so-called 2011 Arab Spring in Tunisia, Egypt, and Syria by providing a media coverage, which was decisive both for social mobilization and for the international support of the protest. Proof of this is the blocking of internet traffic ordered between 28 January and 2 February by the Mubarak regime. See Di Liddo, M., Falconi, A., Iacovino, G. & La Bella, L. (2011). Il Ruolo dei Social Network nelle Rivolte Arabe. *Osservatorio di politica internazionale*, 40, pp. 1-29. Retrieved from http://www.parlamento.it/application/xmanager/projects/parlamento/file/repository/affariinternazionali/osservatorio/approfondimenti/PI0040App.pdf; Hounshell, B. (2011). The revolution will be Tweeted. Life in the vanguard of the new Twitter proletariat. *Foreign Policy*. Retrieved from http://www.foreignpolicy.com/articles/2011/06/20/the_revolution_will_be_tweeted; Howard, P.N. (2011, February 16); Digital media and the Arab spring. *Reuters*. Retrieved from http://blogs.reuters.com/great-debate/2011/02/16/digital-media-and-the-arab-spring.

[38] Rodotà, S. (2012). *Il diritto di avere diritti*. Roma-Bari: Gius. Laterza & Figli, p. 5.

[39] The most common and best-known situations of conflict on the network concern cases of offenses to personal reputation or the hypothesis of reporting of news related to the criminal records of a person in the absence of public interest. Barra Caracciolo, F. (2018). La tutela della personalità in internet. *Il Diritto dell'informazione e dell'informatica*, 2, pp. 201-212; Finocchiaro, G. (2019). Diritto all'oblio e diritto di cronaca: una nuova luce su un problema antico. In *giustiziacivile.com,* 1, pp. 1-6.

connection to which it seems that as soon as personal data gains a public dimension, it also receives a lower level of protection.[40]

Indeed, the vulnerability to which one is often exposed on the network is changing from a sociological and anthropological point of view and affecting, on the legal front, the notion of privacy.[41] If, according to the original conception as the "right to be left alone", the right to privacy at its core corresponds to the inaccessibility of one's own private sphere, free from unjustified interferences of others, the most recent definition of privacy recognizes another key aspect by identifying the right to privacy with the concepts of autonomy and self-realization: essentially, with the right to build one's own personality in society.[42]

Therefore, it can be stated that the notion of privacy has gone from being a "negative" freedom, in terms of freedom "from" intrusions, to a "positive" freedom, in terms of freedom "to" fulfill oneself, without abandoning the first notion.[43] If the notion of privacy is adopted either as a limitation of the knowledge of others about oneself or as the power over one's own information,

[40] Rodotà, S. (2012). *Il diritto di avere diritti*. Roma-Bari: Gius. Laterza & Figli, pp. 25-26.

[41] Originally, the notion of privacy was intended as "the right to be left alone" (Warren, S. & Brandeis, L. (1890, December 15). The right to privacy*. Harvard Law Review,* 4(5), p. 193). Over the years, this assumption has been enriched by new specifications. The next step in the definition of privacy is due to the work of Alan Westin, who first defined privacy as "*the claim of an individual to determine what information about himself or herself should be known to others*", suggesting three elements that affect privacy norms: political, socio-cultural, and personal (Westin, A. (2003, April 29). Social and political dimensions of privacy. *Journal of Social Issues*, 59(2), pp. 431-434). Other scholars, including Ruth Gavison and Richard Posner, welcomed the definition of privacy as the withholding of personal information (Gavison, R.E. (1980). Privacy and the limits of law. *The Yale Law Journal*, 89(3), p. 423. Retrieved from https://ssrn.com/abstract=2060957; Posner, R.A. (1978). The right of privacy. *Georgia Law Review,* 12(3), p. 409). Tom Gerety thought of privacy as "*the control over or the autonomy of the intimacies of personal identity*" (Gerety, T. (1977). Redefining privacy. *Harvard Civil Rights-Civil Liberties Law Review*. 12(2), p. 281). Evidently, the notions of privacy are numerous and must depend on the evolution of society. Agree, P.E. & Rotenberg, M. (2001). *Technology and privacy. The new landscape*. Cambridge, Massachusetts: MIT Press.

[42] Baldassarre, A. (1997). *Diritti della persona e valori costituzionali*. Torino: Giappichelli, p. 242.

[43] Aimo, M. (2003). *Privacy, libertà di espressione e rapporto di lavoro*. Napoli: Jovene, pp. 31-32. Part of the doctrine even considers that the protection of privacy and the right to the protection of personal data are to be dealt with in distinct terms, even if they are preconditions for each other. In this respect, Articles 7 and 8 of the CFR provide, respectively, for the protection of the right to privacy and the safeguard of the right to the protection of personal data. De Siervo, U. (2005). La privacy. In S.P. Panunzio (Ed.), *I diritti fondamentali e le Corti in Europa*. Napoli: Jovene, p. 345.

then privacy at its core defines the limits and conditions "*of legitimate knowledge of personal information or data*".[44]

Some German decisions have played a crucial role in this transition from the conception of privacy-property to the idea of privacy-dignity,[45] outlining for the first time in Europe the so-called right to "informational self-determination (*informationelle Selbstbestimmung*[46])", which, as a fundamental and personal right to decide in autonomy about the disclosure and use of one's own personal data, strengthens the scope of the right to privacy. The fundamental premise is that those who fear that personal behaviors are going to be monitored and stored as information will try not to display such behaviors or will even give them up, thus undermining the right to individual expression.[47]

Even if it may be rather difficult to provide an exhaustive legal definition of the right to privacy, Articles 7 and 8 of the Charter of Fundamentals Rights of the European Union and Article 16 of the Treaty on the Functioning of the European Union can be considered as the starting point for the evolution of the notion of privacy. According to Article 8 of the Charter of Fundamentals Rights of the European Union and Article 16 of the TFEU, the right to privacy, in terms of personal data protection, is a fundamental right since it represents an indispensable tool in the definition of one's own personality.[48]

---

[44] Del Punta, R. (2019). Social media and workers' rights: What is at stake? *International Journal of Comparative Labour Law and Industrial Relations*, 35(1), p. 80.

[45] *"Under the conditions of modern data processing, the protection of the individual against unlimited collection, storage, use and disclosure of his personal data is covered by the general personal right of the GG Art 2 para. 1 in combination with GG Art 1 para. 1. In this respect, the fundamental right guarantees the individual's right to decide on the disclosure and use of his personal data. Restrictions of this right to 'informational self-determination' are only permissible in the overriding public interest. They require a legal basis in accordance with the constitution, which must comply with the constitutional requirement of clarity of norms. In its regulations, the legislator must also observe the principle of proportionality. He must also take organisational and procedural precautions which counteract the risk of a violation of the right of personality*". BVerfG 15 December 1983, in *Neue Juristische Wochenschrift*, 1984, p. 419 ff. (translation in Rivista giuridica del lavoro 1987, I, 532 ff.)

[46] Intended as the personal right to decide for him/herself whether, when, and within what limits his/her personal data is made public. See: Volkszählungsurteil BVerfGE 65, 1 of 15. December 1983.

[47] Aimo, M. (2003). *Privacy, libertà di espressione e rapporto di lavoro*. Napoli: Jovene, p. 33.

[48] Rodotà, S. (2012). *Il diritto di avere diritti*. Roma-Bari: Gius. Laterza & Figli, p. 321.

In conclusion, it can be stated that the protection of privacy is an essential condition for the exercise of the fundamental rights to self-determination and the expression of one's own personality.[49] However, it is necessary to understand what limits it encounters in the fulfillment of the employment relationship.

In relation to the right to express one's own personality, it seems that one of the reasons for the global success of SNSs is due to their capacity to allow their users to process their own public identity[50] through open sharing to a digital audience of a vast range of information, which remains available on the social network and collectible by other online web databases.[51] Common social media platforms, such as Facebook and Twitter,[52] have revolutionized methods of communication. If, in the previous age of Web 1.0, online information was sorted by topic, going online in the age of Web 2.0 means accessing endless multimedia content produced by others, such as posts and tweets. Considering this, it can be argued that SNSs indulge the natural tendency to share one's own personal data, allowing users to spread personal content.[53]

[49] D'Antona, M. (1991). L'autonomia individuale e le fonti del diritto del lavoro. *Giornale di diritto del lavoro e relazioni industriali*, 51, p. 458.

[50] Iaquinta, F. & Ingrao, A. (2014). La "privacy" e i dati sensibili del lavoratore legati all'utilizzo di "social networks". Quando prevenire è meglio che curare. *Diritto delle relazioni industriali*, 4, pp. 1027-1028. Research conducted by the Department of Cognitive and Psychological Neuroscience at Harvard University has shown that the activity of providing self-information within a virtual community in which each user can build their own virtual identity by sharing personal content and interacting with other subjects stimulates the same areas of pleasure that are activated with food, money, and sex. Tamir, D.I. & Mitchell, J.P. (2012, May 22). Disclosing information about the self is intrinsically rewarding. *PNAS Proceedings of the National Academy of Sciences of the United States of America*, 109(21), pp. 8038-8043. doi: 10.1073/pnas.1202129109.

[51] Di Fraia, G. (2012). Social network e racconti identitari. *Minorigiustizia*, 4, p. 14; Cavallo, M. & Spadoni, F. (2010). *I social network. Come internet cambia la comunicazione*. Milano: Franco Angeli.

[52] Social networking sites have been defined as "*web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system*. […] *What makes social network sites unique is not that they allow individuals to meet strangers, but rather that they enable users to articulate and make visible their social networks"*. See Boyd D.M. & Ellison N.B. (2008). Social network sites: Definition, history and scholarship. *Journal of Computer-Mediated Communication*, 13, p. 211. Retrieved from https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1083-6101.2007.00393.x.

[53] Popoli, A.R. (2014). *Social network* e concreta protezione dei dati sensibili: luci ed ombre di una difficile convivenza. *Diritto dell'informazione e dell'informatica*, 6, pp. 984-985.

Within this framework, the labor dimension offers interesting food for thought. In the context of new technologies, it is nearly impossible not to leave any online "traces", which employers, thanks to increasing control techniques, frequently do not hesitate to collect.[54] For these reasons, on the one hand, it is self-evident that today, a substantial amount of an employee's personal data, sometimes even without his/her knowledge,[55] is readily available on the network. On the other hand, the new digital technologies indulge the employer's innate wish to be "*omniscient but possibly invisible*".[56]

From another perspective, it comes down to understanding if the complete compliance of the employment contract could be prejudicated by circumstances and behaviors not directly related to the job performance itself (and if, on the basis of that, a hypothesis of dismissal due to conduct related to an employee's personal sphere could be considered lawful); or if only the working performance, restrictively considered, is the subject of the contract, and any private conduct could affect its fulfillment, justifying a lawful dismissal.

In this regard, it seems appropriate to immediately note that in order to investigate the hypotheses of "interference" between private and working life, a series of "physiological" legislation gaps will inevitably arise in the course of this dissertation (because of the extraneousness of the cases in question to the employment relationship and, therefore, also to the discipline of it). In order to address these gaps, the majority of doctrine and jurisprudence often resort to applying civil

[54] Aimo, M. (2003). *Privacy, libertà di espressione e rapporto di lavoro*. Napoli: Jovene, p. 41.

[55] Numerous studies have shown that social network users are often not aware of how far their online activities implicate a potential public disclosure of their uploaded data. Bonneau, J. & Preibusch, S. (2010) The privacy jungle: On the market for data protection in social networks. In T. Moore, D. Pym & C. Ioannidis (Eds.), *The eighth workshop on the economics of information security and privacy* (pp. 121-167). Boston, MA: Springer; Acquisti, A. & Gross, R. (2006). Imagined communities: Awareness, information sharing, and privacy on the Facebook. In G., Danezis & P. Golle (Eds.), *Privacy Enhancing Technologies. PET 2006. Lecture Notes in Computer Science* (4258, pp. 36-58). Berlin, Heidelberg: Springer.

[56] Aimo, M. (2003). *Privacy, libertà di espressione e rapporto di lavoro*. Napoli: Jovene, p. 40; Ghezzi, G., Mancini, G.F., Montuschi, L. & Romagnoli, U. (1979). *Statuto dei diritti dei lavoratori*. Bologna: Zanichelli, p. 143.

categories (for the most part, the so-called "general clauses") to integrate concepts that strictly belong to the context of labor law.

Nevertheless, the methodological implications for the use in a different legal context of principles belonging to another field of law, such as that of labor law, are not irrelevant, and, in general, this transposition cannot be carried out without due care.[57] In fact, although the civil categories have almost always found room for application in the field of labor law,[58] they have raised many objections about their adequacy to account for the peculiarities distinguishing the employment relationship.[59]

Part of the doctrine holds that labor law, since it noticed the insufficiency of the *locatio operarum* scheme in conveying the peculiarities of the employment relationship, first reformulated the principle of formal equality between the contractual parties by reason of a substantial balancing of their legal positions, so far as to gradually induce a sort of "socialization"[60] of the private law, according to a "personalistic postulate".[61] For this reason, it is important to keep in mind that labor law, perhaps more than civil law, is born "from the fact" and is constantly called upon to confront itself with reality.[62]

In light of this particular "sensitivity" of labor law to social data, it is necessary to take advantage of an important methodological teaching: the indiscriminate application of the civil law categories in the labor law field frequently involves the risk of flattening the elements of novelty

[57] Nogler, L. (2013). (Ri)scoprire le radici giuslavoristiche del «diritto civile». *Europa e diritto privato*, 4, p. 996. The author criticizes the automatic application in the labour law field of civil law categories, i.e., without a prior verification of their compatibility with the values proper to the labour law. For the same opinion, see Spagnuolo Vigorita, L. (1992). Interventi. In G. Santoro-Passarelli (Ed.), *Diritto del lavoro e categorie civilistiche*. Torino: Giappichelli, p. 53.
[58] Persiani, M. (2009). Diritto privato e diritto del lavoro. *ADL Argomenti di diritto del lavoro*, 4-5/1, p. 950; Cessari, A. (1967). Tradizione e rinnovamento del diritto del lavoro. *Rivista di diritto del lavoro*, 1, p. 24.
[59] Castronovo, C. (2011). L'utopia della codificazione europea e l'oscura Realpolitik di Bruxelles dal DCFR alla proposta di regolamento di un diritto comune europeo della vendita. *Europa e diritto privato*, 4, pp. 852-853.
[60] Cessari, A. (1967). Tradizione e rinnovamento nel diritto del lavoro. *Rivista di diritto del lavoro*, 1, pp. 31-43.
[61] Mengoni L., Proto Pisani A., Orsi Battaglini A. (1990). L'influenza del diritto del lavoro su diritto civile, diritto processuale civile, diritto amministrativo. *Giornale di diritto del lavoro e di relazioni industriali*, 7(45), pp. 16-22.
[62] Scognamiglio, R. (1992). Conclusioni. In G. Santoro-Passarelli (Ed.), *Diritto del lavoro e categorie civilistiche*. Torino: Giappichelli, p. 150.

inherent in the considered cases[63] and, in methodological terms, "*relying on ancient conceptual classifications is a logical form which often precludes the genuine vision of the legal innovation processes*".[64]

It is precisely this different subject of study of labor law in relation to private law that has fueled separatist tensions, although the same labor law doctrine does not seem to be able to renounce definitively the "*infrastructures and junctions which are always provided to it by civil law*".[65] In these terms, it is necessary to understand whether the achieved autonomy of labor law is nowadays shaped in terms of self-sufficiency; in other words, whether labor law operates on the basis of principles that are not *"dependent on civil law categories"*.[66] Essentially, this amounts to checking if and to what extent the civil law can still offer fundamental conceptual instruments to other areas of the private law, including, above all, labor law.[67]

In the context of this thesis, the application of civil categories within the context of labor law will be critically examined in relation to those decisions of the employer dictated by the acquisition of employee information on the net. The research will do so by shedding light on the current,

[63] Already L. Barassi, in the second edition of his work, "Contratto di lavoro" observes, recalling the German scholar Hugo Sinzheimer, that "*if there is a field in which jurists and economists have to give their hand, it is precisely this one of work: no longer an abstract analysis of the phenomenon of work based on pure legal texts but an examination of it in his throbbing life. With this it is necessary to oxygenate the texts of law*" (Barassi, L. (1915-1917). Il contratto di lavoro nel diritto positivo italiano. Milano: Sel, 2 ed., vol. 1, p. 451). See also Sinzheimer, H. (1976). *Arbeitsrecht und Rechtssoziologie. Gesammelte Aufsätze und Reden*. Frankfurt-Köln: Otto Kahn Freund, Thilo Ramm; Cazzetta, G. (1988). Leggi sociali, cultura giuridica ed origini della scienza giuslavoristica in Italia tra Otto e Novecento. *Quaderni fiorentini per la storia del pensiero giuridico moderno,* XVII, p. 258; Romei, R. (1992). Brevi spunti di riflessione sui rapporti tra diritto del lavoro e diritto civile. In G. Santoro-Passarelli (Ed.), *Diritto del lavoro e categorie civilistiche*. Torino: Giappichelli, p. 189; Mengoni, L., Proto Pisani, A. & Orsi Battaglini, A. (1990). L'influenza del diritto del lavoro su diritto civile, diritto processuale civile, diritto amministrativo. *Giornale di diritto del lavoro e relazioni industriali*, 7(45), pp. 11-14.

[64] Gamillscheg, F. (1976). Zivilrechtliche Denkformen und die Entwicklung des Individualarbeitsrechts: Zum Verhältnis von Arbeitsrecht und BGB. *Archiv Für Die Civilistische Praxis, 176*(2/3), pp. 197-220. Retrieved from www.jstor.org/stable/40994836. The author warns that before relying on a category belonging to the private contract law, one must verify whether it can be considered compatible with "*our current visions inspired by the idea of the welfare state*".

[65] Mengoni L., Proto Pisani A., Orsi Battaglini A. (1990). L'influenza del diritto del lavoro su diritto civile, diritto processuale civile, diritto amministrativo. *Giornale di diritto del lavoro e di relazioni industriali*, 7(45), p. 10.

[66] Nogler, L. (2013). (Ri)scoprire le radici giuslavoristiche del «nuovo» diritto civile*. Europa e diritto privato*, 4, p. 996.

[67] Cian, G. (1998). Il diritto civile come diritto privato comune (ruolo e prospettive della civilistica italiana alla fine del XX secolo). *Rivista di Diritto civile*, 1(1), p. 4. Here, the author refers to the civil law as the "connective tissue" of the all other sectors of the private law field in the legal system.

possible correlations between the civil and labor law disciplines, given that their historical stages have led to a progressive and now complete "emancipation" of labor issues from the original civil source.[68]

To conclude, the purpose of the present dissertation is to investigate the effects the employer's digital identity[69] can have on the employment relationship by developing the research in the labor and civil law fields according to a comparative and interdisciplinary legal method.

1.4 EVIDENCE OF RELEVANCE

Although it is undisputed that the key role played by data protection is to safeguard constitutional values, such as dignity,[70] the protection instruments developed at the legislative level[71] appear to no longer be adequate for the contemporary shape of the internet as a "*worldwide database, where information is archived and not easily deleted*".[72] Specifically, new interrogations emerge from the widespread inclination to search on SNSs[73] for information about a specific person

[68] Romei, R. (1992). Brevi spunti di riflessione sui rapporti tra diritto del lavoro e diritto civile. In G. Santoro-Passarelli (Ed.), *Diritto del lavoro e categorie civilistiche*. Torino: Giappichelli, p. 185. Here, the author talks about the "cultural subordination" of the labor law to the civil law. See also Cazzetta, G. (1996). Il diritto del lavoro e l'insostenibile leggerezza delle origini (a proposito di Umberto Romagnoli, *il lavoro in Italia. Un giurista racconta*, Bologna, il Mulino, 1995). *Quaderni fiorentini per la storia del pensiero giuridico moderno*. Milano: Giuffrè, p. 548.

[69] This means, in a broad sense, the set of information available online and related to the person of the worker.

[70] Simitis, S. (1977). Datenschutz und Arbeitsrecht. *Arbeit Und Recht, 25*(4), pp. 97-108. Retrieved February 17, 2020, from www.jstor.org/stable/24017884; Lattanzi, R. (2011). Dallo Statuto dei Lavoratori alla disciplina di protezione dei dati personali. *Rivista italiana di diritto del lavoro*, (1/1), pp. 151-174; Zanelli, P. (1988). Innovazione tecnologica, controlli, riservatezza nel diritto del lavoro. *Diritto dell'informazione e dell'informatica*, 3, pp. 749-763;

[71] Among the international sources, first and foremost, are the 1948 Universal Declaration of Fundamental Rights, the International Covenant on Civil and Political Rights, the 1966 Convention on Economic, Social and Cultural Rights, the 1948 American Declaration on the Rights and Duties of Man, the 1969 American Convention on Human Rights, and finally, the 1997 ILO code of Practice, Protection of Workers' Personal Data. At the European level, the protection of workers' privacy is enshrined in the Convention for the Protection of Individuals, approved by the European Council in 1981 in the 1980 OECD Guidelines on the Protection of Privacy and the Cross-border Flow of Personal data and in the 1995 Directive on the Protection of the Individual. Colucci, M. (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of view. In R. Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43, pp. 29-30). The Hague/London/New York: Kluwer Law International.

[72] Cross-tab (2010, January). Online reputation in a connected world, p. 3. Retrieved from https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf; Sprague, R. (2011, Febraury 28). Invasion of the social networks: Blurring the line between personal life and the employment relationship. *University of Louisville Law Review*, 50, p. 4. Retrieved from https://ssrn.com/abstract=1773049; Oberwetter, C. (2008). Bewerberprofilerstellung durch das Internet - Verstoß gegen das Datenschutzrecht?. *Betriebsberater (BB)*, 29, p. 1562.

[73] In Europe alone, the number of users registered on Facebook is 387 million, out of a total number of monthly active users of 2.50 billion. Aamong social networks, Facebook is the one with the largest audience but it is certainly not the

for a variety of purposes: to reconnect old friendships, to start a new relationship, and, not least, to decide whether to establish a working relationship.[74] According to research commissioned by Microsoft,[75] recruiters are deciding more and more often to accept or reject a job-application after consulting information about the candidates available on the web, and the recruiters themselves expect that within the next five years, this trend will significantly increase.[76]

As can be observed from the diagram below, candidates often tend to underestimate the relevance that their own online reputation could have on their professional future, considering that it is the personal information accessible on the web that is reviewed increasingly often during the recruitment process and that this phenomenon is particularly widespread, although with different incidences, in the countries covered by the research.

Specifically, in the United States and England, there is a wide gap between the impact of online data on professional careers as perceived by the consumers and the percentage admitted by the interviewed recruiters in cases of an application's rejection due to data found online. The perception of consumers interviewed about the impact of their online reputation and the statements of recruiters correspond better in Germany and France. Indeed, "*in Germany, 13% of consumers surveyed believe information found online about them could influence a hiring decision. Their perceptions closely parallel the 16% of recruiters and HR professionals surveyed who report having rejected candidates based on information they found online. Similarly, 10% of French*

only one to offer this type of service. The list of social networks is very long, although some are known only in some countries and not in others (Facebook by the Numbers: Stats, Demographics & Fun Facts (2020) Omnicore Agency. Retrieved from https://www.omnicoreagency.com/facebook-statistics/).

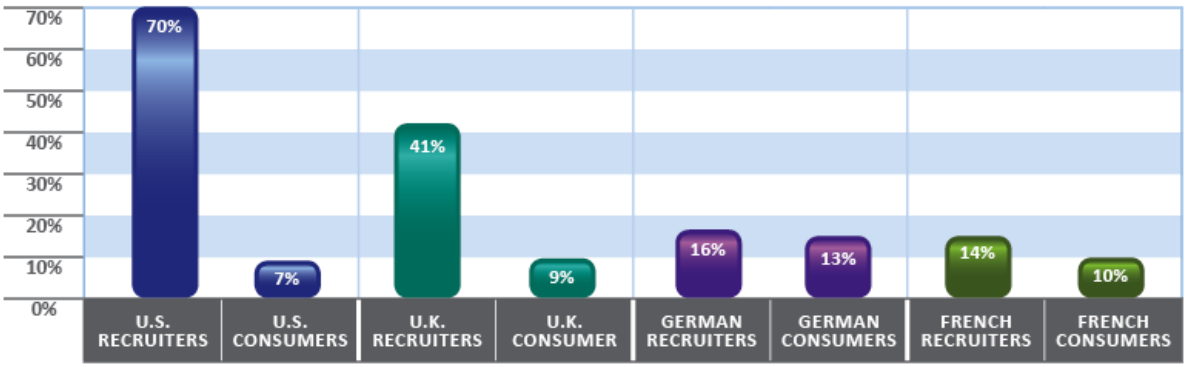
[74] Cross-tab (2010, January). Online reputation in a connected world, p. 3. Retrieved from https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf.

[75] "*The research examines the expanding role of online reputation in both professional and personal lives. It studies how recruiters and HR professionals use online reputational information in their candidate review processes, and how consumers feel about this use of their information. It investigates the steps consumers take to monitor and protect their online reputation"* Cross-tab (2010, January). Online reputation in a connected world, p. 1 abstract. Retrieved from https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf.

[76] Cross-tab (2010, January). Online reputation in a connected world, pp. 20-21. Retrieved from https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf.

consumers surveyed believe information about them online could affect their hiring while 14% of recruiters and HR professionals report they have rejected a candidate based on that information".[77]

Table 1 – Recruiters and Human Resources professionals who have rejected candidates based on data found online vs. consumers who think online data affected their job search.[78]



An interesting aspect, highlighted by the table below, concerns the nature of the information that has the greatest impact on the final decision to reject a job application. In point of fact, the information that appears to have a particularly negative impact is of a strictly personal nature, such as lifestyle, previous economic status, and inappropriate comments and photos.

[77] Cross-tab (2010, January). Online reputation in a connected world, p. 5. Retrieved from https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf.
[78] Cross-tab (2010, January). Online reputation in a connected world, p. 5. Retrieved from https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf.

Table 2 – Types of online reputational information that influenced decisions to reject a candidate.[79]

Types of Online Reputational Information That Influenced Decisions to Reject a Candidate				
	U.S.	U.K.	Germany	France
Concerns about the candidate's lifestyle	58%	45%	42%	32%
Inappropriate comments and text written by the candidate	56%	57%	78%	58%
Unsuitable photos , videos, and information	55%	51%	44%	42%
Inappropriate comments or text written by friends and relatives	43%	35%	14%	11%
Comments criticizing previous employers, co-workers, or clients	40%	40%	28%	37%
Inappropriate comments or text written by colleagues or work acquaintances	40%	37%	17%	21%
Membership in certain groups and networks	35%	33%	36%	37%
Discovered that information the candidate shared was false	30%	36%	42%	47%
Poor communication skills displayed online	27%	41%	17%	42%
Concern about the candidate's financial background	16%	18%	11%	0%

It is reasonable to assume that online resources, such as SNSs, allow recruiters to become aware of that category of information about which questions cannot be asked but which are of interest to the employer because they could reveal elements of the candidate's personality that could potentially conflict with the company's values.[80]

These outcomes are confirmed in a 2009 survey promoted by the German Ministry for Consumer Protection, according to which 28% of the companies surveyed claimed to use the internet to find information about their candidates, and 36% of them (3% regularly, 17%

[79] Cross-tab (2010, January). Online reputation in a connected world, p. 9. Retrieved from https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf.

[80] Sronce, C.S. (2011). The references of the twenty-first century: Regulating employers' use of social networking sites as an applicant screening tool. *Southern Illinois University Law Journal*, 35, p. 503. In the German legal system, according to established case-law on recruitment questionnaires, the balance between conflicting interests of the employer in inquiring about the applicant's personal circumstances and applicant's right of personality and the individual sphere is resolved considering inadmissible the questions of private nature, unless there is an exceptional link with the potential job (BAG, ruling of 16 February 2012 - 6 AZR 553/10, in *Sammlung arbeitsrechtlicher Entscheidungen*, 4, pp. 85-89, with comment of C. Rolfs & H.M. Feldhaus (2012). *Die Frage nach der Schwerbehinderung im bestehenden Arbeitsverhältnis*). In the Italian legal system, it is the Workers' Statute (act 20 May 1970, N.300) which, in Article 8, prohibits the employer, for the purpose of hiring, as in the course of the employment relationship, to carry out investigations, even by third parties, on the political, religious, or trade union opinions of the worker, as well as on facts that are not relevant to the assessment of the worker's professional attitude.

occasionally, 16% rarely) asserted that they use social networks as the main source of personal information.[81] In Italy, the situation is not very different. According to a survey conducted by Adecco in collaboration with the company Reputation Manager, 49% of Italian companies interviewed stated that they use social networks in staff recruiting, and 27% of them admitted to having excluded candidates because of the content shared on their social profiles.[82]

The above-mentioned statistics show the spread of such a huge phenomenon that in 2010, a proposal was submitted in the German legal system to amend the Federal Workers' Data Protection Act with the scope to prohibit recruiters from processing candidates' data on social networks even if the data itself is public unless the candidate has given his or her consent to the processing.[83] The proposed amendment to the Federal Workers' Data Protection Act was rejected by parliamentary opposition, and therefore the so-called phenomenon of "social recruitment" has not found a legislative solution, leaving many legal issues unresolved and under examination by the German and European doctrine.[84]

The questions that arise concern, in general terms, the legitimacy of such research carried out by the employer on the Internet, and particularly on SNSs, during the selection of personnel. For instance, some doubts arise about the conditions to which "social recruitment" should be subject and if any information circulating on the network concerning the candidate is likely to be

[81] Bundesministerium für Ernährung und Landwirtschaft (2009, August 20). *Umfrage zu Haltung und Ausmaß der Internetnutzung von Unternehmen zur Vorauswahl bei Personalentscheidungen*, pp. 1, 5. Retrieved from https://www.bmel.de/SharedDocs/Downloads/Verbraucherschutz/InternetnutzungVorauswahlPersonalentscheidungen.html;nn=310768.

[82] Adecco (2012, January). Digital reputation & social recruiting. Retrieved from https://adeccogroup.it/PDF/Digital-Reputation-Social-Recruiting-Adecco-infografica-2012.pdf.

[83] Bundesdatenschutzgesetz in der Fassung des Regierungsentwurfs des Gesetzes zur Regelung des Beschäftigtendatenschutzes vom 15.12.2010, BT-Drucks. 17/4230, article 1, paragraph 7, number 6, p. 6. The proposal to amend the Federal Workers' Data Protection Act has not been approved and consequently, the German public and private companies must observe the regulations of the Federal Data Protection Act if they process, use, or collect data by means of data processing systems, § 1 para. 2 n.3, § 2 para. 4 BDSG.

[84] Finkin, M.W., Krause, R. & Okuno, H.T. (2015). Employee autonomy, privacy, and dignity under technological oversight. In M.W. Finkin & G. Mundlak (Eds.), *Comparative labor law* (pp. 185-186). Cheltenham, Northampton: Edward Elgar Publishing.

processed by the employer. On closer inspection, the nature of the information is not at all a secondary aspect, considering that strictly personal and intimate information is often very easy to find on the Internet, with the consequence that precisely this kind of information, linked to the applicant's most private sphere, could lead to an exclusion on purely discriminatory grounds. If the Internet should reveal that the potential new employee is homosexual, this sensitive data should not play a role in the recruitment decision,[85] but in cases where it does, but the candidate will hardly be made aware of the actual reason why he/she was discarded, with the consequence that he/she is in fact unable to appeal against the refusal or assert his/her reasons in legal proceedings.[86] For this reason, there is still no case law on the hypothesis of the rejection of applications based on information about the candidate found online by the employer.[87]

On the contrary, however, there are more and more rulings on dismissal hypotheses based on information about the employee found on the Internet by the employer. This trend highlights the fact that the use of social networks by the employer to obtain as much information as possible about the prospective workers does not terminate once the employment relationship is established; instead, the digging on social media can become effective monitoring of the worker's online activity.

That this type of network research is also carried out by the employer in the context of the employment relationship poses further legal questions, not only related to the employee's data processing but also to the relevance that the conduct of the worker outside the place and time of work may have on the outcome of the employment relationship, by reiterating the long-standing

[85] Oberwetter, C. (2008). Bewerberprofilerstellung durch das Internet - Verstoß gegen das Datenschutzrecht?. *Betriebsberater (BB)*, 29, p. 1563.

[86] Forst, G. (2010). Bewerberauswahl über soziale Netzwerke im Internet?. *Neue Zeitschrift für Arbeitsrecht (NZA)*, p. 427.

[87] Finkin, M.W., Krause, R. & Okuno, H.T. (2015). Employee autonomy, privacy, and dignity under technological oversight. In M.W. Finkin & G. Mundlak (Eds.), *Comparative labor law* (p. 186). Cheltenham, Northampton: Edward Elgar Publishing.

conflict between the private and public spheres in the employment relationship.[88] As confirmation of the relevance of the phenomenon, in some cases, the requirement to proper online conduct from the employee is fixed in the employment contract as a specific contractual term.[89]

Consequently, for the reasons stated above, it is evident in the new technological context that the impressive range of social media options has definitively suppressed the (perhaps idyllic) idea of a "silent worker",[90] regarding whose life the employer is unaware of the most private aspects (political orientation and personal beliefs). On the contrary, today, employees' personal data is easily available on the web. Against this new technological background, it is no coincidence that in many legal systems, the legislator has intervened by laying down strict procedures with which employers must comply whenever they want to introduce largely invasive technological control systems.[91] This reveals an emerging need for the protection of workers' data in order to safeguard constitutionally guaranteed legal assets, such as autonomy, privacy, and dignity. Thus, the well-known intuition of Alain Supiot seems to be confirmed, according to which the anthropological role of law should be to intervene between man and machines, with the aim of humanizing the latter.[92]

[88] Miscione, M. (2017). I comportamenti privati rilevanti per il lavoro nella Rete senza tempi e spazi. *Il Lavoro nella giurisprudenza*, (6), p. 521.

[89] The Italian Ministry of Justice, circular of 20 February 2015 on the use of social networks in the prison administration. Retrieved from https://www.giustizia.it/giustizia/it/mg_1_8_1.wp?contentId=SDC1122254. The document specifies that private behaviors, which are generally irrelevant for the employment relationship, can be considered as assessment indices for the fulfilment of the contractual obligations. In this respect, it is fundamental to give account of a crucial aspect: if a judicial proceeding represents the breaking point of the employment relationship, a contractual regulation should constitute a means of preventing possible future conflicts regarding frequent cases of dispute.

[90] Del Punta, R. (2019). Social media and workers' rights: What is at stake? *International Journal of Comparative Labour Law and Industrial Relations*, 35(1), p. 99.

[91] Colucci, M. (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of view. In R. Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43, p. 29). The Hague/London/New York: Kluwer Law International.

[92] Finkin, M.W., Krause, R. & Okuno, H.T. (2015). Employee autonomy, privacy, and dignity under technological oversight. In M.W. Finkin & G. Mundlak (Eds.), *Comparative labor law* (p. 186). Cheltenham, Northampton: Edward Elgar Publishing; Supiot, A. (2006). Homo juridicus. Saggio sulla funzione antropologica del diritto. Milano: Mondadori.

1.5 RESEARCH OVERVIEW

1.5.1 *The countries under examination*

The present thesis will develop a comparative study between Italy and Germany. The choice of these two legal systems is dictated by two sets of reasons. In the foreground, there are historical bases related to the deep bond that has always united the Italian and German legal cultures, even more so today within the common framework of the European Union and the spread of comparative legal science. In the background, the decision to carry out this research on dismissals on the basis of employees' online activity in Italy and Germany is due to the innovative approach that distinguishes these two legal systems in facing the challenges of new digital technologies in the world of work and, also, the priority that has been given in the two legal systems to the dignity of the worker.[93]

The influence[94] that German labor law has exerted on the Italian regulatory sources and even more so on entire generations of Italian scholars, both in matters of individual and collective relations, is undisputed.[95] Indeed, in the first two fundamental Italian doctrinal works on labor law, Lodovico Barassi's *"Il contratto di lavoro nel diritto positivo italiano"*[96] of 1901 and Messina's *"I concordati di tariffe nell'ordinamento giuridico del lavoro"*[97] of 1904, which have been recognized

[93] Lattanzi, R. (2011). Dallo Statuto dei Lavoratori alla disciplina di protezione dei dati personali. *Rivista italiana di diritto del lavoro*, (1/1), pp. 152-153;

[94] The term "influence" refers not only to the development of comparative research between Italy and Germany, but also to the tendency to assimilate within one's own legal system the experiences of another, questioning critically the theories and models of foreign origin. Gaeta, L. (2015). L'influenza delle culture giuridiche straniere sul diritto del lavoro italiano. *Rivista italiana per le scienze giuridiche*, 6, p. 206.

[95] Gaeta, L. (2016). La subordinazione del diritto del lavoro italiano nei confronti della Germania. *Lavoro e diritto*, (4), p. 696; Pedrazzoli, M. (2014). Philipp Lotmar e il diritto del lavoro italiano. In I. Fargnoli (Ed.), *Philipp Lotmar - letzter Pandektist oder erster Arbeitsrechtler?* (pp. 145-160). Frankfurt am Main: Vittorio Klostermann.

[96] See Barassi, L. (1901). *Il contratto di lavoro nel diritto positivo italiano*. Milano: Sel, 1 ed; Gaeta, L. (2001). Lodovico Barassi, Philipp Lotmar e la cultura giuridica tedesca. *Giornale di diritto del lavoro e di relazioni industriali,* 2001, 90, pp. 165-194. The author Gaeta L. on p. 165, notes that the work of L. Barassi *"[...] in the first two chapters, i.e. in the first 224 pages, there are a total of 531 notes in the margin, including those that contain mere internal references; of these, 207 are occupied by quotations written in German*". In addition, in Barassi's work, pandettists, such as Bernhard Windscheid and Heinrich Dernburg, are among the most frequently cited German authors.

[97] Messina, G. (1904), I concordati di tariffa nell'ordinamento giuridico del lavoro. *Rivista di diritto commerciale*, I.

as the first works to have conceptualized the subject of labor law in Italy and therefore as milestones of Italian labor law (the first in the field of employment law and the second with regard to collective labor law) reveals a strong influence of the German labor law.[98] In this sense, it also seems necessary to recall the innovative contribution that the German labor doctrine has provided to the Italian doctrine in the field of accidents at work. It was in the Germanic legal world that the first acts on the reversed onus of proof in the event of an accident at work were adopted,[99] until the introduction in 1885 in Germany (*die gesetzliche Unfallversicherung*) and in 1898 in Italy of the employer's insurance obligation against employees' occupational injuries.[100]

The close relationship between the German and Italian legal cultures became even more evident during the Weimar Republic when the Italian doctrine found interesting food for thought in the theories of German jurists about the concept of the company as a social unit.[101] The dialectical relationship between the Italian and German labor doctrine did not rest even during the years of the First World War and the post-war years when the debate became particularly lively around the topic of the nature of the labor relationship.[102] It was only under the Nazi regime that the close link between Italian and German labor lawyers was broken, to re-emerge after the Second World War when the Italian doctrine returned to make extensive use of the systematic and pandettistic method (the most illustrious exponent in this sense was the scholar Francesco Santoro Passarelli[103]) in the application of the civil categories of individual and collective autonomy. It is precisely in these years

[98] Gaeta, L. (2001). Lodovico Barassi, Philipp Lotmar e la cultura giuridica tedesca. *Giornale di diritto del lavoro e di relazioni industriali,* 2001, 90, pp. 165-194.
[99] Das Reichs-haftpflichtgesetz of 7. Juni 1871.
[100] Das Bundesgesetz über die obligatorische Arbeitslosenversicherung und die Insolvenzentschädigung (Arbeitslosenversicherungsgesetz, AVIG) vom 25. Juni 1982.
[101] More specifically, the theories of the Freirechtsschule, according to which labor law must be conceived as being independent of civil law and more in keeping with the reality of the company, are of particular interest in Italy. Grossi, P. (2000). *Scienza giuridica italiana. Un profilo storico 1860-1950*. Milano: Giuffrè, p. 148; Gaeta, L. (2015). L'influenza delle culture giuridiche straniere sul diritto del lavoro italiano. *Rivista italiana per le scienze giuridiche*, 6, p. 216.
[102] Ghera, E. (2001). Lodovico Barassi e Paolo Greco**.** *Giornale di diritto del lavoro e di relazioni industriali,* 90, pp. 155-164.
[103] Santoro Passarelli, F. (1969). *Nozioni di diritto del lavoro*. Napoli: Jovene, p. 15; Gaeta, Lorenzo (2015). L'influenza delle culture giuridiche straniere sul diritto del lavoro italiano. *Rivista italiana per le scienze giuridiche*, 6, p. 221.

that Italian labor lawyers dealt with German supporters of the contractual or community theory of the company,[104] with frequent references to the studies of Nikisch,[105] Hueck, and Nipperdey.[106]

The 1960s, with the social and political changes that have characterized them, as well as with the works of the well-known Italian scholars Gino Giugni and Federico Mancino, represent a turning point for the Italian science of labor law, which no longer looked to the German experience with the same attention as before.[107] In fact, the Italian doctrine of labor law reveals a changed interest both in the themes and in the methods adopted: there was no longer any question about the nature and object of the employment relationship, but rather about the newly adopted Statute of workers, applying a method that was increasingly distant from the civil one and closer to that of other sciences, such as economics.[108]

The question that arises spontaneously is whether the Italian labor law has exercised the same influence on German labor law. Unfortunately, it is not possible to answer this question in the affirmative because the German labor scholars have never shown a keen interest in Italian legal ideas, theories, and solutions equivalent to the attention with which the Italian labor law doctrine has always observed the German legal culture.[109] Certainly, there is no lack of exceptions. For example, during the early twentieth century, the German doctrine often compared itself to the studies of illustrious Italian Romanists, such as Salvatore Riccobono and Isidoro Modica.[110]

---

[104] Gaeta, L. (2015). L'influenza delle culture giuridiche straniere sul diritto del lavoro italiano. *Rivista italiana per le scienze giuridiche*, 6, p. 223.
[105] Nikisch, A. (1955). *Arbeitsrecht*. Tübingen: Mohr.
[106] Hueck, A. & Nipperdey, H.C. (1957), *Lehrbuch des Arbeitsrechts*. Berlin Frankfurt am Main: Vahlen.
[107] Gaeta, L. (2016). La subordinazione del diritto del lavoro italiano nei confronti della Germania. *Lavoro e diritto*, (4), pp. 702-703.
[108] Gaeta, L. (2016). La subordinazione del diritto del lavoro italiano nei confronti della Germania. *Lavoro e diritto*, (4), pp. 702-703.
[109] Portale, G. B. (2018). Diritto societario tedesco e diritto societario italiano in dialogo. *Banca borsa e titoli di credito*, (5/1), p. 597; Gaeta, L. (2001). Lodovico Barassi, Philipp Lotmar e la cultura giuridica tedesca. *Giornale di diritto del lavoro e di relazioni industriali,* 2001, 90, p. 169.
[110] Gaeta, L. (2001). Lodovico Barassi, Philipp Lotmar e la cultura giuridica tedesca. *Giornale di diritto del lavoro e di relazioni industriali,* 2001, 90, p. 170; Lotmar, P. (1902). *Der Arbeitsvertrag nach dem Privatrecht des deutschen Reiches*. Leipzig: Duncker & Humblot, first edition, pp. 86-87, footnote n. 2; Lotmar, P. (1902). *Der Arbeitsvertrag nach dem Privatrecht des deutschen Reiches*. Leipzig: Duncker & Humblot, first edition, p. 356, footnote 2. Lotmar cites in his work the two Italian Romanists, Salvatore Riccobono and Isidoro Modica.

Nevertheless, perhaps for linguistic reasons or due to the self-referential attitude of German labor law scholars, the influence of Italian labor law on German labor law has historically never been as relevant.[111]

The picture just outlined concerning the origins of the mutual relationship between the Italian and German labor law doctrine is "photographed" by the words of the well-known Italian scholar Gino Giugni who, when interviewed by Pietro Ichino about the foreign influence on the Italian labor law doctrine and the influence of the Italian labor law doctrine on foreign doctrines, responded in the following way:

"*[…] The foreign influence has been very strong. At first, the protagonist was the German dogmatic doctrine, involved above all by the school of Bologna: we need only reflect on the first works of Giuseppe Federico Mancini, Giorgio Ghezzi, Umberto Romagnoli, mostly spoken or thought in German. [...] there was then the primacy of influence of the English doctrine, of the American one [...] and again of the German one [...]. French doctrine has always been much followed, of course, but it doesn't exert a real influence because it is above all casuistic [...]. Among the Italians, the most comparativeists are, without doubt, first of all Tiziano Treu and then Bruno Veneziani.*

As for the influence of Italian doctrine on foreign ones (Editor's note) It is enough to remember that some authors in England have defined the Italian doctrine as the most advanced at present. And, on the other hand, it is enough to look at Lord Wedderburn's latest works to realize how much attention is paid to it. Not so in France or the United States, where tendencies towards national self-sufficiency prevail [...]. In general, also because of the language barrier, we are much better known in the South, of Europe and America, than in the North: our influence has been greatest, also in terms of legal politics, in Spain and Latin America […]".[112]

[111] Gaeta, L. (2015). L'influenza delle culture giuridiche straniere sul diritto del lavoro italiano. Rivista italiana per le scienze giuridiche, 6, pp. 230-231.
[112] Ichino, P. (1992). Intervista a Gino Giugni. *Rivista italiana di diritto del lavoro*, I, pp. 429-430.

In conclusion, it can be said that historically, in the relationship between Italian and German labor law doctrine, the German experience appears to have had a greater influence on the Italian legal culture than the Italian legal culture on the German.[113] However, in today's new globalized reality, the *"legal systems and, even more so, the legal doctrine, especially in today's world, can be compared to communicating vessels which, while preserving their own identity, offer and receive ideas, rules, solutions".*[114]

Indeed, the effect of globalization on national legal systems entails a phenomenon of homologation or permeability between different national laws, with an exponential increase of sources of law (so-called "juridical pluralism"). In the context of this progressive dissolution of the borders of the national legal systems, it might seem that the object of comparative legal research itself is being lost.[115] If we take a closer look, it is precisely because any national legal system can nowadays be considered autonomous that every jurist is called upon to deal with more than one center of power and, therefore, with multiple judicial systems.[116] From this point of view, it was rightly observed that today's jurist should be a true comparatist.[117] This is because, between each national legal system, it is possible to identify persistent, significant differences and, at the same

[113] Gaeta, L. (2015). L'influenza delle culture giuridiche straniere sul diritto del lavoro italiano. Rivista italiana per le scienze giuridiche, 6, pp. 230-231.
[114] Patti, S. (2015). L'influenza del diritto civile italiana sul diritto tedesco. In V. Di Cataldo, V. Meli & R. Pennisi (Eds.). *Impresa e mercato. Studi dedicati a Mario Libertini: Impresa e società-Concorrenza e mercato-Crisi dell'impresa. Scritti vari*, (vol. III). Milano: Giuffrè.
[115] Viglione, F. (2011). I "confini" nel diritto privato comparato. *La Nuova giurisprudenza civile commentata*, 3(2), p. 162; Reimann, M.W. (2001). Beyond national systems: A comparative law for the international age. *Tulane Law Rewiew*, 75(4), p. 1115.
[116] Historically, comparative law emerged with the birth of modern states during the 16th and 17th centuries in correspondence with the development of national legal orders within each national territory. The primary purpose of the first comparative studies was to find concordance between the various legal systems in order to harmonize law at the domestic level and thus promote the expansion of trade. In its second historical phase, corresponding to the last decades of the 19th century, comparative law continued in its development phase, until it stopped with the First and Second World Wars and the consequent closure of the law's national borders. After the first decades of the 20th century, there was a rebirth of comparative law, animated by new currents of universalism and cosmopolitanism. In the current era, under the impetus of globalization and the process of European integration, comparative law is becoming increasingly important in the search for common principles and traditions between legal systems. Moccia, L. (2016). *Comparazione giuridica e prospettive di studio del diritto*. Padova: CEDAM, p. 82.
[117] Twining, W. (2000). *Globalization and legal theory*. London: Butterworth, p. 255.

time, a kind of tendency towards legal harmonization arising from supranational bodies. In this composite context, legal comparison, understood not as a review of national rules but as a tool to understand the reasons that led to their formulation and possible circulation, identifying the legal factors that contribute to their eventual foreign reception, plays a key role.[118]

Therefore, if on the one hand, comparative law is going through a phase of uncertainty,[119] on the other hand, the internationalization and the European integration process offer comparative studies a chance for constant development, often in the direction of harmonization (but not only in that direction).[120]

Legal comparison is a crucial tool within the European legal system, both in terms of the creation and in terms of the application of European law.[121] Comparative legal studies provide valuable support for the European legislator, who is called upon to draft supranational rules enforceable to all the legal systems of the Member States. Regarding the application phase of European standards, the European Union legal system itself has expressly considered legal comparison as an official interpretative technique on more than one occasion. By way of example, Article F of the Treaty on European Union provides that the Union should respect the fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States as general principles of European law.[122]

[118] Viglione, F. (2011). I "confini" nel diritto privato comparato. *La Nuova giurisprudenza civile commentata*, 3(2), p. 171.
[119] Grossfeld, B. (1984). *Macht und Ohnmacht des Rechtsvergleichung*. Tübingen: J.C.B. Mohr, p. 193 (transl. Grossfeld, B. (1990). *The strength and weakness of comparative law*. Oxford New York: Clarendon Press Oxford University Press).
[120] Grandi, M. (1996). Comparazione giuridica e diritto del lavoro. *ADL Argomenti di diritto del lavoro*, 3, p. 23; Viglione, F. (2011). I "confini" nel diritto privato comparato. *La Nuova giurisprudenza civile commentata*, 3(2), p. 162.
[121] Grandi, M. (1996). Comparazione giuridica e diritto del lavoro. *ADL Argomenti di diritto del lavoro*, 3, p. 24; Somma, A. (2001). *L'uso giurisprudenziale della comparazione nel diritto interno e comunitario*. Milano: Giuffrè; Smorto, G. (2010). L'uso giurisprudenziale della comparazione. *Europa e diritto privato*, 1, p. 243.
[122] Moccia, L. (2016). *Comparazione giuridica e prospettive di studio del diritto*. Padova, CEDAM, p. 32.

From the considerations so far, clear reasons have emerged for why the Italian and German legal systems have been identified as countries whose outcomes in the field of dismissals due to the employee's misconduct on the Internet are a suitable subject of this comparative research. The above-mentioned influence of the German law on the Italian one frequently emerges, especially in relation to two topics on which the present thesis will focus extensively, i.e., the so-called loyalty bond, which, according to part of labor law doctrine, binds the employee to the employer, and the category of duties of protection of the employment contract.

Historically, it has been considered that in the employment contract, the element of loyalty (frequently confused with the so-called element of the "*intuitus personae*"[123]) is prevalent because the employment relationship has its origin in the employer's personal liking of the worker.[124] However, in the most recent doctrine, there is an orientation more inclined to objectify the employment relationship itself, aimed at excluding from the employment context any "spurious" elements, i.e., extraneous to the contractual performance.[125] According to the first theory (the so-called objective or fiduciary theory), facts and behaviors outside the scope of the employment contract but which, because of their seriousness, undermine confidence, which is an essential prerequisite for the cooperation between the employer and the employee, may constitute grounds for dismissal.[126] Conversely, according to the second approach, the employment relationship would rule out circumstances, such as personal opinions, and, in general, everything that concerns

[123] Later in this dissertation, it will be clarified that the concepts of loyalty and of *inuitus personae*, although often concurrent, do not identify with each other. Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, p. 58; Smuraglia, C. (1967). *La persona del prestatore nel rapporto di lavoro*. Milano, Giuffrè, pp. 3-38; Cataudella, A. (1972). Intuitus personae e tipo negoziale. In *Studi in onore di F. Santoro Passarelli* (vol. 1). Napoli, Jovene, p. 621 ff.

[124] Court of Rome, section labour, 28 January 2009, in *Rivista italiana di diritto del lavoro*, 2010, 1/2, p. 43, with comment of A. Gabriele (2009). *Giusta causa oggettiva di licenziamento e inidoneità morale sopravvenuta: brevi riflessioni*; Persiani, M. (1971). La tutela dell'interesse del lavoratore alla conservazione del posto. In L. Riva Sanseverino & G. Mazzoni (Eds.), *Nuovo trattato di diritto del lavoro* (vol. II). Padova, Cedam, pp. 678-681; Napoli, M. (1980). *La stabilità reale del rapporto di lavoro*. Milano: Franco Angeli, p. 300.

[125] De Luca Tamajo, R., Carinci, F., Tosi, P. & Treu, T. (2016). *Diritto del lavoro. Il rapporto di lavoro subordinato* (vol. II). Torino: UTET Giuridica, pp. 424-430.

[126] Simi, V. (1948). *L'estinzione del rapporto di lavoro*. Milano: Giuffrè, p. 52; Santoro Passarelli, F. (1973), *Nozioni di diritto del lavoro*. Napoli: Jovene, pp. 266-268.

circumstances and behaviors related to the employer's private life,[127] with the consequence that only a dismissal strictly concerning the non-fulfillment of the employment contract would be licit.

It is from this perspective that the study involves an additional civil law related issue, e.g., the extent and the content of the fulfillment of the employment contract. Here, we should clarify that, according to a consolidated doctrinal orientation, the contract non-fulfillment that is relevant for the purposes of dismissal evidently cannot be circumscribed to the fundamental obligation of performing the work duties but includes all the eventual violations of other secondary obligations (supplementary, ancillary, and protective), which surround the main contractual one.[128] From as early as the second half of the nineteenth century, the European civil law doctrine has taken on board the theoretical reconstruction, drawn by the German literature, of contractual obligation as a complex relationship. According to this model, contractual obligation consists not only of the primary obligation (on both the liability side and the active side) but also of a series of secondary and collateral obligations, whose goal is to orient the entire relationship to the results expected by both the contractual parties.[129] The briefly described duties of protection "enrich" the primary obligation's content by requiring specific technical manners of fulfilling it (for example, the care obligation for the work tools).[130]

In this framework, a fundamental step is to investigate if the duty of appropriate online conduct can be considered as falling under the category of the ancillary duties and duties of protection and if, for that reason, it is chargeable to the employee. From this perspective, the analysis of the impact of new technologies on the employment relationship proves to be

[127] Avondola, A. (2010). Sulla rilevanza della "inidoneità morale" del lavoratore. *Diritto delle relazioni industriali*, 4, p. 1033.
[128] Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, pp. 85-86.
[129] Mengoni, L. (1954). Obbligazione "di risultato" e obbligazione "di mezzo". *Rivista del diritto commerciale*, pp. 185 ff.
[130] Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, pp. 90-92.

fundamental in resolving the legal issues raised by dismissal due to conduct on the worker's network.

Furthermore, in relation to the impact of new information and communication technologies (I&C) in the workplace, the comparison between Italy and Germany is extremely interesting, as the two legal systems function as models for the other European Member States, thanks to their innovative approach and the attention traditionally paid to the data protection needs of the employee.

The Italian legal system was among the first European States to expressly guarantee within the 1970 Workers' Statute the protection of employee's freedom of opinion (Art. 1) and to safeguard the worker from means of audio-visual control (Art. 4).[131] This advanced protection apparatus has been widely appreciated[132] and circulated throughout Europe, so much so that in the Spanish Constitution of 1978, Article 35.2 heralds the future enactment of a "Spanish Workers' Statute", which came into being in 1980.[133] Another circumstance that makes Italy a "pioneer" in employee data protection is the "transversal" nature of the data protection legislation.[134]

[131] Lattanzi, R. (2011). Dallo Statuto dei Lavoratori alla disciplina di protezione dei dati personali. *Rivista italiana di diritto del lavoro*, 1(1), pp. 151-152.

[132] The article "Reconsidering the premises of labour law: Prolegomena to an EU Regulation on the Protection of Employees' Personal Data" written by the German labour lawyer Spiros Simitis, known for his fundamental contribution to the definition of an European legislation on data protection, dedicates the opening words to the Italian Workers' Statute, considered *"something more than a modernised codification of essentially undisputed rules"*. Simitis, S. (1999). Reconsidering the premises of labour law: Prolegomena to an EU Regulation on the Protection of Employees' Personal Data. *European Law Journa*l, 5, pp. 45-46; Lattanzi, R. (2011). Dallo Statuto dei Lavoratori alla disciplina di protezione dei dati personali. *Rivista italiana di diritto del lavoro*, (1/1), pp. 151-152.

[133] Cazzetta, G. & Sciarra, S. (2013). "Un puente doctrinal". Scienza giuridica ed evoluzione del diritto del lavoro. Intervista a Miguel Rodriguez-Pinero y Bravo-Ferrer. *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 42, pp. 739-766.

[134] On closer inspection, the broad definitions of "personal data" and "processing" convey an extensive protection that potentially covers every legal area. Lattanzi, R. (2011). Dallo Statuto dei Lavoratori alla disciplina di protezione dei dati personali. *Rivista italiana di diritto del lavoro*, 1(1), pp. 154-155. The same Opinion 4/2007 on the concept of personal data, adopted on 20 June by the Working Party on the Protection of Individuals with regard to the Processing of Personal Data, notes that *"as 'personal data' is meant any information relating to an identified or identifiable natural person ('data subject') [...]. It should be noted that this definition reflects the will of the European legislator to have a broad notion of 'personal data' throughout the legislative process. [...] in order to include all information relating to an identifiable person"*. See Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data Adopted (01248/07/EN WP 136) (adopted on June20, 2007). Retrieved from https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf.

Specifically, the Italian data protection rules cover a wide range of areas of law, including labor law. For instance, Article 10 of Legislative Decree N. 276 of 10 September 2003 in the field of employment and the labor market, has stated the prohibition to carry out investigations on discriminatory opinions and treatments,[135] as well as the interventions of the Guarantor for the protection of personal data (*Garante per la protezione dei dati personali*), which on several occasions dealt with the processing of the worker's data.[136]

As far as the German experience is concerned, a ruling of 14 September 1984 by the German Federal Labour Court[137] marked the beginning of the debate within German borders on issues concerning the protection of employees' data. In particular, with the ruling of 14 September 1984, the German Federal Labour Court has observed that the processing of the worker's data by the employer, carried out with automated technological tools, can entail a variety of risks for the personal rights of the data subject and particularly for the right of personality, with consequent

[135] The aforementioned normative source prohibits employment agencies and other authorized or accredited public and private entities from carrying out any investigation, data processing, or pre-selection of workers, even with their consent, on the basis of specific data, including: personal beliefs, trade union or political affiliation, religious beliefs, or gender and sexual orientation, unless these are characteristics that affect the way the work activity is carried out or that constitute an essential and determining requirement for the purposes of carrying out the work activity. The rule also prohibits the processing of workers' personal data that is not strictly related to their professional aptitude and employment.

[136] With the General Authorization to the Treatment of the Genetic Data of 22 February 2007, the Italian Guarantor for the Protection of Personal Data has established the prohibition of the treatment by the employer of the genetic data concerning the worker. The same Guarantor has stated in matters of the right of access to the evaluation data held by the employer that the worker has the right to access all company documents containing his/her personal data, including that of a subjective nature, without any limitation – a right originally established by Art. 7 of the Legislative Decree 196/03 and now governed by Art. 15 of the GDPR 679/2016, the scope of which has ultimately been better defined by order n.32533/2018 of the Corte Suprema di Cassazione, First Civil Section.

[137] *"It is generally recognised that modern data processing technology entails or can entail a variety of risks for the personal rights of the data subject. In view of these dangers to the right of personality, the Federal Constitutional Court, in its decision of 15 December 1983 on the Census Act (Neue Juristische Wochenschrift 1984, p. 419), stated that under the conditions of modern data processing, the protection of the individual against unlimited collection, storage, use and disclosure of his or her personal data is covered by the general right of personality according to Article 2.1 in combination with Article 1.1 of the Constitutional Law. In this respect, the fundamental right guarantees the right of the individual to decide on the disclosure and use of his or her personal data. This right requires special protection because, with the help of automatic data processing, individual details of personal or material circumstances of a specific or identifiable person can today be stored for an unlimited period of time and called up at any time. Furthermore, this individual information could be combined with other data collections to form a partially or largely complete personality profile without the person concerned being able to sufficiently control its accuracy and use. In this way, the possibility of insight and influence is expanded in a hitherto unknown way, which could influence the behaviour of the individual through psychological pressure alone and thus limit individual self-determination"*. BAG, resolution of 14. September 1984 - 1 ABR 23/82, Entscheidungen des Bundesarbeitsgerichts (BAGE) 46, pp. 367-385.

implications for the possibilities to monitor the worker and a subsequent intensification of the conflict between employer and employee and a greater influence on the worker's behavior.[138] From this initial ruling on the processing of employees' data emerges an aspect that distinguishes the German legal system, namely, the fundamental role played by the right of personality (*allgemeines Persönlichkeitsrecht*), which, according to Article 1 para. 1 of the German Basic Law[139] derives directly from the protection of dignity (*Recht auf Schutz der Menschenwürde*) and, as stated by Article 2 para. 1 of the German Basic Law, represents an essential condition for the free development of one's personality (*Recht auf freie Entfaltung der Persönlichkeit).*

From the brief references made to the system of protection of the employee's data operating in Italy and Germany, it appears that the legislators and the general legal science of the two systems of interest have a particular interest in the need for protection, which, in the current world of work, is beginning to be felt in relation to the spreading of sophisticated information and communication technologies. It is also for this reason that the legal comparison between the Italian and the German legal systems turns out to be crucial, in that it helps us comprehend how different the responses in the two different legal systems are with regard to the hypothesis of employees' personal data processing, collected through a scan of employees' online activity.

As mentioned in the opening of this chapter, there are two sets of reasons that determined the decision to conduct this research from a comparative perspective by confronting the Italian and German legal systems. The first is because the relationship between the Italian and German labor science has always been very close, albeit, in a certain sense, "unidirectional", so much so that the German civil categories, such as the fiduciary element and subsidiary obligations, often referred to in relation to the hypothesis of dismissal due to conduct of the employee on the network, have also

[138] Simitis, S. (1999). Reconsidering the premises of labour law: Prolegomena to an EU Regulation on the Protection of Employees' Personal Data. *European Law Journa*l, 5, p. 46.
[139] Grundgesetz für die Bundesrepublik Deutschland, Act n. 3 of 23 May 1949, Bundesgesetzblatt, n. 1, 23 May 1949.

found reception within the Italian legal system. The second is because the Italian and German legal systems have historically always demonstrated a sensitivity to the protection of workers' personal data. Thus, one of the purposes of this research is to comprehend whether and what safeguards should be granted to employee data circulating on the network.

In conclusion, the comparison between the Italian and the German legal systems and the analysis from a multisectoral point of view that reflects both the labor and civil law related implications are both necessary to gain as complete an overview as possible of the complex phenomenon of dismissals due to online conduct.

1.5.2 Practical issues: review of the Italian and German case-law concerning dismissals due to online off-duty conduct

The phenomenon under examination, as a recent social problem, comes to the attention of legal science at the jurisprudential level. The starting point of the analysis must therefore be the transversal analysis of the rulings issued in the two legal orders considered; with the purpose of identifying, on the one hand, the problems and common dynamics of the phenomenon's manifestation and, on the other hand, with a view to identifying possible parallels and divergences in the case-law approach of the two legal systems to the issue in the answers that the jurisprudence has elaborated to satisfy the requests for protection.

The present research is specifically focused on the increasingly frequent hypotheses of dismissal due to employees' online conduct, most often carried out outside the place and times of work. These specific cases, on closer inspection, fall within a broader category of dismissals, that is to say, the class of dismissal due to off-duty conduct. The most recent hypothesis of dismissal in response to employee conduct on the network, compared to the category of dismissal due to off-duty conduct, certainly raises new legal questions, but they are often framed by the jurisprudence in categories and approaches that have been consolidated in relation to the largest category of

dismissals due to off-duty conduct. For this reason, it seems necessary to become aware of the legal issues that emerge from the most recent cases without, however, neglecting the jurisprudential and doctrinal guidelines that provide the background for the issue. In this framework, the aim of the analysis below is to give a brief account of the most significant decisions issued by the Italian and German courts about cases of dismissal due to the employee's network behavior. The guidelines consolidated within the two legal systems will be taken into account later in the thesis in relation to the more extensive category of dismissal for off-duty conduct.

A valid classification criterion is that developed by the scholar Luca Calcaterra, as it offers a useful key to understanding the phenomenon of employees' network behaviors in terms of contractual obligations and their boundaries. According to this method, the employee's private behaviors should be categorized into conduct related bilaterally to the contract and actions completely unrelated to the employment relationship.[140] Three different categories of behaviors can be distinguished by reason of their more or less intense proximity to the contractual obligations:

a) the first group of rulings considers as licit the dismissals based on behaviors unrelated to the performance of work but still representing a breach of the obligations expressly imposed upon the employee by specific legal provisions. The first category generally includes those behaviors which, even though they do not violate the main obligation of diligent performance of the work activities, damage a different interest of the employer, such as the manner of job performance or the person of the worker.[141] They are usually located both temporally and spatially near the employment relationship, taking place during working hours and at the workplace.

[140] Calcaterra, L. (2000). Il licenziamento per fatti e comportamenti estranei al rapporto di lavoro. *Diritti Lavori Mercati*, 3, p. 603.
[141] Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, p. 7.

b) the second group of rules is those that have considered as lawful the dismissals imposed because of conduct that are not part of the work obligation but which have some connection with the employer's sphere or with the working environment.

c) the third group of decisions includes a series of cases in relation to which the only link with the employer's interests is the person of the worker him/herself.

As already mentioned, the first group of rulings includes those pronouncements that considered as lawful the dismissals based on conduct unrelated to the work activity, in contrast with obligations expressly imposed on the employee. Examples of breaches of duty under the employment contract that may justify a dismissal include the hypothesis of theft in the workplace, repeated unexcused absence, frequent late arrivals, refusal to work, the pretense of illness, and insults or assaults against the employer.[142] This first category, which refers to private behaviors in breach of certain contractual obligations, includes, in the digitalized era, cases of dismissals on the ground of private use of a company telephone[143] and the hypothesis of dismissal because of so-called "cyberslacking" or "cyberloafing", namely, the activity of spending time using the Internet at work for reasons that are not related to the job.[144] An interesting ruling of the Italian Supreme Court

[142] ArbG Leipzig, ruling 17 December 1998 - 16 Ca 14177/97, in Database Juris.

[143] Corte Suprema di Cassazione, ruling of 16 August 2016, n. 17108, in *Diritto delle relazioni industriali*, 2016, 4, pp. 1135-1140, with comment of E. Dagnino (2016). *Sul riparto probatorio rispetto alla sussistenza della giusta causa di licenziamento: l'inapplicabilità del criterio della vicinanza alla prova*; Corte Suprema di Cassazione, ruling of 7 April 1999, n. 3386, in *Rivista Italiana di Diritto del Lavoro*, 1999, 3(2), p. 649, with comment of G. Pera (1999). *Il licenziamento per abuso del telefono aziendale*; Court of Milan 17 December 2004 in *Il lavoro nella giurisprudenza*, 2005, 12, pp. 1176-1182, with comment of A. Zilli, (2005). *Licenziamento in tronco per abuso del telefono aziendale*; Court of Rome, sec. lav. 16 February 2005, in *Rivista italiana di diritto del lavoro*, 2005, 3(2), pp. 652-654, with comment of A. Occhino, (2005). *L'abuso del telefono aziendale tra inadempimento contrattuale e illecito aquiliano*; BAG, ruling 04 March 2004 - 2 AZR 147/03, in *Sammlung der Entscheidungen des Bundesarbeitsgerichts*, 110, pp. 1-7; LAG Berlin-Brandenburg, ruling 18 November 2009 - 15 Sa 1588/09, in Database Juris.

[144] Corte Suprema di Cassazione, resolution of 28 May 2018, n. 13266, in *Foro italiano*, 2018, 7-8/1, pp. 2359-2360, with comment of A.M. Perrino (2018), (*In tema di uso del computer aziendale da parte del lavoratore per finalità extralavorative, verifica informatica successiva del datore di lavoro e licenziamento per giusta causa*); Resolution Court of Perugia 20 February 2006 in *Il Diritto dell'informazione e dell'informatica*, 2007, 1, pp. 200-213, with comment of G.B. Gallus (2007). *Verifiche sull'accesso ad Internet dei dipendenti e controlli difensivi*; LAG Niedersachsen, ruling 31 May 2010 - 12 Sa 875/09, in Database Juris; BAG, ruling 07 July 2005 - 2 AZR 581/04, in *Sammlung der Entscheidungen des Bundesarbeitsgerichts*, 115, pp. 195-205. The principle established by the briefly-cited pronouncements is essentially the following: an excessive use of the company computer during the working hours for private purposes can legitimately justify the dismissal of the employee.

of Cassation reversed as unlawful the dismissal of an employee who had named some work files on the computer in a vulgar and offensive way, reputing the termination of the employment relationship as a sanction not proportional to the conduct, which, although disgraceful, was not of such gravity as to affect the bond of loyalty between worker and employer.[145]

The second group of rulings considers as legitimate the dismissals due to conduct unrelated to the work obligations but in contrast with the organizational requirements for normal business activities and a peaceful working environment.[146] This category includes dismissals for acts of violence between colleagues, even if the event takes place outside the workplace, but it originates for work-related reasons and is able to disrupt the serenity and normality of the relationships between the employees and the collaboration between them and the employer.[147] With reference to this specific case study concerning offensive behaviors of the employee against their employer or colleagues, in the era of network communications, the same offensive behaviors may find new forms of manifestation. For instance, the Court of Trento, when considering a dismissal not proportional to an employee's conduct (which in any case was deemed to be unproven), declared illegitimate the dismissal of a worker who had posted on Facebook some content disparaging a colleague.[148] A different conclusion was reached by the Court of Ivrea which, in a similar case concerning the dismissal of an employee who, after his return to service after a dispute concerning

[145] Corte Suprema di Cassazione, ruling of 24 March 2015, n. 5878, in *Rivista giuridica del lavoro e della previdenza sociale*, 2015, 3(2), pp. 420-424, with comment of G. Pistone (2015). *Turpiloquio sul luogo di lavoro e lesione del vincolo fiduciario*.

[146] Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, p. 7.

[147] Corte Suprema di Cassazione, ruling of 8 February 1993, n. 1519, in *Rivista italiana di diritto del lavoro*, 1994, 3(2), pp. 536-541, with comment of L. Angelini (1994). *Ancora in materia di giusta causa di licenziamento per fatti e comportamenti estranei al rapporto di lavoro*.

[148] Resolution Court of Trento 10 June 2014, in *Rivista italiana di diritto del lavoro*, 2014, 4(2), pp. 790-798, with comment of E. Dagnino (2014). *La rilevanza delle condotte extralavorative tra giusta causa di licenziamento nel settore autoferrotranviario e insussistenza del fatto contestato*.

his employment contract, published on his Facebook profile insults to his superior and his colleagues.[149]

With regard to dismissals due to the employee's exercise of freedom of speech through social networks, there have also been rulings in German labor courts, which have expressed a positive opinion on the legitimacy of dismissal due to insults and false statements addressed to the employer, superiors, or colleagues via social networks. For instance, the labor court of Hagen found it legitimate to dismiss an employee who had described his employer on his Facebook page as "*such a lazy pig who has never worked in his shit life*".[150] Similarly, the Duisburg labor court deemed legitimate the dismissal of a worker for having addressed various offenses to her colleagues through her Facebook profile. The worker, who was in convalescence after a surgical operation, had posted on her Facebook profile an old photo that portrayed her in the company of a couple of colleagues in a bar. These colleagues, at the sight of this photo, had implied to the employer the doubt that the employee was at all ill. As soon as the worker learned about these allegations, she addressed a series of vulgar offenses against her colleagues on her Facebook page.[151] In the grounds of this judgment, the Duisburg labor court recalls a very widespread orientation in German jurisprudence, i.e., the tendency to attribute a different level of seriousness to the workers' statements shared on the Internet as opposed to opinions expressed orally, in light of the different levels of disclosure that the statements on the net may have.[152] In the wake of this jurisprudential guideline, a ruling of the

[149] Court of Ivrea of 28 January 2015, n. 1008, in *Il Lavoro nella giurisprudenza*, 2015, 8(9), pp. 838-843, with comment of P. Salazar (2015). *"Facebook" e licenziamento per giusta causa: quando si travalicano i limiti del privato influendo sul rapporto di lavoro*.

[150] ArbG Hagen (Westfalen), ruling of 16 May 2012 - 3 Ca 2597/11, in Database Juris.

[151] ArbG Duisburg, ruling of 26 September 2012 - 5 Ca 949/12, in Database Juris.

[152] ArbG Duisburg, ruling of 26 September 2012 - 5 Ca 949/12, in Database Juris. According to which "*The posting on Facebook represents an embodiment of the offending statement, which, as long as it is not deleted, can be read by others again and again and thus encroaches on the rights of those affected. The special social significance and distribution that social networks now enjoy must also be taken into account. Entries on Facebook also bear the risk that subsequent entries, for example in the form of comments or through one's own entries, which in turn insult the person concerned again or in another form, up to the risk of so-called internet bullying. For this reason, the Chamber is of the opinion that a written statement on Facebook, even if it can be deleted at any time, cannot be compared in terms of intensity with a literal statement among colleagues in private*".

Regional Labor Court of Appeal of Berlin-Brandenburg considered as unlawful the dismissal of an employee who, on the occasion of a work council meeting, had compared the working conditions at the company to the conditions in a concentration camp.[153]

However, there are also decisions that have detached themselves from the preeminent jurisprudential orientation that considers an offensive comment shared on social networks to be more serious than an oral declaration. For example, the Regional Labor Court of Appeal in Hessen[154] reached a different conclusion when called upon to deliver an opinion on the legitimacy of the dismissal of a worker who, in a period of economic difficulty of the company where she was employed, had shared the following outburst in an open group on Facebook "*I'll throw up right away … there are hardly any anti-social partners like this: (How many lies, as well as salaries for newcomers, which are considered 'contrary to the law' before the law, should still exist)*". The court, in considering all the factual elements, found that certainly, the possibility that, in theory, an unlimited number of Internet users could access the statements published online makes the same more damaging to the interests of the employer, but it is necessary to take note of the fact that a single statement within an online discussion loses its importance in the large number of voices that overlap. The labor court of Iserlohn also concluded that the complaints addressed by an employee to the employer on a blog were covered by the fundamental right to freedom of expression under Article 5 paragraph 1 of the GG (German Basic Law), assuming that "*If an employee comments critically on the Internet about people and processes in the employer's business, the fundamental legal framework, in particular the fundamental right to freedom of expression under Art 5 par. 1 GG, must be sufficiently observed in the event of a breach of the contractual duty of consideration. There is also no violation of the contractual duty of consideration in the event of polemical criticism of the*

[153] LAG Berlin-Brandenburg, resolution 02.10.2014 - 10 TaBV 1134/14, in Database Juris.
[154] LAG Hessen, ruling of 28 January 2013 - 21 Sa 715/12, in Database Juris.

employer if the statements do not constitute criminal behaviour either in terms of form or content".[155]

In German casuistry, there are hypotheses of dismissal not only for offensive expressions directed towards colleagues or the employer but also for those made to the detriment of customers. The Schleswig-Holstein Reginal Labor Court of Appeal found lawful the dismissal of an employee who had called a client *"asshole"*.[156] Another interesting ruling of the Regional Labor Court of Appeal of Berlin-Brandenburg dealt with the legal issues related to the dismissal of a nurse from a neonatal intensive care unit who had published some photos on her Facebook profile of a newborn baby, who died at three months from birth and whose twin sister lost her life right after the birth. The photos of the newborn were accompanied by the following words *"So the job is really beautiful", "The time of cuddle - I'm happy",* and *"Rest in peace little angel, fly well with your sisters in the clouds and be a protective angel for all the others puppies. You are a brave little man. A big kiss".*[157] The Berlin Regional Labor Court of Appeal found that the unauthorized diffusion of patient images on a social network such as Facebook is a serious violation of the duty of confidentiality, given that the personal rights of the patient concerned can be seriously injured if the violation occurs on social networks, where the circulation of the shared content cannot be controlled on the network. Therefore, such conduct can constitute a legitimate reason for dismissal. In the specific case, however, the Labor Court of Appeal considered that an injury to the newborn's personal rights did not occur, since the images and phrases shared by the nurse were not offensive, and the portrait subject was not identifiable due to his very young age and the absence of specific somatic features. For these reasons, the Berlin Regional Labor Court of Appeal found the dismissal unlawful, as it was disproportionate to the nurse's conduct, which could have been called up with a warning.

[155] ArbG Iserlohn, ruling of 09 March 2010 - 5 Ca 2640/09, in Database Juris.
[156] LAG Schleswig-Holstein, ruling of 08 April 2010 - 4 Sa 474/09, in Database Juris.
[157] LAG Berlin-Brandenburg, ruling of 11 April 2014 - 17 Sa 2200/13, in Database Juris.

It is interesting to note that in the two legal systems analyzed, it very often happens that the courts have had to deal with cases that are very similar in the factual circumstances, if not overlapping. In this sense, a ruling of the Court of Appeal of Turin confirmed the judgment of first instance concerning a dismissal of a worker who, on his Facebook and Google+ profiles in the "information" sections, had indicated that he was employed *"in a shit company"* and that he hated *"fake people and that bastard of my chief of staff"*.[158] The opposite conclusion was reached by the labor court of Bochum, which held that the dismissal of a trainee who had indicated in her Facebook profile information that she worked for an "*exploitative oppressor*" and described the tasks she performed as "*shit*" was illegitimate.[159] However, on appeal, this decision was overturned by the Regional Labor Court of Appeal of Hamm, which found it legitimate to dismiss the trainee, considering that the words shared in Facebook by the trainee constituted a seriously defamatory statement that could justify the extraordinary termination of the professional training relationship.[160]

This second category includes not only cases of direct online offenses against colleagues or employers but may also relate to the hypothesis of a critical opinion expressed not openly but by means of a "like". Specifically, the Regional Administrative Court of Lombardy denied the suspension against a disciplinary sanction imposed on an employee of the penitentiary police, who had clicked the "like" button with regard to an article accessible on Facebook that reported a critical dossier on the suicide of a prisoner in the penitentiary where the employee was serving.[161]

[158] Court of Appeal of Turin 15 May 2014, in *Rivista giuridica del lavoro e della previdenza sociale*, 2015, 3/2, pp. 465-469, with comment of Catania B. (2015), *Responsabilità disciplinare per dichiarazioni su "social network".*
[159] ArbG Bochum, ruling of 29 March 2012 - 3 Ca 1283/11, in Database BeckRS 2012, p. 70844.
[160] LAG Hamm (Westfalen), ruling of 10 October 2012 - 3 Sa 644/12, in Database Juris.
[161] Resolution Regional Administrative Court Milan sec. III 3 March 2016, n. 246, in *Il Lavoro nella giurisprudenza*, 2017, 4, pp. 382-387 with comment of M. Cottone (2017). *"Social Network": limiti alla libertà d'espressione e riflessi sul rapporto di lavoro (il "Like")*.

The German doctrine and jurisprudence are also concerned with the meaning that should be attributed to the "like" button on Twitter or Facebook. The latter considered that the user who clicks the "like" button expresses his/her approval of the content to which the "like" is addressed and therefore, "*Pressing the 'like-me-button' on the 'Facebook' website to confirm a statement insulting the employer can – possibly after prior warning – justify the termination of an employment relationship*".[162] The German doctrine, for its part, is more cautious in embracing this equivalence between the "like" button and presumed consent, elements that give rise to doubts about the immediacy and superficiality with which the "like" option is often used, as well as the different purpose and meaning that each user can attribute to this form of expression[163] (SNSs users, especially on Twitter, often use the "like" button to "save" certain content in their profile in order to easily have it available afterward, but the meanings that can be attributed to the "like" can be varied: as confirmation of reading, as a courtesy, as a point to a conversation, in an ironic sense, or even by mistake[164]).

The third group of judgments concerns a whole series of cases in which the only connection with the employer's interests is the person of the employee himself.[165] This category includes all those cases of dismissal that are not related to the employment relationship and do not harm the interests of the employer and yet may induce a negative judgment on the person of the worker

[162] ArbG Dessau-Roßlau, ruling of 21 March 2012 - 1 Ca 148/11, in Database Juris. The case brought to the attention of the Dessau-Roßlau labor court concerned the dismissal of a bank employee who had clicked the "like" button to a series of contents shared on Facebook by her husband. In the first post, he declared he wanted to give to a pig the name of the two CEOs of the bank where his wife worked, stating that "*Well, all pigs end up in front of a butcher in the end*". The second content shared by the husband of the bank employee and appreciated by her by means of the "like" option concerned a cartoon depicting a fish with the bank's logo in the middle and the following sentence: "our fish stinks from the head".

[163] Burr, S. (2015). Kündigung wegen unternehmensschädlichen Facebook-Postings. *Neue Zeitschrift für Arbeitsrecht-Beilage*, p. 116.

[164] Bauer, J.H & Günther J. (2013), Kündigung wegen beleidigender Äußerungen auf Facebook. *Neue Zeitschrift für Arbeitsrecht*, pp. 70-71; Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht*, pp. 786-787.

[165] Calcaterra, L. (2000), Il licenziamento per fatti e comportamenti estranei al rapporto di lavoro. *Diritti Lavori Mercati*, 3, p. 612.

himself.[166] This category mainly includes dismissals for a crime for which the worker is responsible.[167] According to the Italian case-law, the types of offense in support of lawful dismissal can be vary and include, for instance, the possession or trafficking of drugs,[168] the crime of perjury, attributing in a civil trial to the employer facts that are harmful to his dignity and his integrity,[169] aiding and abetting the prostitution of the wife of the employee himself,[170] or the employee's involvement in a shooting.[171] At the same time, in relation to this third category of private conducts that, according to the majority of the Italian jurisprudence, have been considered legitimate grounds for dismissal, though, without a direct link with the employment relationship, some cases of termination of the employment relationship because of private conduct on the network have been reported as well. An interesting judgment of the Court of Rome considered legitimate the dismissal imposed on an airline hostess whose pornographic content, such as offers of sexual services indicating her professional status of hostess and the name of the airline itself, was available on the Internet.[172] The Court of Bergamo, by resolution of 24 December 2015, first considered legitimate the dismissal of an employee for having posted on its Facebook profile a photo of himself

[166] Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, pp. 12-13.
[167] Balandi, G.G. (1980). Il procedimento penale a carico del lavoratore. *Rivista trimestrale di diritto e procedura civile*, 3, pp. 904-949.
[168] Trial Court (Pretura) of Bari 4 December 1989, in *Rivista italiana di diritto del lavoro*, 1990, 3(2), pp. 688-695, with comment of E. Vullo (1990). *Hashish e licenziamento per giusta causa: una sentenza criticabile*; Corte Suprema di Cassazione, ruling of 9 March 2016, n. 4633, in *Rivista italiana di diritto del lavoro*, 2016, 4(2), pp. 800-805, with comment of P. Frigo (2016). *Sulla rilevanza disciplinare di condotte extralavorative illecite e ... reticenti*. According to the Italian Supreme Court of Cassation, it is legitimate to dismiss an employee involved in the crime of possession and trafficking of drugs, all the more so because he neglected the employer during his detention under house arrest in the period in which he was absent due to illness. The illegal extra-work conduct has disciplinary importance when, due to its seriousness and habitual nature, it concretely determines the danger that the worker may commit crimes of the same nature in the workplace or may behave in such a way as to generate in the employer a negative prognostic opinion about the correctness of the future performance.
[169] Corte Suprema di Cassazione, ruling of 8 March 1998, n. 2626, in *Rivista italiana di diritto del lavoro*, 1999, 1(2), pp. 147-155, with comment of P. Tullini (1999). *Il licenziamento in tronco, la fiducia e i c.d. fatti extra-lavorativi*.
[170] Court of Florence of 14 February 2013, in *Rivista italiana di diritto del lavoro*, 2013, 3(2), pp. 616-620, with comment of M. Lughezzani (2013). *Sulla rilevanza dei fatti extra-lavorativi: lo sfruttamento della prostituzione della moglie giustifica il licenziamento*.
[171] Corte Suprema di Cassazione, ruling of 4 December 2013, n. 27129, in *Diritto e Giustizia*, 4 December 2013.
[172] Court of Rome 28 January 2009, in *Massimario di giurisprudenza del lavoro*, 5/09, p. 324, with comment of C. Pisani, (2009). *La hostess "allegra": licenziamento per inidoneità morale*.

armed with a toy gun, then the decision was reformed by the same court in an opposition filed by the employing company, in the sense of declaring the dismissal illegitimate.[173] The Hamburg labor court[174] was asked to judge on a similar case, also concerning a dismissal due to a photo posted on Facebook by an employee. Specifically, a police officer was fired for having published on his Facebook profile a photo that portrayed him holding a skull on which he had placed the police hat and in whose background, a Jewish school was visible. The Hamburg labor court held that "*the apology of National Socialism is in principle a legitimate cause of an unannounced dismissal of a police officer since, even outside of working hours employees of the public sector are obliged to behave loyally towards their employer and take due account of their integrity duties*". In light of this general principle, the Hamburg Labor Court held that in the case in question, no contractual violation occurred, considering that the skull used by the worker in the photo appeared different from that used by the National Socialist party and therefore, the characteristics of the photo could not be read as a political statement or a threat. Even a German magistrate and vice-president of a criminal chamber had to answer for a photo he shared from his Facebook profile.[175] The judge was removed because he shared a photo on a well-known social network of him sitting on the terrace with a glass of beer in his hand and wearing a shirt on which the following sentences were printed: "*We will give your future a home: JVA (an acronym for the German word of penitentiary)*", "*2nd Grand Trial Chamber at LG (an acronym for the German word of District Court) Rostock*", and "*since 1996 until today*".

In light of the considerations above, it is possible to affirm that, within the framework of the Italian and German jurisprudence, some hypotheses of dismissal for an employee's private conduct,

[173] Court of Bergamo, resolution of 24 December 2015, in *Il Lavoro nella giurisprudenza*, 2016, 5, pp. 476-482, with comment of Cosattini, L.A. (2016). *I comportamenti extralavorativi al tempo dei "social media": "postare" foto costa caro*.
[174] ArbG Hamburg, ruling of 18 September 2013 - 27 Ca 207/13, in Database Juris.
[175] BGH, ruling of 12 Janury 2016 - 3 StR 482/15 (LG Rostock).

unrelated to the work performance, have passed the scrutiny of legitimacy since they have been considered suitable to compromise the employer's expectation of a correct future fulfillment of the work obligation by the worker.

From the general overview of the most relevant case studies in Italy and Germany in the matter of dismissals due to the online off-duty conduct of the employee, some common features emerge between the two legal systems. First of all, the phenomenon under consideration appears to be considered in both legal systems according to the same forms. In this sense, merely considering the cases subject to scrutiny by the Italian and German courts, without dwelling on the legal grounds that founded the aforementioned decisions – an analysis that will be carried out later in this study – highlights some similar features in instances where an employee's online conduct led to his/her dismissal.

Furthermore, according to the findings, both the Italian and German majority jurisprudence consider that any behavior included in one of the three categories may constitute a violation of specific contractual obligations, such as to legitimize the dismissal ordered by the employer. Further, the courts of the two legal systems also recognized that the breach of contract thus committed corresponds on the part of the employee with some interests or rights that are also worthy of protection. For these reasons, the classification developed below identifies for each category of off-duty behaviors that may lead to dismissal the most widespread conduct on the network that has been considered a legitimate cause of dismissal by the Italian and German majority jurisprudence.

First of all, one of the most common online behaviors, which is temporally and spatially connected within the employment relationship and which, as was seen, can very often lead to a dismissal, is excessive web browsing during working time and in the workplace.[176] With regard to

[176] The phenomenon is not recent. As early as 1999, an article in the Newsweek magazine cited a research by the Vault.com according to which "*90 percent of the nation's workers admit to surfing recreational sites during office hours. And 84 percent of workers say they send personal e-mail from work. SurfWatch Software estimates that nearly one third of American workers' time on the Net is spent cheating the boss out of real work, double last year's rate of on-the-job*

this first category, the good that the conduct of the employee can damage is productivity. In fact, the use of electronic resources on duty for reasons not related to work can reduce the performance of the worker him/herself by distracting him/her from his/her duties. Furthermore, surfing the net from the company account for purposes not related to work exposes the company's IT systems to possible risks, with potential repair costs. The worker, for his/her part, has the right that the content of private communications forwarded from his/her business account should remain unknown to the employer.[177] The European Court of Human Rights has expressed itself on precisely this balance of conflicting interests in the notorious *Bărbulescu v. Romania* case.[178]

The second category, which is also widespread, concerns the sharing on the net of offensive statements addressed to the employer, superiors, colleagues, or even customers or users. Statements made by means of social networks can take different forms, such as an autonomous affirmation (a so-called "post"), a comment on other online content, or a message inside of a conversation visible to a small circle of people or visible to anyone. The use of the "like" button can also be included in the last category regarding the statements shared by means of social networks, although the meaning of this is controversial. This second category of online behaviors can cause damage to the reputation of the employer when the offenses are directed towards him/her or his/her colleagues if they are the addressees of the statements shared online by the worker. In these hypotheses, the worker has the right to express his/her own thoughts within the allowed limits, even if this results in a criticism of the employer. However, an injury to the company organization

recreational surfing. Research commissioned by Elron Software found that more than half of American workers cybershop on company time". See Naughton, K. (1999, November 28). Cyberslacking. *Newsweek*. Retrieved from https://www.newsweek.com/cyberslacking-164428.

[177] Ingrao, A. (2016). Il "cyberslacking" e i diritti del lavoratore "catturato nella rete informatica". Note critiche a margine della sentenza della Corte Europea dei diritti dell'uomo, sez. IV, 12 gennaio 2016, n. 61496, "Barbulescu vs. Romania", in attesa della pronuncia della Grande Camera. *Osservatorio costituzionale*, 3. Retrieved from http://www.osservatorioaic.it.

[178] European Court of Human Rights, fourth section, Bărbulescu v. Romania, 5 September 2017, application n.61496/08. Retrieved from http://hudoc.echr.coe.int/eng?i=001-177082.

can also occur from this second category of online employee conduct, since an offensive and provocative declaration by a worker towards colleagues can cause an escalation in the reactions of the latter, with consequent repercussions on interpersonal balance and business collaboration. Among the legal assets of the employer that can be harmed by the conduct of the worker on the net, business secrets, which can sometimes be disclosed or otherwise violated, must also be considered.

The third category of networked conduct that may involve the dismissal of the employee includes those activities of the worker on the net in which there is any direct link with the employment relationship, such as the sharing of personal photos. The identification of the asset relating to the legal sphere of the employer injured by this third category of online employee conduct, which was often considered a legitimate cause of dismissal by Italian and German jurisprudence, appears controversial. Italian and German case-law refer several times to the "fiduciary bond" or the "duty of loyalty" existing between the work and worker.[179] In relation to the first two categories of employee conduct on the network, the conflicting interests are easily identifiable. For the third category, which involves a weaker link between private conduct and the employment relationship, the contractual element that is considered to be injured is the fiduciary bond, which, according to the majority of Italian and German jurisprudence, distinguishes the employment relationship. On closer inspection, the fiduciary bond and the duty of loyalty are elements to which the Italian and German jurisprudence often make widespread reference in relation to dismissals as a result of off-duty conduct on the net. Therefore, some common features emerge from the analysis of the most significant subject matters with which the Italian and German courts have dealt. These mutual aspects concern not only the forms in which the events occur but

[179] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht*, p. 786.

also the affinity in the legal approach developed by the judges, ultimately demonstrating the uniformity of the phenomenon.

In conclusion, following the analysis of the most relevant Italian and German case-law on dismissals due to online off-line behaviors, it is possible to identify more than just a fundamental underlying legal theme. As can be seen, most of the time, the judges involved have very often struck a balance between conflicting interests by resorting to civil law categories of the employment relationship. The first concerns the element of loyalty as a benchmark for verifying the legitimacy or illegitimacy of a dismissal ordered in response to an employee's off-duty conduct. The second element, closely connected with the first, concerns suitable criteria for the identification of private conduct that can be considered relevant for the purposes of a dismissal. These two themes, which are deeply interconnected, inevitably imply a civil law related reflection on the "area of the demanding" and on the "area of the disciplinarily relevant".

1.5.3 *The methodology adopted*

The comparative method adopted here is designed to deepen the comprehension of the phenomenon under study,[180] which, placing itself in close relationship with today's pervasive use of social networks, could very soon affect every legal system. The method adopted for the present research, explained in detail below, takes due account of the scientific research questions expressed so far and fits them into the methodology landscape by combining two of the main methods particular to comparative legal research. However, it is first necessary to explain a premise related to the research question to comprehend the reasons that led to using a comparative composite method.

[180] Denti, V. (1980). Diritto comparato e scienza del processo. In Giovanni Bognetti & Rodolfo Sacco (Eds.), *L'apporto della comparazione alla scienza giuridica*. Milano, Giuffrè, p. 213; Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, p. 1; Griffiths, J. & Adams, M. (2012). Against "comparative method": Explaining similarities and differences. In M. Adams & J. Bomhoff (Eds.), *Practice and theory in comparative law*. Cambridge: Cambridge University Press, pp. 279-301.

Coming back to the issue of the research, the instances of dismissals due to online off-duty conduct are a sign of a radical change in social, interpersonal relationships and in the construction of one's own social and political identity, which nowadays mostly takes place in cyberspace.[181] This idea is confirmed by S. Rodotà, according to whom "*The great technological transformation changes the framework of civil and political rights, reshaping the role of public authorities, changing personal and social relations, and affecting the very anthropology of the individual*".[182]

In this sense, the topic of interest of this survey constitutes one of the many manifestations in labor law of a much wider phenomenon that not only embraces the employment relationship but affects every aspect of social life. It is important to consider that since the phenomenon has only recently occurred, it has not yet been the subject of specific attention by legislators, and therefore, it has only been brought to the attention of legal operators at the judicial level. As has already emerged, the point of departure from which the present study takes its cue is the increasing frequency of court cases regarding dismissal due to off-duty activities on the net and, in particular, on social networks. A key element of the research is confirming through jurisprudential outcomes that the phenomenon manifests itself primarily on a social level. The fact that legal science is becoming aware of the issues related to the hypothesis of dismissal due to online activity, mainly through the increasing number of court cases, also influences the methodological approach adopted. In this sense, regardless of the subject matter, social data should never be neglected in legal studies, especially in comparative legal studies.

For these reasons and in the spirit of in-depth comparative research, one of the methodological prerogatives of the present research is to conduct the investigation by examining

[181] Perlingieri, C. (2017). *Social networks and private law*. Napoli: Edizioni Scientifiche Italiane, p. 11; Iaquinta, F. & Ingrao, A. (2014). La "privacy" e i dati sensibili del lavoratore legati all'utilizzo di "social networks". Quando prevenire è meglio che curare. *Diritto delle relazioni industriali*, 4, pp. 1027-1028.
[182] Rodotà, S. (2006). Una Costituzione per Internet. In *Notizie di POLITEIA*, XXII, 82, p. 177.

not only the legislation level of the legal systems considered but also by paying greater attention to the case-law, without neglecting the sociological element behind the legal issues.[183]

The particular consideration reserved for the judgments issued by the Italian and German judicial authorities, first of all, provides a unique window into the features of online activities, which often assume new forms following technological innovation and which the employer can consider sufficient grounds for dismissal if implemented by the employee. The second reason why the decisions issued by the Italian and German courts will be given utmost importance in the context of this research concerns the gap that can very often occur between the law in books and the law in action.[184]

Once this preliminary clarification regarding the methodological implications deriving from the novelty of dismissal cases for off-duty online conduct has been made, the discussion will turn to the methodological needs that arise when conducting comparative research.

Legal comparison, in general terms, poses many methodological problems, especially in the field of labor law. As observed by the scholar R. Birk, "*methodological reflection on the comparison in labour law still leaves much to be desired*".[185] Legal comparison does not apply a single scientific method. Given its predominantly transnational nature, comparative law itself has developed multiple methodological approaches over time, often differing both in the object of study and the purpose of it.[186]

---

[183] Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, p. 7; Rebhahn, R. (2002). Ziele und Probleme der Arbeitsrechtsvergleichung in Europa. *Zeitschrift für europäisches Privatrecht*, p. 441.

[184] Rebhahn, R. (2002). Ziele und Probleme der Arbeitsrechtsvergleichung in Europa. *Zeitschrift für europäisches Privatrecht*, p. 441; Gorla, G. (1948). *Commento a Tocqueville. "L'idea dei diritti".* Milano: Giuffrè. The importance of historical analysis accompanied by the study of jurisprudential pronouncements is well expressed by the author, according to whom "*it is a canon of historical interpretation, well known if not always observed, that law, as an expression of a given civilization, it is not always and only found in the laws, in the codes, in the works of the jurists, and that the intimate meaning of the laws should not be sought only in the formula of them, often static and immobile in the turn of the times, but also in the custom, in the spirit of that given civilization and in the eminent personalities who represent it*".

[185] Birk, R. (2001). Arbeitsrecht und Rechtsvergleichung - Die Kontrolle der Einhaltung der Europäischen Sozialcharta. *Zeitschrift für vergleichende Rechtswissenschaft*, 100, p. 51.

[186] Grandi, M. (1996). Comparazione giuridica e diritto del lavoro. *ADL Argomenti di diritto del lavoro*, 3, p. 5.

There are many factors that make it problematic to identify an agreed and univocal methodology for legal comparison, such as the fact that comparatists come from different national legal systems, each characterized by its own interpretative approach, or the often decisive influence exerted by other sciences on the content and method adopted in comparative legal studies, the so-called "necessary interdisciplinary contamination" from which follows the frequent attraction of comparative law to the contributions of disciplines other than the juridical, such as sociology.[187] These antinomies have always accompanied the path of comparative law and in recent years have raised questions about many of its well-established concepts, such as the concept of "legal family" or the object and the aims of legal comparison itself.[188] There can be many aims of legal comparison. Following the most accredited classification, legal comparison can be intended as a means to broaden knowledge for knowledge's sake or as an instrument for better comprehension of legal developments with a direct practical aim, like that of improving a national legal system, or, finally, as a vehicle to harmonize the law.[189]

In the dispute concerning the methods of legal comparison, some scholars have intended comparison itself as a science inspired by neutral purposes, animated by pure cognitive intent.[190] According to this conception, called "comparative nomoscopy", comparative legal research should be carried out on the basis of a strictly descriptive criterion in order to confront different legal

[187] Clark, D.S. (Ed.) (2012) *Comparative law and society*. Cheltenham (UK)-Northampton (MA): Edward Elgar Publishing; Mostacci, E. (2017). Schemi di classificazione e comparazione giuridica: un regno immenso e anonimo. *Diritto pubblico comparato ed europeo*, (4), p. 1167; Husa, J. (2009, October 14). Farewell to functionalism or methodological tolerance?. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 67(3), p. 422, July 2003. Retrieved from https://ssrn.com/abstract=1488669.

[188] Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, p. 1.

[189] Glenn, H.P. (2006). The aims of comparative law. In J.M. Smits (Ed.), *Elgar Encyclopedia of Comparative Law, Second Edition*. Cheltenham, UK: Edward Elgar Publishing, pp. 57-58. doi: https://doi.org/10.4337/9781781006108.00009. Rebhahn, R. (2002). Ziele und Probleme der Arbeitsrechtsvergleichung in Europa. *Zeitschrift für europäisches Privatrecht*, p. 443.

[190] Sacco, R. (1980). Comparazione giuridica e conoscenza del dato giuridico positivo. In G. Bognetti & R. Sacco (Eds.), *L'apporto della comparazione alla scienza giuridica*. Studi di diritto comparato, 20, Milano: Giuffrè, p. 6; Wignore, J.H. (1928). *A panorama of the world's legal systems* (vol. III). Saint Paul: West Publishing Company, p. 1120; Viglione, F. (2011). I "confini" nel diritto privato comparato. *La Nuova giurisprudenza civile commentata*, 3(2), p. 162.

systems without the possibility of admitting comparative research aimed at satisfying a practical need for the resolution of a factual issue.[191]

This reconstruction does not seem to be suitable, firstly because the comparison between legal systems on issues in relation to which the two legal systems are affected by substantial differences could prove difficult, if not useless,[192] and secondly because comparative law can offer an effective cognitive contribution to legal sciences primarily if the comparison itself is based on the observation of concrete legal phenomena belonging to different legal systems.[193] In these terms, the "working hypothesis" of a comparative study affects the design of the research method itself. For these reasons, comparison in labor law can certainly be carried out for purely cognitive reasons, but comparison is far more valid if a specific question is investigated and if it is conducted between legal systems that share a similar economic and social system.[194]

The concept of legal comparison as a means of solving practical problems through a study involving the analysis of more than one legal system appears to be the most common opinion. In this sense, the comparison of labor law issues turns out to be fundamental and sometimes necessary. In this regard, it is sufficient to consider all the legal issues posed by those employment relationships governed by an international contract and characterized by an element of internationality that implies the involvement of the legislation of more than one legal system.[195] In these cases, Article 6 of the Rome Convention of 1980 and Article 8 of the EC regulation n. 593/2008, called Rome I, provided that the employment contract may be regulated by the law chosen by the

[191] Wignore, J.H. (1928). *A panorama of the world's legal systems* (vol. III). Saint Paul: West Publishing Company, p. 1120; Gutteridge, H.C. (1949). *Comparative law. An introduction to the comparative method of legal study and research* (vol. I). Cambridge Studies in International and Comparative Law. London: Cambridge University Press, p. 8.
[192] Rebhahn, R. (2002). Ziele und Probleme der Arbeitsrechtsvergleichung in Europa. *Zeitschrift für europäisches Privatrecht*, p. 444.
[193] Stone, F.F. (1951). The End to Be Served by Comparative Law. *25 Tulane Law Review*, p. 326.
[194] Gamillscheg, F. (1964). *Arbeitsrecht und Rechtsvergleichung, in Göttinger Arbeitskreis (Ed.), Recht im Dienste der Menschenwürde: Festschrift für Herbert Kraus* (pp. 97-107). Würzburg: Holzner Verlag. In pp. 97, 103 ("vergleichbarer Sozialaufbau"), 107 („vergleichbares soziales Niveau"), 102 ("ähnliche Struktur").
[195] Rebhahn, R. (2002). Ziele und Probleme der Arbeitsrechtsvergleichung in Europa. *Zeitschrift für europäisches Privatrecht*, p. 443.

parties, under the condition that the elected law does not deprive the employee of the protection afforded to him/her by the mandatory rules of the law that would be applicable in the absence of choice. In the absence of choice, the employment contract should be governed alternatively: by the law of the country in which the employee habitually carries out his/her work, even if he/she is temporarily employed in another country; or, if the employee does not habitually carry out his/her work in any one country, the employment relationship should be regulated by the law of the country in which the place of business, through which he/she was engaged, is situated. If it appears from the circumstances that the contract is more closely connected with another country, then the contract shall be governed by the law of that country.

Legal comparison also proves to be fundamental with regard to the European integration process at the regulatory level, which is crucial for the harmonization process of the legislation of the Member States. Regarding legislative harmonization, this mechanism presents peculiar characteristics in the European context. Legislative harmonization within the European Union presents itself as a dynamic process in both the top-down and the bottom-up directions. On the one hand, European law and the decisions of the Court of Justice tend to unify European legislation and its application within the European Union's boards. On the other hand, European law, in order to be as effective as possible, presupposes a specific knowledge and comparison of the domestic legislation of each Member State.[196]

In light of this quick overview of the various utilities that the adoption of a comparative method can have in conducting research on labor law, it is possible to conclude that for the purposes of this study, the comparison between the Italian and German legal systems can assist in finding a solution to the balance of opposing interests that dismissals due to employee activity on the

[196] Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, pp. 20-21; Moccia, L. (2016). *Comparazione giuridica e prospective di studio del diritto*. Padova: CEDAM, pp. 32-35.

network pose and helps us to understand the margins that may exist for a univocal approach by the two systems to the problem.

As already mentioned, comparative law does not apply an exclusive methodological approach. The method that has been implemented most frequently in legal comparison and has historically characterized comparative research is the so-called "functional method", even if from the literature on the legal theory, it is possible to identify at least five other methods of comparative research. These other methodologies, according to the scholar S. Geoffrey, correspond to the five different "schemes of intelligibility" and are: the structural method, the analytical method, the law-in-context method, the historical method, and the common-core method.[197] The nomenclature adopted highlights a specific characteristic of each of the different methodological approaches but is not intended to imply they are unrelated. Rather, they are so deeply connected that variations and intersections between them are likely if the research question requires it.[198]

The functional method allows us to verify the response offered by each of the different considered legal systems to a common problem.[199] The implicit assumption is that the practical questions that every legal system must deal with are almost equal, even if the solutions adopted can be equivalent or dissimilar. For this reason, the functional method is suitable when the aim of the research is to analyze social problems and the legal reply to them.[200] The weakness of the

[197] Samuel, G. (2014). *An introduction to comparative law theory and method*. Oxford and Portland, Oregon: Hart Publishing, pp. 81-82; Scarciglia, R. (2016). *Metodi e comparazione giuridica*. Padova: CEDAM, p. 60.
[198] Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, p. 9.
[199] Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, p. 8; Pound, R. (1936). What may we expect from comparative law? *American Bar Association Journal*, 22, pp. 56-60. According to the author, a functional comparison is a "*study of how the same thing may be brought about, the same problem may be met by one legal institution or doctrine or precept in one body of law and by another and quite different institution or doctrine or precept in another*".
[200] Gordley, J. (2012). The functional method. In P.G. Monateri (Ed.), *Methods of comparative law*. Research Handbooks in Comparative Law. Cheltenham, U.K., Northampton, MA: Edward Elgar Pub, p. 117. The author notes that Konrad Zweigert, who first conceptualized the functional method (Zweigert, K. & Kötz, H. (1971). Einführung in die Rechtsvergleichung. Tübingen: J.C.B. Mohr (Paul Siebeck) stated that "*the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results*".

functional method, and the reason it has been widely criticized,[201] is that it does not encompass a thorough review of the doctrinal contribution elaborated in response to the practical matters, compared to the social and historical approaches.[202] For this reason, the risk inherent in the functional method is that it will result in superficial comparative research with no regard for the broader cultural context.[203]

The structural method, for its part, takes an analytical approach to the founding elements underlying the legal phenomena, and, in this way, it enables the verification of commonalities in terms of principles and concepts shared by legal systems.[204] This is why the comparative scholar G.W. Leibniz used the structural method in 1667 when he drew up the classification of legal families[205] on the assumption that a certain structural element, adopted as a cataloging criterion and, most often, private law related, belongs to more than one legal system.

Another method of the legal comparison that is frequently applied in the Anglo-American legal world is the analytical one, developed by the scholar W.N. Hohfeld.[206] The intuition at the heart of the analytical method is that the notion of "right", although it has several meanings, holds a basic elementary concept that cannot be reduced in other terms and by reason of which it is possible to recognize commonalities and differences between the various legal systems of the European Member States.[207] According to this approach, some fundamental element would establish an "ideal

[201] Scarciglia, R. (2016). *Metodi e comparazione giuridica*. Padova: CEDAM, pp. 69-70; Michaels, R. (2006). The functional method of comparative law. In M. Reimann & R. Zimmerman (Eds.), *The Oxford Handbook of Comparative Law*. Oxford University Press, Forthcoming; Duke Law School Legal Studies Paper n. 87, p. 4. Retrieved from https://ssrn.com/abstract=839826. The author notes that *"In short, 'the functional method' is a trifold misnomer: There is not one ('the') functional method but many, not all methods so called are functional at all, and some projects claiming adherence to it do not even follow any recognizable method*".

[202] Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, p. 11.

[203] Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, p. 11.

[204] Samuel, G. (2014). *An introduction to comparative law theory and method*. Oxford and Portland, Oregon: Hart Publishing, pp. 81-82.

[205] Tripiccione, A. (1961). *La comparazione giuridica*. Padova: CEDAM, pp. 16-18.

[206] Hohfeld, W.N. (1919). *Fundamental legal conceptions, as applied in judicial reasoning*. Yale University Press, pp. 710-770.

[207] Brouwer, P.W. & Hage, J. (2007). Basic concepts of European private law. *European Review of Private Law*, p. 4. According to the author, "*the private law of the different European countries can be reconstructed in terms of a limited set of the same basic concepts*".

type" of a basic legal concept, independently from the legal system to which it belongs, and thanks to these "ideal types", it would be possible to classify legal systems according to the degree of greater or lesser proximity to the "ideal type".[208] Thus, for example, the concept of "ownership" would contain, even if in varying levels of intensity in the different legal systems, two fundamental elements: the "protection of possession" and the "freedom of disposal". Even if the intensity with which these two elements appear in the different legal systems may change, the basic concept of ownership, understood as the "ideal type", would remain.[209]

Through the law-in-context method, it is possible to look at a wider context than the legal one as strictly understood. According to this method, all other social elements, such as cultural, economic, psychological, and religious ones, that may be relevant for the purposes of comparative analysis are worthy of note. In this sense, comparative research cannot be carried out without the analysis of the context of the regulatory regime under consideration. For this reason, the law-in-context method should always be placed side by side with another comparative legal study. Indeed, none of the methods of legal comparison can be considered self-sufficient; rather, each of them is in a complementary relationship with the others, and only a proper combination of them that suits the research question can be a truly effective methodological tool.[210] As a confirmation of what has been observed, the functional method itself implies in part an analysis of the context in which a certain problem occurs in order to discover what kind of legal response is embraced.[211]

The contexts that are essential to analyze for the specific purposes of comparative legal research, such as the historical, the sociological, and the anthropological ones, can vary. A well-known example of the application of the law-in-context method can be found in R. Sacco's

[208] Brouwer, P.W. & Hage, J. (2007). Basic concepts of european private law. *European Review of Private Law*, p. 11.
[209] Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, p. 15.
[210] Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, p. 16; Scarciglia, R. (2016). *Metodi e comparazione giuridica*. Padova: CEDAM, pp. 85-87.
[211] Örücü, E. (2007). Developing Comparative Law. In E. Örücü & D. Nelken (Eds.), *Comparative Law: A Handbook*. Oxford: Hart Publishing, p. 62.

elaboration of the so-called "legal formants" belonging to the legislative, doctrinal, and jurisprudential contexts, but relevant elements can also arise from other backgrounds and non-legal disciplines.[212] In the final analysis, understanding the general contexts in which the law is located means investigating the reasons why the law presents itself as it is.[213]

The historical method as a comparative research approach is itself a declination of the law-in-context method, with a specific focus on the historical origins of the present-day law. A comparative study cannot disregard the investigation of the events that have taken place and determined an institutional and normative structure, such as that which can be observed today in the legal systems under examination. As was rightly observed by the scholar G. Gorla, "*comparison involves history*",[214] borrowing and modifying the well-known expression elaborated by F. W. Maitland "*history involves comparison*".[215]

Moreover, only historical comparisons can detect the existence of similar structures and approaches, disclosing a common root between different legal systems whose congruences are no longer so evident today. Although there may be obvious differences between various legal systems, it cannot be ruled out that the divergences between them are nothing but dissimilar developments of a common legal conception, which remains latent and binds the legal systems together.[216]

Between the end of the nineteenth and beginning of the twentieth centuries, the comparative doctrine elaborated another method of research called "the common-core method", which offers a tool of investigation to support comparative research driven by the desire to discover the common heart of numerous legal systems. The common-core method has been more widely

[212] Sacco, R. (1991). Legal formants: A dynamic approach to comparative law (Installment I of II). *American Journal of Comparative Law*, 39(1), p. 26. doi:10.2307/840669.
[213] Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, p. 17.
[214] Gorla, G. (1955). *Il Contratto*, vol. II. Milano: Giuffrè, p. V.
[215] Maitland, F.W. (1911). Why the history of english law is not written. In Herbert Albert Laurens Fisher (Ed.), *The Collected Papers of Frederic William Maitland* (vol. I, p. 480) Cambridge: University Press.
[216] Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, p. 19.

followed with the inception of the European Union and the introduction of the process of legislative harmonization. In fact, comparative research among the Member States' legal systems in pursuit of a common core is a valuable tool in the hands of the European legislator and is to the advantage of the European integration process. In this context, the common-core method allows for the identification of the differences and similarities between legal systems, with a view to understanding the extent to which a harmonized discipline can be achieved in a given area or the extent to which European legislation can be applied at the local level.

It is in light of the legal comparative working toolbox that the method adopted for the present research, considering the peculiarities and complexity of the subject matter, is a combination of the methodologies described so far. The specific characteristics of the theme of research require the application of a composite method that takes account of the legal implications without undervaluing the sociological aspect and the European framework. The multilevel approach required by the complexity of the subject concerns and involves, on the one hand, legal analysis at the European and domestic levels and, on the other hand, a sociological and anthropological reflection, since the so-called "digital identity" is a broad concept and a product of the digital age, with challenging effects within almost every modern society. In this respect, the emergence of an employee's digital identity reveals, above all, a widespread phenomenon that even affects the employment relationship. The frequency of judicial decisions with regard to cases of dismissal because of private activity on the Internet indicates a new application of the online resources at the social level, both by the employee as a user of them and by the employer as a "data collector" of the information accessible on the web.

As has already emerged, the starting point of this investigation is the analysis, according to a comparative perspective and a law-in-context method, of the rulings that have been taken (the so-called legal formant of jurisprudence) by the Italian and German judges in cases of dismissal due

to online off-duty conduct. However, if the jurisprudential outcomes of the two legal systems considered in the first analysis are fundamental for the reasons discussed, the argumentative structure of the same rulings will be subjected to scrutiny in order to verify their congruity with the normative and doctrinal framework. In this sense, the essential methodological stages are articulated as an analysis of the rulings in order to identify the juridical issues involved and codify a theoretical approach to the legal institutions involved, with the aim of developing interpretative paradigms that are conceptually founded in the light of historical developments.[217] The last step will consist of carrying out further investigation of the rulings issued by the Italian and German courts in light of the interpretative paradigms developed in order to verify their validity from a dogmatic point of view. In accordance with the results obtained, a classification system will be applied in which each most frequent case of dismissal due to online employee behavior corresponds to the most conceptually appropriate balance of the conflicting interests at stake.

In this sense, the analysis of jurisprudence is fundamental for several reasons. In the first place, the assessment of the rulings allows us to frame the terms in which the social phenomenon occurs in the legal science, to grasp, according to an inductive method,[218] the answer provided by the case law[219] and the issues it poses, thus outlining the matters that need to be deepened in order to resolve the research questions. Second, thanks to the case-law outcomes, it is possible to define the most suitable comparative method, which allows us to investigate the legislative and jurisprudential responses set up at national and European levels by grasping the still unresolved issues and margins of indeterminacy, proposing solutions where possible.

[217] Mostacci, E. (2017). Schemi di classificazione e comparazione giuridica: un regno immenso e anonimo. *Diritto pubblico comparato ed europeo*, 4, p. 1166.
[218] Gorla, G. (1950). Le scuole di diritto degli Stati Uniti d'America. *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 48(1), pp. 320-334.
[219] Pound, R. (1910). Law in books and law in action. *American Law Review*, 44, pp. 12-36.

For this purpose, the methodological approach that best meets the needs of the research is analytical. This means that every issue, and therefore every legal institution under investigation, will be examined “in parallel” in the Italian and German legal systems. Furthermore, all the data will be subjected to analysis in a diachronic sense, favoring the study according to a historical criterion. Such an approach makes it possible to map not only the connections and differences between the two legal systems but also to trace the reasons why they occur.

Finally, in drawing conclusions from the research conducted according to the method outlined so far in its fundamental features, we should not lose sight of the objectives that animate the investigation itself. In this sense, the main purpose of this research is to find an answer to a practical problem, that is, what legal relevance can be attached to the impact of the employee’s online conduct on the employment relationship. It should be noted that the scientific approach with which this research is conducted does not assume that the solution adopted so far in either of the legal systems considered is correct or that that developed in the other is not. There is no relationship of subordination between the two legal systems, and the scientific approach with which the research is conducted does not assume that the solution adopted by one of the two legal systems is preferable. As has already been said, the practical issues that both legal systems are faced with are the same, and in both, non-homogeneous jurisprudential solutions have been developed, indicating the absence of a widely-shared doctrinal approach. Thus, it is necessary to develop a scientifically based system that offers conceptual tools to verify the lawfulness or unlawfulness of the dismissals due to online activities.

The first step consists of analyzing the juridical institutes individually in their respective legal systems, considering the regulatory sources, their application, and interpretation. The second step is understanding the peculiarities which qualify the juridical institutions in both considered countries in the concrete and contemporary dynamics, as well as in light of the historical and cultural

developments. In this regard, it seems appropriate and fundamental to also consider the possible influence between the two systems and the necessary impact exercised by the European system.

The first major issue to be addressed concerns the protection of worker's data and privacy. Regarding this aspect, it is necessary to retrace the most significant stages of the debate around the concept of privacy both in general and with a focus on the declination of the concept within the employment relationship in terms of protection of the employee's personal data. Only a historical reconstruction of the notion of privacy enables us to appreciate in which terms this value is compatible with the advent of social networks within the employment relationship. This is because today, the use of social and digital platforms conceals not only new questions for legal science – the doctrine and theoretical constructions of which were developed around the concept of the employee's digital identity and will be studied according to the structural method – but also sociological and anthropological aspects, which will be analyzed according to a law-in-context method. Furthermore, the study of the European data protection regulation is an essential step in the research related to the employee's data protection because the legislation being applied in both legal systems determines a structural interdependence between the two.

The second legal issue, with which the majority jurisprudence in the two legal systems of interest has dealt, concerns the relevance of the employee's private conduct on the continuation of the employment relationship and, therefore, the extent of the employment contract's obligation. In other words, the issue to tackle is the relevance of the employee's behavior outside the workplace and outside working times to his/her contractual fulfillment.

In this regard, the Italian and German jurisprudence often rely on the application of categories of a purely civil law nature, such as the fiduciary bond between the employer and the employee and the theory of duties of protection. Both legal systems not only share a tradition of thought and debate about the need to recognize adequate protection of the employee's private

sphere, the most recent culmination of which is the recently adopted European regulation on data protection, but also a broad reflection on the civil law related basis of the employment contract. Specifically, the theory on ancillary contractual obligations, developed in Germany, has circulated in Europe and been transposed to the Italian legal system as well.

This circumstance reveals that the two legal systems share a common root, making a comparison between them even more interesting with a view to reconstructing the developments that the same legal theories have experienced in Italy and Germany and how they are applied today to the increasing need for protection arising from the newly digitalized work and social contexts. For the reasons set out above, the comparative analysis that will be developed with this dissertation is intended to be as "intimate" as possible with the two legal systems. It does not limit itself to considering the different legislative responses to the same phenomenon but seeks common roots in the doctrinal and jurisprudential responses elaborated to face a transversal phenomenon and social novelty.

1.5.4 *How the outcomes will be assessed*

Among the various stages of the study, the one dedicated to the elaboration of the results best allows us to appreciate the underlying reasons that animate the present research. The comparison conducted between the German and Italian legal systems in relation to the increasingly frequent cases of dismissal due to online conduct is intended first of all to be an opportunity to acknowledge the two legal systems under comparison, as well as to resolve the legal issues raised by the practical cases. With this in mind, the starting point is the formulation of a well-argued balance of the opposing interests that preserves the experience of both legal systems in keeping

with the spirit of the European legal harmonization, according to the common principles they already share.[220]

A fundamental step concerns the classification of the results obtained in order to propose some legal solutions to a "complex phenomenal reality".[221] In the process of the elaboration of the results, the focus of the research is once again on the key factor of the study, namely, the jurisprudential pronouncements.

As it has been pointed out, the importance reserved for the Italian and German jurisprudence on the subject matter of the present research is deeply reflected in the method adopted. The prevailing methodological approach with which the investigation is conducted is of a case-problematic type. In this sense, following inductive reasoning, the inspiring principles and theories most accredited within the jurisprudence will be derived from the sentences issued in order to test their coherence with the teachings of the doctrine. The last step, dedicated to the formulation of the conclusions in the light of the results, will again turn its gaze to the sentences to identify the most common cases and propose a legal solution for each of them that suggests the most appropriate balance of the opposing interests at stake.

In the context of the path outlined above, the most consolidated jurisprudential guidelines in the two legal systems considered will be examined in order to verify their congruence with the most recent regulatory requirements regarding employee data protection, as well as their correct application of the principles of private law often referred to by the rulings in the employment context. Once a complete picture of the most widespread jurisprudential guidelines and their congruity with respect to the doctrinal elaborations and legislative prescriptions has been obtained,

[220] Moccia, Luigi (1994). La "comparazione" come "pedagogia giuridica" nell' opera di Gino Gorla. *Rivista trimestrale di diritto e procedura civile*, (2), p. 598.
[221] Mostacci, Edmondo (2017). Schemi di classificazione e comparazione giuridica: un regno immenso e anonimo. *Diritto pubblico comparato ed europeo*, 4, p. 1171.

it will be possible to identify for each concrete case the most questionable arguments and thus propose an alternative solution.

In conclusion, therefore, the criterion on the basis of which the results obtained will be evaluated will be one of systematic congruity. The research will not only scrutinize the rulings issued in the two legal systems to assess their consistency with the regulatory and doctrinal framework but also ensure that the proposed solutions follow the same principle of system concordance.

1.6 STRUCTURE OF THE THESIS

This first introductory chapter has offered a detailed overview of the underlying peculiarities of the research. The first step consisted of defining the research questions and the object on which the study will focus. Having thus defined the subject of investigation, it seemed appropriate to give an account of the incidence of the phenomenon under study in today's social reality. Then, the chapter went into the substance of the research, defining the reasons why the Italian and German legal systems were selected as points of comparison, as well as illustrating the most relevant judgments that dealt with the phenomenon under study. The last step concerned the illustration of the applied methodology and the evaluation criteria of the results obtained.

The following chapter will focus on the concept of privacy and data protection within the employment relationship. Additionally, the historical-legal evolution of these values will be retraced up to the formulation of the most recent notions. The final step will consist of giving an account of the sociological traits inherent in the widespread success of social networks and the role they play in today's society.

Once the general outlines of the debate around the protection of worker's privacy and data protection have been defined, the study will proceed with the analysis of the legal role given to these two values in the Italian and German legal systems. The analysis will be focused on the importance recognized in both the legal systems of the protection of the employee's privacy and

data processing. The investigation will then focus on the study of the regulations that have been prepared at the European level to protect these aspects of the existence of the worker, with particular attention to the recent provisions introduced by Regulation (EU) n. 2016/679. Once the protection system set up by the two legal systems and by the European one has been defined, it will be possible to identify the legislative requirements to which the employer must comply in the event of processing employee data. In the light of these results, it will be possible to find answers to some of the research questions underlying this study. In particular, the eventual protection that must be given to the data shared by the worker him/herself on his/her social profiles will be outlined.

The third chapter is dedicated to the other underlying theme of this research, namely, the legal relevance that can reasonably be given to the private online conduct of the worker and its impact on the continuation of the employment relationship. In order to answer this question, it is necessary to define the general framework of the discipline of dismissal in Italy and Germany. Then, it will be possible to turn our attention to the hypotheses of dismissal for off-duty conduct already consolidated in these two legal systems, the theoretical foundations of which it will then be necessary to trace in both legal systems. From this analysis, two elements of private law will emerge, namely that of the *intuitus personae* and the fiduciary bond, which will have to be explained in order to verify the congruence between the application of these elements by labor doctrine and the notion elaborated in the field of private law.

The fourth chapter will focus on the study of the employment relationship as a complex obligation, recalling the well-known civil category of secondary obligations. The purpose will be to investigate the configurability of the possible precautions that the worker must observe in his/her private network activity. In light of these considerations, it will be possible to identify for each hypothesized manifestation of the phenomenon (the examination of the candidates' online reputation, dismissal due to the online activities of the employee during or outside working hours)

the conditions under which the processing of worker's data must be carried out by the employer and the precautions that the worker must take when using the network.

At the end of the study, it will be possible to provide an answer to the fundamental question of this investigation, that is, how the best balance between the opposing interests at stake in cases of dismissal for off-duty worker conduct on the net should be implemented, by postulating to which concrete circumstances of the specific cases greater legal relevance should be attributed.

THE VALUE OF EMPLOYEE'S PRIVACY AND DATA PROTECTION ON THE INTERNET

2.1 A NOTION IN THE MAKING

The meaning that should be attributed to the concept of privacy is by no means unanimous.[222] For legal as well as political and philosophical science, it is difficult to provide a widely shared definition.[223] From a philosophical point of view, one of the reasons why the notion of privacy poses many controversial questions is the inherent risk that the protection of privacy could indirectly shelter the perpetrators of crimes from the legal and social consequences of their actions.[224]

The definition of privacy takes on even more controversial characteristics when approached in the work context.[225] According to the American scholar A. Bernstein, the absence of a widely shared definition of privacy within the employment relationship must be understood not in a problematic sense but as an opportunity for a multi-level elaboration.[226] The reason that the qualification of the concept of privacy within the employment relationship is so complex is the absence of an absolute right of the employees not to be subjected to any control by the employer.[227] In this situation, it is not possible to recognize the worker's right to a so-called "perfect privacy", according to the conception of R. Gavison, i.e., the right to "*no one having information about him*

[222] Niger, S. (2006). *Le nuove dimensioni della privacy: dal diritto alla riservatezza alla protezione dei dati personali*. Padova: CEDAM, p. 27. According to the author, regarding the concept privacy of the nineteenth century, "*the notion of privacy, therefore, is not a unifying notion, i.e. it is not a concept that expresses needs uniformly and consistently widespread in the community*". In this sense, see also De Giacomo, C. (1999). *Diritto, libertà e Privacy nel mondo della comunicazione globale*. Milano: Giuffrè, p. 16; Ubertazzi, T.M. (2004). *Diritto alla privacy, natura e funzioni giuridiche*. Padova: Cedam, p. 76.

[223] DeCew, J. (n.d.). Privacy. In Edward N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2018 ed.). Retrieved from https://plato.stanford.edu/archives/spr2018/entries/privacy/.

[224] Schoeman, Ferdinand (1984). *Philosophical Dimensions of Privacy: An Anthology*. Cambridge: Cambridge University Press, p. 1.

[225] Bernstein, A. (2005-2006). Foreword: What we talk about when we talk about workplace privacy. *Louisiana Law Review,* 66(923), p. 1.

[226] Bernstein, A. (2005-2006). Foreword: What we talk about when we talk about workplace privacy. *Louisiana Law Review,* 66(923), p. 2.

[227] Selmi, Michael (2006). Privacy for the working class: Public work and private lives. *Louisiana Law Review,* 66(124), pp. 1-22.

(so-called 'secrecy'), no one paying attention to him (so-called "anonymity"), and no one having physical access to the worker himself (so-called "solitude")".[228]

A further element that hinders the achievement of a widely shared definition of the concept of privacy within the work context and, in general, of the concept of privacy in itself is the different legal culture of origin of the various scholars who have addressed the issue. The approach of European scholars is very different from that of their American colleagues.

In Europe, the legal and philosophical reflection around the concept of privacy followed a separate course, with different approaches and arrival points, although the basic questions that encouraged the debate were the same. In England, the legal reflection on privacy started in 1710 with the introduction of the Statute of Anne, a copyright regulation aimed at protecting property not only in its material form but also in the form of artistic and cultural expressions, such as literary works. First the judges and then the legislator recognized to these intangible forms of property the protection that was reserved to the latter in its classical sense.[229] In 1873, an important article by the English jurist S.J. Fitzjames took a central role in the discussion around the legal and philosophical value to be recognized to the privacy.[230] In France, the reflection on the concept of privacy began with the French Revolution and became an issue of practical relevance due to the publication of scoops in scandalous articles in the tabloids.[231] In 1819, with the enactment of the three statutes "*de Serre*", the principle according to which the individual owns his honor was affirmed.[232] Although the French legislator provided a definition of private life in 1881, the debate

[228] Gavison, Ruth (1980). Privacy and the limits of law. *Yale Law Journal,* 89(3), p. 421.
[229] Petrucco, F. (2019). The right to privacy and new technologies: Between evolution and decay. *Rivista di diritto dei media*, 1, p. 154. Retrieved from http://www.medialaws.eu.
[230] Westin, A. (1970). *Privacy and freedom*. Atheneum: New York, p. 337; Fitzjames, S.J. (1873). *Liberty, equality and fraternity.* New York: Henry Hold and Co, p. 160.
[231] Walton, C. (2009). *Policing public opinion in the French Revolution. The culture of calumny and the problem of free speech*. Oxford: Oxford University Press, p. 39.
[232] Petrucco, F. (2019). The right to privacy and new technologies: Between evolution and decay. *Rivista di diritto dei media*, 1, p. 156. Retrieved from http://www.medialaws.eu.

around this concept has never ceased, powered by the dissemination of news on the private life of public figures.[233]

The most significant aspect on which the debate of the European civil lawyers and the American common lawyers differ regards the legal asset for the protection of which the defense of privacy must be guaranteed.[234] According to the continental concept, the protection of privacy is traditionally an essential prerequisite for the protection of human dignity, while according to the American approach, the protection of privacy is primarily intended as "*liberty against the state*",[235] namely, as a defense against state intrusion.

The keen observation of the scholar N. Bobbio, according to whom "*human rights, fundamental as they may be, are historical rights, which means that they are born, gradually, not all at once and not once forever, under certain circumstances, marked by struggles for the defence of new freedoms against old powers*"[236] also applies to the right to privacy. The words of the illustrious jurist grasp well that process, imposed by incessant social changes, of the continuous emerging of new rights, which, on the one hand, take their place beside the already historically established rights[237] and, on the other, experience a necessary and perennial reformulation.[238]

A tangible example of the abovementioned coexistence between historically established and recently affirmed rights can be found in the Charter of Fundamental Rights of the European Union,

[233] Rendina, L. (2019, October 30). Privacy vs protezione dati personali: attenti alla differenza, ne va della nostra identità. *Agenda digitale*. Retrieved from https://www.agendadigitale.eu/sicurezza/privacy/privacy-e-protezione-dati-personali-cosa-sono-quali-differenze-cosa-e-cambiato-col-gdpr/.
[234] Whitman, J. (2004). The two Western cultures of privacy: Dignity v. liberty. *Yale Law Journal*, 113, pp. 1161-1162.
[235] Whitman, J. (2004). The two Western cultures of privacy: Dignity v. liberty. *Yale Law Journal*, 113, p. 1161.
[236] Bobbio, N. (1992). *L'Età dei diritti*. Torino: Einaudi, pp. XII-XIII. The immediate reference is to that theory according to which the birth of human rights coincides with the fight against the absolute state of the modern age. Pugliese, G. (1989). Appunti per una storia della protezione dei diritti dell'uomo. *Rivista trimestrale di diritto e procedura civile*. 43(3), pp. 619-659.
[237] This aspect was well expressed by the words of the illustrious scholar S. Rodotà when he observed that "*the world of rights thrives on accumulations, rather than on replacements*". Rodotà, S. (2004, October 25). *Nuovi diritti. L'età dei diritti. Lezioni Norberto Bobbio*. Retrieved from http://www.cgil.it/cgil_attachments/75092_0_bioetica_00013.pdf. Brugiotti, E. (2013). La privacy attraverso le "generazioni dei diritti". Dalla tutela della riservatezza alla protezione dei dati personali fino alla tutela del corpo elettronico. *Dirittifondamentali.it*, 2, p. 1.
[238] Zagrebelsky, G. (1992). *Il diritto mite*. Torino: Einaudi, p. 105.

in which "*the old and the new manage to intertwine because the catalogue of rights looks to a person located in its time and its concrete condition, dropped into reality but does not forget about history*".[239]

This process of redefinition to which rights are subject also affects the right to privacy, in relation to which to the originally predominant notion of "the right to be let alone", under the pressure of technological progress, came up alongside the need for data protection.[240] In line with this evolution of the concept of privacy, legal science has progressively developed new hypotheses about the juridical good for which the protection of privacy must be guaranteed. From the initial conception of privacy as a defense of confidentiality, conceived in terms of the extension of property rights, this change in perspective has gradually revealed the deep link between privacy and protection of personal dignity. The intuition that the concept of privacy was also to be understood as control over one's own information is also inherent in the original definition in terms of "right to be left alone". In fact, many of the original reflections around the notion of privacy took their beginnings from the "pink news" on private aspects of public figures. The same intuition of Warren and Brandeis was born from the need to defend Warren's wife from revelations concerning her private life, which had been made public by a local newspaper.[241] In these terms, therefore, there emerged the need to balance the freedom of the press and the right to information with confidentiality.

[239] Rodotà, S. (2004, October 25). *Nuovi diritti. L'età dei diritti. Lezioni Norberto Bobbio*. Retrieved from http://www.cgil.it/cgil_attachments/75092_0_bioetica_00013.pdf.

[240] Petrucco, F. (2019). The right to privacy and new technologies: Between evolution and decay. *Rivista di diritto dei media*, 1, p. 150. Retrieved from http://www.medialaws.eu.

[241] In this regard, an affirmation by the lawyer Warren is emblematic, who exclaimed "*this matter of the newspapers that deal too much with the social life of my wife cannot continue*". Soffientini, M. (2013). Le origini della privacy, la normativa odierna e la prospettiva futura con il regolamento europeo. In N. Bernardi, M. Perego, M. Polacchini, M. Soffientini (Eds.), *Privacy officer. La figura chiave della data protection europea* (p. 21). Assago: Wolters Kluwer.

The historical experience that most marked the evolution of the concept of privacy, especially on the European continent, was that of totalitarianism.[242] Under the weight of totalitarian regimes, even the private sphere of the individual underwent an invasion, which affected not only interpersonal relationships but also the subject's intimate sphere.[243] The social control carried out by the police imposed a constant and penetrating surveillance regime in every area of life.[244] Moreover, the totalitarian regimes were able to make use of increasingly sophisticated technologies[245] that made the control methods "*more subtle and less brutal, but extraordinarily effective*".[246] It is in this historical context that the urgency to protect another aspect of privacy emerged, no longer regarded as merely the protection of private life in the strict sense, but as a power over the access of others to information concerning oneself.[247]

This was the first time that the legal doctrine[248] began to wonder about the rise of this newly perceived need for control over one's own information, initially conceived of as a declination of the right to privacy, understood as the right to be left alone. Following this, the first regulatory interventions by European legislators began to be registered, which dealt with regulating the treatment of data between private individuals, such as the Data Protection Act of 1984 in England and Loi n. 7817 of 1978 in France.[249]

To protect privacy and data protection internationally, in addition to the legislative instruments adopted by the Council of Europe, such as Article 8 of the ECHR and the Convention for

[242] Niger, S. (2006). *Le nuove dimensioni della privacy: dal diritto alla riservatezza alla protezione dei dati personali*. Padova: CEDAM, p. 30.
[243] Martinelli, A. (2009). Introduzione. In H. Arendt, *Le origini del totalitarismo*. Torino: Einaudi, p. XV.
[244] Forti, S. (2009). *Le figure del male.* In H. Arendt, *Le origini del totalitarismo*. Torino: Einaudi, p. XXXII.
[245] Ubertazzi, T.M. (2004). *Diritto alla privacy, natura e funzioni giuridiche*. Padova: CEDAM.
[246] Niger, S. (2006). *Le nuove dimensioni della privacy: dal diritto alla riservatezza alla protezione dei dati personali*. Padova: CEDAM, p. 35.
[247] Zatti, P. & Colussi, V. (2001). *Lineamenti di diritto privato*. Padova: CEDAM, p. 158.
[248] Rodotà, S. (1974). La "privacy" tra individuo e collettività. *Politica del diritto*, p. 545; Ferri, G.B. (1982). Persona e privacy. *Rivista di diritto commerciale*, 1, p. 75; De Cupis, A. (1973). *I diritti della personalità*. Milano: Giuffrè, vol. I.
[249] Brugiotti, E. (2013). La privacy attraverso le "generazioni dei diritti". Dalla tutela della riservatezza alla protezione dei dati personali fino alla tutela del corpo elettronico. *Dirittifondamentali.it*, 2, p. 10.

the Protection of Individuals with respect to the Automated Processing of Personal Data n. 108, which came into force on 1 October 1985, other regulatory sources are in force, such as Article 17 of the Covenant on Civil and Political Rights, which recognizes the right of every individual not to be subjected to arbitrary or unlawful interference with his/her privacy, family, home or correspondence, nor to unlawful attacks on his/her honor and reputation. Although the literal tenor of this rule recalls the original notion of the concept of privacy, there are numerous interpretative interventions made by the United Nations Human Rights Committee, such as General Comment n. 16, which provided a reading of the provision appropriate to the data protection needs emerging from the increasingly pervasive technological context.

In light of the considerations made so far and the development of the notion of privacy, the relationship of historical closeness but current conceptual distinction that links the concept of the right to privacy and data protection clearly emerges. The divergence between the right to privacy and data protection is cleverly captured by the words of S. Rodotà, according to whom "*in the right to respect for private and family life, the individualistic moment is manifested above all, the power basically runs out in excluding interference from others: protection is static and negative. Data protection, on the other hand, sets unavoidable rules on the methods of data processing, takes the form of intervention powers: dynamic protection follows the data in their circulation. Control and intervention powers, moreover, they are not only attributed to those directly concerned, but are also entrusted to an independent authority: protection is no longer only individualistic but involves specific public responsibility. We are thus also faced with a redistribution of social and legal powers".*[250]

[250] Rodotà, S. (2003). Foreword. In D. Lyon, *La società sorvegliata. Tecnologie di controllo della vita quotidiana*. Milano: Feltrinelli, p. XI.

In this sense, the notion of privacy, from its initial conception in terms of the exclusion of third parties from one's private sphere, has increasingly assumed the characteristics of a defense of freedom of individual choices.[251] Indeed, the most recent notion of data protection derives from the original concept of privacy, intended as the right to control over one's own information, knowledge, and circulation of these[252] in order to safeguard the freedom of choice of action in any social context of life.[253] As already observed, the concept of privacy and data protection is deeply linked to the technological evolution and the increasingly sophisticated means of collecting, storing, and transmitting ever greater amounts of data that the latter offers, ultimately favoring new forms of intrusion.[254]

The right to privacy and data protection, as a fundamental right pertaining to the person, must be preserved in every environment in which personality develops, such as the workplace.[255] The employment relationship has always been a context in which privacy and data protection have interesting implications. In the employment relationship, there are many elements that characterize the protection of privacy and the processing of worker data in a peculiar way. First of all, there is the relationship of the worker as a person,[256] from which follows the constant and daily contact between the employee and the employer, an element that inevitably goes along with the tendency of the employer to collect as much information as possible about his/her own employees.[257] Furthermore, the working context represents one of the areas in which technological innovations

[251] Rodotà, S. (1997). Persona, riservatezza, identità. Prime note sistematiche sulla protezione dei dati personali. *Rivista critica del diritto privato*, 4, p. 588.
[252] Veneziani, B. (1987). Nuove tecnologie e controllo di lavoro: profili di diritto comparato. *Giornale di diritto del lavoro e di relazioni industriali*, 1, p. 28; Failla, L. & Quaranta, C. (2002). *Privacy e rapporto di lavoro*. Assago: IPSOA, p. 12.
[253] Chieco, P. (1998). Il diritto alla riservatezza del lavoratore. *Giornale di diritto del lavoro e di relazioni industriali*, 1, p. 3.
[254] Failla, L. & Quaranta, C. (2002). *Privacy e rapporto di lavoro*. Assago: IPSOA, p. 14.
[255] Failla, L. & Quaranta, C. (2002). *Privacy e rapporto di lavoro*. Assago: IPSOA, p. 14.
[256] Trojsi, A. (2000). Sfera privata del lavoratore e contratto di lavoro (artt. 5, 8 e 26 St. lav.). *Quaderni di diritto del lavoro e delle relazioni industriali*, (24), p. 195.
[257] Chieco, P. (2000). Privacy e lavoro. La disciplina del trattamento dei dati personali del lavoratore. Bari: Cacucci, p. 16.

are most applied – they are used both in the production process[258] and for organizational and personnel control tasks.[259]

The employer generally has an interest in collecting data from candidates or workers for the following purposes: to select staff, to offer vocational training courses or qualification advancements, to ensure the safety and health of workers, to preserve industrial property, to check the quality of workers' performance, for reasons related to customer service or, finally, to comply with legislative provisions.[260] Therefore, in the face of the pervasiveness in the workplace of these means of control and data collection, there are numerous regulatory instruments both at the international and national level aimed at managing the phenomenon in order to prevent violations of fundamental workers' rights.

2.2 THE INTERNATIONAL FRAMEWORK

2.2.1 The ILO's action

The International Labour Organization (ILO), whose mandate in the role of United Nations agency is to promote at the international level human rights and social justice in the world of work, adopted on 1 January 1997 the ILO Code of Practice on Protection of Workers' Personal Data.[261]

The Code of Practice on Protection of Workers' Personal Data does not have a binding force but establishes some general principles regarding the collection, security, storage, use, and communication of workers' personal data.[262] These standards represent some guidelines to be

[258] Stenico, E. (2000). Il trattamento dei dati personali del lavoratore subordinato: dalla segretezza al controllo. *Quaderni di diritto del lavoro e delle relazioni industriali*, (24), p. 125.
[259] Romei, R. (1994). Diritto alla riservatezza del lavoratore e innovazione tecnologica. *Giornale di diritto del lavoro e di relazioni industriali*, p. 70.
[260] Colucci, M. (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of view. In Roger Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43). The Hague/London/New York: Kluwer Law International, p. 29.
[261] ILO (1997). Code of Practice on Protection of Workers' personal data, Geneva: International Labour Office.
[262] Colucci, M. (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of view. In Roger Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43). The Hague/London/New York: Kluwer Law International, p. 31.

followed for the private and public sector in the event that the processing of workers' personal data is performed either manually and automatically.[263] The conditions to which the worker's data processing must be subject are meant to prevent the processing of personal data that could cause unlawful discrimination in matters of employment or occupation.[264] From the tenor of the notions adopted by the Code, such as that of "personal data",[265] "processing",[266] "monitoring",[267] and "worker",[268] emerges a broad approach aimed at regulating a varied and constantly renewed case study in keeping with the technological progress.

The fundamental principle that the Code identifies as an essential prerequisite for any type of processing is that of the explicit consent of the worker, who must also be sufficiently informed, together with the workers' representatives of any data collection process, of the rules that govern that process.[269] The role of workers' representatives is fundamental in developing policies on workers' privacy. They should be informed and consulted concerning: the introduction or modification of automated data processing systems; the introduction of any electronic monitoring

[263] Article 4 "Scope of application" of the ILO Code of Practice on Protection of Workers' Personal Data, Geneva: International Labour Office, 1997.

[264] In fact, the references in the Code to the principle of non-discrimination are frequent. Article 8.6 "Storage of personal data" provides that *"personal data should be stored and coded in a manner: (a) that the worker can understand; and (b) that does not ascribe any characteristics to the worker that have the effect of discrimination against the worker".*

[265] According to Article 3 "Definition" of the ILO Code of Practice on Protection of Workers' Personal Data, Geneva: International Labour Office, 1997, the term "personal data" means any information related to an identified or identifiable worker.

[266] According to Article 3 "Definition" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997, the term "processing" includes the collection, storage, combination, communication, or any other use of personal data.

[267] According to Article 3 "Definition" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997, the term "monitoring" includes, but is not limited to, the use of devices such as computers, cameras, video equipment, sound devices, telephones and other communication equipment, various methods of establishing identity and location, or any other method of surveillance.

[268] According to Article 3 "Definition" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997, the term "personal data" means that the term "worker" includes any current or former worker or applicant for employment.

[269] Article 5.8 "General principles" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.

system of workers' behavior; the substance, purpose, and managing of any tests concerning the personal data of the workers.[270]

The data processing must comply with the standards of legality and lawfulness and be done exclusively for those reasons and purposes directly pertinent to the employment relationship and for which the personal data were originally collected[271] (so-called "finality principle"). In light of these guiding principles, "*if personal data are to be processed for purposes other than those for which they were collected, the employer should ensure that they are not used in a manner incompatible with the original purpose, and should take the necessary measures to avoid any misinterpretations caused by a change of context*".[272] Moreover, personal data provided by the worker that is irrelevant or goes beyond the demand for personal data because the worker has misunderstood the request should not be processed.[273]

The Code of Practice on Protection of Workers' Personal Data identifies other general principles to which the processing of workers' data should be oriented, first among them being the workers' right to examine, access, and obtain a copy of any records that include the worker's personal data without any charge from the employer.[274] Furthermore, in this respect, workers should have the right to demand the deletion or the rectification of those personal data incorrect, incomplete, or contrary to the principles of the Code.[275]

[270] Article 12.2 "Collective rights" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[271] Article 5 "General principles" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[272] Article 5.3 "General principles" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[273] Article 6.9 "General principles" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[274] Articles 11.3, 11.4 and 11.7 "Individual rights" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva, International Labour Office, 1997.
[275] Article 11.9 "Individual rights" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.

With regard to the employer, the Code sets the prohibition to take decisions concerning a worker based exclusively on the automated processing of that worker's personal data[276] and the obligation to regularly assess the data processing practices in order to reduce as far as possible the kind and amount of personal data collected and to improve the privacy protection of workers.[277]

The principles analyzed so far also apply if it is necessary to collect personal data from third parties. In this case, too, the worker should be informed in advance and give his/her explicit consent.[278] The employer, for his/her part, should disclose the purposes of the processing and the sources and means of use intended, as well as the type of data to be gathered and the consequences, if any, of refusing consent.[279] In the same way, the employer should not communicate a worker's personal data to third parties without the employee's explicit consent unless exceptional and exhaustive conditions arise.[280]

In relation to the type of data that the employer can acquire, the Code of Practice on Protection of Workers' Personal Data sets a ban in relation to the data concerning a worker's: sex life, political, religious or other beliefs, and criminal convictions.[281] These categories of data can only

[276] Article 5.5 "General principles" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[277] Article 5.7 "General principles" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[278] Articles 6.2 and 6.6 "Collection of personal data" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997. Furthermore, if the worker is asked to sign an authorization to the data collection from the employer, this statement should be in clear and specific language.
[279] Article 6.2 "Collection of personal data" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[280] The code identifies the hypotheses in which the communication is: (a) necessary to prevent serious and imminent threat to life or health; (b) required or authorized by law; (c) necessary for the conduct of the employment relationship; (d) required for the enforcement of criminal law. See Article 10.1 "Communication of personal data" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[281] Article 6.5 "Collection of personal data" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997. In the same way, the employer is not authorized to collect data concerning the employee''s membership of workers'' organizations or trade unions. This prohibition fails if the employer is required or authorized to collect this category of data by law or collective agreements.

be collected by the employer if the data are directly relevant to an employment decision and in conformity with the national legislation.[282]

In the case of the monitoring of workers, they must be informed of the reasons behind the monitoring, the time schedule, the methods adopted, and the data collected before the monitoring starts. The employer, on the other hand, must minimize the intrusion into the workers' privacy that the monitoring implies.[283] The secret monitoring of workers is permitted only if it is in compliance with the national legislation or if there is a reasonable suspicion of serious wrongdoing, while the constant monitoring of employees should be permitted only if it necessary for health and safety or the protection of property.[284]

The Code of Practice on Protection of Workers' Personal Data requires that the employer adopts all the technical measures that can defend personal data against loss and unauthorized access, use, modification, or disclosure.[285] The technical measures that the employer must take specifically to ensure reasonable protection of workers' personal data depend on the circumstances of the data processing.[286] As a general rule, the employer should regularly provide information, reviews, and lists of personal data processed and stored on each individual worker. In addition, the employer, regardless of whether the data processing is performed by automated systems or by manual file or in any other dossier which includes workers' personal data,[287] should periodically

[282] Article 6.5 "Collection of personal data" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[283] Article 6.14 "Collection of personal data" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[284] Article 6.14 "Collection of personal data" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[285] Article 7.1 "Security of personal data" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.
[286] Colucci, M. (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of view. In Roger Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43). The Hague/London/New York: Kluwer Law International, p. 38.
[287] Article 11.2 "Individual rights" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.

verify that the personal data gathered are accurate, up to date, complete, and stored only for as long as is justified by the specific purposes for which it has been collected.[288]

From the analysis carried out, the intent underlying the Code of Practice on Protection of Workers' Personal Data that clearly emerges is the individuation of international guiding principles that should constitute the common root for the definition, at the national or individual employment relationship level, of a specific discipline on data-protection regulation within the employment relationship.[289] As already reported, the legal instrument of the Code of Practice – unlike other regulatory instruments that are legally binding, mandatory in content, or for the purpose that the national legislation must achieve, such as conventions, international treaties, and recommendations – ensures a great amount of flexibility, necessary not only for the heterogeneity that characterizes the world of work but also for the rapidity with which increasingly sophisticated IT tools are developed. Employers and workers or their representatives, such as the national legislators, can negotiate the specific data protection regulation to be applied to the employment relationship in accordance with the provisions of the Code of Practice.[290]

2.3 THE COUNCIL OF EUROPE'S ACTION

2.3.1 Charter of Fundamental Rights of the European Union: current landing point

With the intensification of the use of the Internet in every sector, data protection has become increasingly urgent as a guarantee for the respect for human rights on the web, to the point

[288] The hypotheses in which the personal data of a worker can be kept for a longer period of time are strictly identified, that is: if a worker wishes to be on a list of potential job candidates for a specific period; if the personal data are required to be maintained by the national legislation; or if the personal data are required by an employer or a worker for any legal proceedings to prove any matter to do with an existing or former employment relationship. See Article 8.5 "Storage of personal data" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997.

[289] "Commentary on the code of practice", section "Purpose" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997, p. 9.

[290] "Commentary on the code of practice", section "Purpose" of the ILO Code of Practice on Protection of Workers' Personal Data', Geneva: International Labour Office, 1997, p. 9.

of being of such importance that it has assumed a conceptual autonomy with respect to the notion of privacy. This interpretative approach is confirmed by the Charter of Fundamental Rights of the European Union, which in Article 7 recognizes the right to "*respect for private and family life" and art. 8 the right to "protection of personal data"*.[291] In this sense, the jurisprudence of the European Court of Human Rights[292] has provided a valuable contribution to the evolution of the concept of privacy – with reference to the employment context as well – which, from the initial notion of the right to be left alone, has been enriched by several attributes. In the context of the gradual evolution of the concept of privacy through the jurisprudence of the European Court of Human Rights, several aspects have been recognized as relevant to the respect of private and family life, enshrined in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Among these are included the respect of a particular lifestyle of minorities (*G. & E. v. Norway*, 1983[293]); the right to establish and develop relationships with other human beings (*Niemietz v. Germany*, 1992[294]); the right to enjoy private and family life safe from severe environmental pollution which may affect individuals' well-being (*López Ostra v. Spain*, 1994[295]); the right to a name *"as a means of personal identification and of linking to a family"* and as a condition for exercising *"the right to establish and develop relationships with other human beings, in professional or business contexts as in others"* (*Burghartz v. Switzerland*, 1994[296]).

The interpretation developed by the European Court of Human Rights around the scope of application of Article 8 ECHR identifies in the right to respect for private and family life the

[291] Carta, M. (2014). Diritto alla vita privata ed Internet nell'esperienza giuridica europea ed internazionale. *Il Diritto dell'informazione e dell'informatica*, 1, p. 8.
[292] European Court of Human Rights, ruling of 26 March 1985, *X and Y v. Netherland*, application n. 8978/80.
[293] European Court of Human Rights, ruling of 3 October 1983, *G. and E. v. Norway*, application n. 9278/81 & 9415/81 (joined).
[294] European Court of Human Rights, ruling of 16 December 1992, *Niemietz v. Germany*, application n. 13710/88, vol. 251- B of Series A, § 29.
[295] European Court of Human Rights, ruling of 9 December 1994, *López Ostra v. Spain*, application n. 16798/90, vol. 303-C of Series A, p. 55, § 51.
[296] European Court of Human Rights, ruling of 22 February 1994, *Burghartz v. Switzerland*, application n. 16213/90, vol. 280-B of Series A, § 24.

recognition of the right to self-determination in every field of the manifestation of one's own personality, intended in terms of informational self-determination and thus as a power to control one's own information[297] and, ultimately, as a prerequisite for the enjoyment of fundamental rights.[298]

The European Court of Human Rights has, on more than one occasion, ruled on a number of appeals concerning privacy in the employment context and has had the opportunity to specify the criteria to be used to balance the employee's right to privacy against the employer's powers of control. With regard to the phase of the establishment of the employment relationship, the European Court of Human Rights in *Sidabras and Džiautas v. Lithuania* found a Lithuanian law preventing former KGB employees for a period of 10 years from working in the public sector and in certain private-sector jobs contrary to Article 14 and Article 8 ECHR. In particular, the Court found that the Lithuanian legislation (introduced after Lithuania's independence with the aim of protecting national security) entailed disproportionate restrictions on the applicants' privacy and their right to pursue a professional activity.[299] One of the most important aspects to emerge from the judgment in *Sidabras and Džiautas v. Lithuania* concerns the profound connection that the Court has shown to exist between the civil right to privacy and the social right to work, one being a precondition for the protection of the other.[300] Even during the performance of an employment contract, interference may arise between the employee's right to privacy and the employer's economic interests. For example, in *Kopke v. Germany*, the European Court of Human Rights ruled in favor of the dismissal of a German supermarket cashier, who was dismissed because of a theft discovered

[297] Carta, M. (2014). Diritto alla vita privata ed Internet nell'esperienza giuridica europea ed internazionale. *Il Diritto dell'informazione e dell'informatica*, 1, p. 8.
[298] Brugiotti, E. (2013). La privacy attraverso le "generazioni dei diritti". Dalla tutela della riservatezza alla protezione dei dati personali fino alla tutela del corpo elettronico. *Dirittifondamentali.it*, 2, p. 11.
[299] European Court of Human Rights, ruling of 23 June 2015, *Sidabras and Others v. Lithuania*, application n. 50421/08 and 56213/08.
[300] Mantouvalou, V. (2005). Work and rivate Lilfe: Sidabras and Dziautas v Lithuania. *European Law Review*, 30, pp. 573-585.

after viewing covert video surveillance carried out by her employer with the help of a private investigation agency. In this case, the Court held that there was no violation of Article 8 ECHR, as the interference in the employee's private life was limited to what was necessary to verify suspicions of wrongdoing on her part.[301] In a similar case, the Court found a violation of Article 8 ECHR by the United Kingdom. In particular, the dispute concerned the monitoring of a civil servant's telephone calls and email communications without any kind of protection of privacy, as there was no legislation in place in the United Kingdom at the relevant time to regulate the monitoring by employers of employee communications.[302]

Further judgments of the European Court of Human Rights have dealt with the relevance of private conduct on the fate of the employment relationship within a trendy organization that required its employees to conduct themselves privately in accordance with the religious teachings they had been given. In *Obst v. Germany*, the Court held that there was no violation of Article 8 ECHR in the dispute concerning the dismissal of an employee as a European public relations officer within the Mormon Church who was having an extramarital affair. The reasons for the Court's decision are as follows: Mr. Obst voluntarily confessed his behavior; his important role in the Church was not compatible with his behavior; and he was young, so able to find another job.[303] On the other hand, in *Schüth v. Germany*, the Court held that it was unlawful to dismiss an organist and choirmaster in a Catholic parish for having engaged in an extramarital affair and having a child with another woman, thus violating his obligations of fidelity according to the basic Catholic rules for

[301] European Court of Human Rights, ruling of 03 April 2007, *Copland v. United Kingdom*, application n. 62617/00.
[302] In *Halford v. United Kingdom*, Ms Halford brought proceedings before the Industrial Tribunal claiming that she had been discriminated against on the grounds of sex inher attempt to be promoted within the Police Department. In particular, Ms Halford brought an action before the European Court of Human Rights, claiming a violation of Article 8 of the Convention on the grounds that certain home and office telephone calls had been intercepted for the purpose of obtaining information to be used against her in legal proceedings for discrimination. The Court held that there had been a violation of the employee''s right to privacy in view of the fact that at the material time, there were no regulations governing the interception of calls made outside the workplace (the Regulatory of Investigatory Powers Act having come into force only in 2000), with the result that the employee had a legitimate expectation of privacy.
[303] European Court of Human Rights, ruling of 23 September 2010, *Obst v. Germany*, application n. 425/03.

church service. In this case, the Court found that there was no violation of the employee's right to privacy in light of the fact that he had always kept his extramarital affair secret; as an organist and choir director, he had little opportunity to find another job.[304]

From the rulings referred to herein, it is possible to deduce the principles applied by the European Court of Human Rights on the protection of privacy in the employment context. The first principle applied by the Court – and inferable from the second paragraph of Article 8 ECHR – is the so-called principle of purpose, according to which limitations to the right to privacy are permissible only if there is a need to protect other legal goods (such as national security, public safety, and the economic well-being of the country). The second criterion used by the Court is that of proportionality, according to which the sacrifice imposed on the right to privacy must be proportional to the objective of protection pursued. Moreover, the further principle that must guide the action of the member states of the Council of Europe is that of legality, according to which any limitations to the right to privacy must be provided for by law. Finally, a further secondary criterion developed by the Court concerns the reasonable expectation of privacy on the part of the employee. In other words, reasonable expectation depends on the company policy adopted by the employer regarding the protection of employees' privacy.

In conclusion, therefore, with regard to the scope of application of Article 8 of the European Convention on Human Rights in the employment context, the Court confirmed the conception of the right to privacy as the freedom of everyone to develop their individuality and personality according to their own preferences.[305] Moreover, in the difficult balancing act between the employee's right to privacy and the employer's economic interests, the Court identified the principle of proportionality as the decisive criterion for judging the legitimacy of a limitation on the

[304] European Court of Human Rights, ruling of 23 September 2010, *Schüth v. Germany*, application n. 1620/03.
[305] Collins, H., Ewing, K. & McColgan, A. (2012). *Labour law.* Cambridge: Cambridge University Press, pp. 414- 422.

employee's right to privacy in order to protect the employer's property and economic interests, including the protection of the health and safety of the workforce.

A further contrast between the legal position of the employee and that of the employer, which arises from the increasingly widespread practice of employers acquiring confidential information on employees available online, concerns, on the one hand, the employees' freedom of expression and, on the other, the employer's right to reputation. Freedom of expression is specifically guaranteed by Article 10 of the European Convention on Human Rights, which states that everyone has the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.[306] However, paragraph two of the same article specifies that the exercise of these freedoms may be subject to such formalities, conditions, restrictions, or penalties that are prescribed by law and necessary in a democratic society in the interests of other higher goods, such as national security, territorial integrity or public safety, for the protection of the reputation or rights of others, and to prevent the disclosure of information received in confidence. Further limitations on the exercise of freedom of expression may result from EU anti-discrimination directives.

In this respect, it is precisely the employer's reputation and the confidentiality of company information that may be affected by the employee's exercise of freedom of expression, especially if the employee entrusts his or her opinion to social networks, which very often imply potentially unlimited dissemination of the thoughts expressed. The Court dealt specifically with the dismissal of an employee of Apple Retail (UK) Ltd, who had made negative comments about his employer on

[306] The immediate referent of the provision is the public authority. In fact, freedom of expression was originally understood as freedom from state interference. The European Court of Human Rights has stated in more than one judgment that Article 10 ECHR is also applicable to relations between private individuals and, in particular, to employment relationships, whether private or public. In affirming the applicability of Article 10 ECHR to employment relationships of a public nature, the Court has, however, specified relevant differences according to the nature of the office or position of the civil servants.

Facebook that were only visible to the employee's virtual "friends".[307] The reason for the employee's dismissal was the discrediting of Apple's brand image and the fact that the company's policy clearly regulated the use of social networks by its employees. The British court found that the dismissal was justified by the fact that the content shared on the network could not be considered private, as it could be spread very easily. Moreover, the national court held that, although it was not apparent from the employee's profile that he was employed by Apple, this fact was nevertheless known to his virtual friends, as evidenced by some of the comments in response to the post. The employee brought an action before the European Court of Human Rights, claiming that his right to privacy had been infringed in relation to the unauthorized use of his data by third parties. The Court held that there was no violation of the employee's right to privacy because this was a case where the information had been transmitted to the employer by one of the employee's virtual Facebook friends and, therefore, the claimant did not have a reasonable expectation of privacy in his information. Moreover, the Court also pointed out that if the employee's right to privacy had been infringed upon, the employer's processing of the information would still have been justified and proportionate to the need to protect his or her reputation. The Court also examined the question of the employee's exercise of freedom of expression by means of social networks, concluding that the employer's policy, which in its rule-book strictly prohibited critical remarks on its products, was legitimate, as it aimed to protect the employer's reputation. For this reason, the Court found that the restrictions on employees' freedom of expression resulting from the company's policy were proportionate. The criteria applied by the Court in *Crisp v. Apple Retail*, as well as in other judgments

[307] *Crisp v. Apple Retail (UK) Limited* (unreported ET/1500258/2011). Specifically, the comments were of the following tenor: *"Once again f*** a lot of work") "MobileMe f***ed up my time zone for the third time in a week and woke me up at 3am? JOY !!!"* referring to "MobileMe", an Apple app.

concerning the freedom of expression of the worker,[308] are again the principle of legality of purpose and proportionality.

In conclusion, the legal issues that arise with regard to privacy and freedom of expression in the employment context are due to the difficulties that the so-called horizontal application of fundamental rights and freedoms entails. In fact, the European Convention for the Protection of Human Rights and Fundamental Freedoms does not offer effective remedies to national judges, with the consequence that the respect of the provisions of the Convention itself can be guaranteed (beyond the intervention of the Court itself by the person who considers his or her right infringed upon) through the interpretation of the general clauses of private law.

2.3.2 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

On 28 January 1981, the Council of Europe adopted the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which entered into force on 1 October 1985. The tenor of the Convention clearly shows the origin of the right to data protection as a declination of the right to privacy. Article 1 of the Convention, recalling Article 8 on the right to respect for private and family life of the European Convention on Human Rights of 1950, identifies the guarantee of respect for rights and fundamental freedoms and, in particular, the right to privacy with regard to automatic processing of personal data the objective of the Convention itself. Specifically, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data concerns both the protection of people against the abusive use of the automated

[308] Similarly, in *Vogt v. Germany*, the Court found that the dismissal of a teacher in a state secondary school in Germany was disproportionate because of her political activity as an activist of a communist organization. The Court reaffirmed the right of a democratic state to require its civil servants to be loyal to the Constitution. However, it concluded that the applicant's dismissal was disproportionate to the legitimate aim pursued, considering that there was no indication that she herself had taken up an anti-constitutional stance, that the communist party was not forbidden in Germany, and that it would be difficult for the applicant to find other employment.

processing of personal data and the regulation of the cross-border flow of data. The Convention is the first internationally binding source that is open for accession by other states that are not members of the Council of Europe, and[309] it currently has a total number of 55 ratifications by the Member States and not by the Council of Europe.

2.3.3 Recommendation n. R(89)2 on the Protection of Personal Data Used for Employment Purposes

The European Council, in light of the increasingly widespread use of digital automatic data processing technologies in the employment context and with the goal of achieving an ever-greater harmonization between the Member States' legislation, adopted on 18 January 1989 Recommendation n. R(89)2 on the Protection of Personal Data Used for Employment Purposes.

The Recommendation identifies basic principles aimed at minimizing the risks for the rights (above all, the right to privacy), fundamental freedoms, and human dignity of employees inherent in the automatic data processing methods.[310] In this respect, the Recommendation falls within that category of regulatory instruments adopted by the European Council on data and privacy protection according to a sectoral approach to the matter,[311] i.e., adapting the principles already ruled through the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 to the specific working environment. Indeed, Recommendation n. R(89)2 on the Protection of Personal Data Used for Employment Purposes and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981

[309] Carta, M. (2014). Diritto alla vita privata ed Internet nell'esperienza giuridica europea ed internazionale. *Il Diritto dell'informazione e dell'informatica*, 1, p. 8.

[310] Preamble of Recommendation n.R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.

[311] The category of recommendations adopted by the European Council on privacy and data protection in specific areas include: Recommendation n. R(81)1 on regulations for automated medical data banks, Recommendation n. R(83)10 on the protection of personal data used for scientific research and statistics, Recommendation n. R(85)20 on the protection of personal data used for the purposes of direct marketing, Recommendation n. R(86)1 on the protection of personal data used for social security purposes and Recommendation no. R(87)15 regulating the use of personal data in the police sector.

share the same concept of privacy, which is to be intended not according to a restrictive meaning as freedom from unjustified intrusions by the employer in the private and professional life of the employee, but according to a broad interpretation that includes the aspects related to data processing, such as the regulation of the collection, use, processing, and storage.[312]

In defining its purpose and scope, the Recommendation clarifies that it finds application to the automated processing,[313] collection, and use of personal data by the employer and the employment agencies for employment purposes in both the public and private sectors.[314] The legal asset taken expressly as an object of protection by the Recommendation is the safeguard in the collection and use of personal of the employee's privacy and human dignity, with particular regard to the possibility of exercising social and individual relations at the place of work.[315]

After providing the definition of the key concepts such as: "personal data"[316], "non identifiable individual",[317] and "employment purposes"[318], the Recommendation explains the fundamental principles that should guide the automated processing of the employee's data by the employer. It is first of all stated that personal data should be obtained by the employer from the

[312] Colucci, M. (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of view. In Roger Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43). The Hague/London/New York: Kluwer Law International, p. 56.

[313] However, the Recommendation recognizes the ability of Member States to extend the scope of the principles set out in the Recommendation itself to the manual processing of workers'' data. Article 1.2. of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.

[314] Article 1.1 and 1.4 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.

[315] Article 2 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.

[316] According to Article 1.3 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989, the term "personal data" includes "*any information relating to an identified or identifiable individual*".

[317] According to Article 1.3 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989, an individual is not identifiable "*if identification requires an unreasonable amount of time, cost and manpower*".

[318] According to Article 1.3 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989, the term "employment purposes" is intended as "*the relations between employers and employees which relate to recruitment of employees, fulfilment of the contract of employment, management, including discharge of obligations laid down by law or laid down in collective agreements, as well as planning and organisation of work*".

employee or the job candidate him/herself,[319] who in turn should be fully informed in advance about: the main purposes and category of collected and stored data; the groups of persons or bodies to whom the data are regularly communicated and the right of access and rectification or erasure as well as the ways and means of exercising this right.[320] Furthermore, the employee or job candidate should be informed about the introduction or adaptation of automated systems for the collection and use of personal data or for the monitoring of the employee's activity[321] and, in the event that an employee is faced with a decision based on automatic processing of data held by the employer, the employee should have the right to verify that the data have been lawfully processed.[322] Lastly, the employee or the job candidate should be informed when it is appropriate to consult sources outside the employment relationship.[323]

Concerning the employees' collected data, they should be relevant, not excessive with regard to the type of employment and the evolving information needs of the employer,[324] and, in case of recruitment procedures, to the extent necessary to evaluate the suitability of prospective candidates and their career potential.[325] Personal data should not be stored by the employer for a period longer than is justified by the purposes of recruitment, fulfillment, and management of the

[319] Article 4.1 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[320] Article 11 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[321] Article 3.1 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[322] Article 12.3 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[323] Article 4.1 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[324] Article 4.2 and 4.3 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989. Regarding the purposes underlying the collection of data, the recommendation provides in Article 6.2. that "*Where data are to be used for employment purposes other than the one for which they were originally collected, adequate measures should be taken to avoid misinterpretation of the data in the different context and to ensure that they are not used in a manner incompatible with the original purpose. Where important decisions affecting the employee are to be taken, based on data so used, he should be informed*". See Article 6.2 and 4.3 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[325] Article 4.3 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.

employment contract or by the interests of a present or former employee.[326] Certain categories of data capable of revealing sensitive information should only be collected and stored in specific cases within the limits laid down by the domestic law and in accordance with appropriate safeguards provided by the same. In the absence of such safeguards, such data should only be collected and stored with the express and informed consent of the employees.[327]

In line with the principles examined so far, the Recommendation provides that the storage of personal data is permissible only if the data have been collected in accordance with the principles delineated above.[328] Furthermore, the collected data should not be stored or coded in a way that allows the profiling of employees without their knowledge.[329]

In conclusion, regarding the security of data, employers should implement adequate technical and organizational measures designed to ensure the security and confidentiality of personal data stored for employment purposes against unauthorized access, use, communication, or alteration.[330]

The analysis of the provisions laid down in the Recommendation clearly shows the primary objective pursued by the Council of Europe, namely, to balance the undisputed advantages that the use of new technologies brings in the working environment and the protection of workers' rights and freedoms, which can thus be undermined.[331] The Recommendation includes the privacy but, above all, the dignity of the worker among the employees' values that can be compromised by the

[326] Article 14.1 and 1.3 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[327] Article 10.1 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[328] Article 5.1 and 5.2 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[329] Article 5.2 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[330] Article 13.1 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[331] Preamble of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.

use of automatic data processing. In several points, the Recommendation refers explicitly to the protection of further fundamental rights and freedoms in addition to the right to privacy (in this sense, Article 2 is indexed "*respect for privacy and human dignity of employees*"), confirming a vision of the worker as a human being, with protected identity from which the needs for social interaction, the freedom of association and expression, and the right to bargain collectively derive.[332]

For these reasons, the Recommendation's approach to the protection of personal data collected for employment purposes appears to be innovative. In fact, the Recommendation is the only legal instrument at the international level specifically dedicated to data protection in the workplace, and it also reveals a complex conception of the human legal values worthy of protection and threatened by the widespread use of automatic data collection tools.[333] Alongside the data and privacy protection of the workers, there is the protection of the employee's dignity and freedoms declared by the European Convention on Human Rights, the European Social Charter, and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[334] For these reasons, the Recommendation states that the personality of the worker should never be profiled by means of automated data collection techniques, and, in particular, the employer should never make decisions on the basis of automated processing.[335]

[332] Article 2 of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[333] Colucci, M. (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of view. In Roger Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43). The Hague/London/New York: Kluwer Law International, pp. 55-57.
[334] Preamble of Recommendation no. R(89)2 "Protection of Personal Data Used for Employment Purposes", Strasbourg, Council of Europe, 1989.
[335] Colucci, M. (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of view. In Roger Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43). The Hague/London/New York: Kluwer Law International, p. 56.

2.3.4 Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data

The Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data adopted in 1980 with the form of a Recommendation by the Organisation for Economic Cooperation and Development falls within the non-binding legal sources for the international community regarding the protection and regulation of individuals' personal data. The Guidelines encompass a set of basic rules and principles that guide the intervention of national legislators on the matter but also constitute the conceptual basis for future adoption of an international convention on data protection.[336] Considering the "*changing technologies, markets and user behaviour, and the growing importance of digital identities*",[337] the OECD Council on 11 July 2013 adopted a revised Recommendation concerning the Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data. The revision was mainly based on two fundamental traits: on the one hand, the necessity to facilitate, through a risk management-based approach, the effective protection of privacy, and on the other hand, the need to manage the issue of data protection in today's global and intersectoral dimension.[338] In this sense, some new concepts have also been introduced, such as that of "national privacy strategies", "privacy management programmes", and "data security breach notification".[339]

[336] In 1978, the OECD i instructed a group of experts to elaborate some guidelines on basic rules for the transborder flow and the protection of personal data and privacy in order to facilitate the harmonization of national legislations. See OECD (2013), The OECD privacy framework, p. 39. Retrieved from http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.

[337] OECD (2008, June 18), The Seoul Declaration for the Future of the Internet Economy, OECD Digital Economy Papers, no. 147, Paris, OECD Publishing, p. 10. Retrieved from https://www.oecd-ilibrary.org/docserver/230445718605.pdf?expires=1596631942&id=id&accname=guest&checksum=DAB6DA714B9F64DD7EE359217784A2B2.

[338] OECD (2013), The OECD privacy framework, p. 4. Retrieved from http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.

[339] OECD (2013), The OECD privacy framework, p. 4. Retrieved from http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.

The revision made in 2013 in reaction to the changed global reality has left intact the fundamental principles contained in the Annex to the Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data. Among the key principles, after the definition of the basic concepts such as "personal data",[340] "data controller",[341] "laws protecting privacy",[342] "privacy enforcement authority",[343] and "transborder flows of personal data",[344] it finds the definition of the scope of the Recommendation itself, which is the establishment of the "*minimum standards which can be supplemented by additional measures for the protection of privacy and individual liberties, which may impact transborder flows of personal data".*[345] The guidelines, as a sign of the progressive evolution of the concept of privacy towards the notion of data protection, seek to balance two opposing interests, namely: the protection of privacy and individual liberties and the advancement of the free flow of personal data. The values through which data and privacy protection must operate are: the principle of knowledge and consent of the data subject regarding the processing of data; the principle of accuracy, completeness, and up-to-dateness of the data collected; the purpose specification principle; the data quality principle; the use limitation principle;

[340] "*any information relating to an identified or identifiable individual (data subject)*". See "Definitions" of the OECD, Guidelines governing the protection of privacy and transborder flows of personal data in the OECD (2013), The OECD privacy framework, p. 13. Retrieved from http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.

[341] "*A party who, according to national law, is competent to decide about the contents and use of personal data regardless of whether or not such data are collected, stored, processed or disseminated by that party or by an agent on its behalf*". See "Definitions" of the OECD, Guidelines governing the protection of privacy and transborder flows of personal data in the OECD (2013), The OECD privacy framework, p. 13. Retrieved from http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.

[342] "*national laws or regulations, the enforcement of which has the effect of protecting personal data consistent with these Guidelines*". See "Definitions" of the OECD, Guidelines governing the protection of privacy and transborder flows of personal data in the OECD (2013), The OECD privacy framework, p. 13. Retrieved from http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.

[343] "*any public body, as determined by each Member country, that is responsible for enforcing laws protecting privacy, and that has powers to conduct investigations or pursue enforcement proceedings*". See "Definitions" of the OECD, Guidelines governing the protection of privacy and transborder flows of personal data in the OECD (2013), The OECD privacy framework, p. 13. Retrieved from http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.

[344] "*movements of personal data across national borders*". See "Definitions" of the OECD, Guidelines governing the protection of privacy and transborder flows of personal data in the OECD (2013), The OECD privacy framework, p. 13. Retrieved from http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.

[345] OECD, Guidelines governing the protection of privacy and transborder flows of personal data in the OECD (2013), The OECD privacy framework, p. 13. Retrieved from http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.

the openness principle; the individual participation principle and the accountability principle. The mechanism identified by the Guidelines to balance privacy protection and the advancement of the free flow of personal data is the restrictions on the free flow of personal data between Member States when the requirements of the Guidelines for the protection of privacy and individual liberties have not been substantially and effectively fulfilled.[346]

2.4 THE EUROPEAN UNION'S ACTION

There is currently no binding regulatory source at the European level dealing specifically with the processing of personal data in the workplace. The matter is dealt with by the European legislator in an indirect way either because it is governed by general principles for the processing of data within the European Union or because the matter is dealt with by means of regulatory instruments that are not binding on the Member States.[347] In this respect, the Commission of the European Communities in 1997, by means of the Communication (97)390, affirmed the principle that the provisions of Directive 95/46/EC are also applied in relation to the processing of workers' data,[348] and, by means of Articles 14 to 21 of the Recommendation of the Committee of Ministers to Member States on the processing of personal data in the context of employment, the European legislator has intervened to draw up a specific discipline on the remote control of the worker's activity.[349] The Recommendation specifically regulates the protection of workers' data if their

[346] OECD, Guidelines governing the protection of privacy and transborder flows of personal data in the OECD (2013), The OECD privacy framework, p. 60. Retrieved from http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.
[347] Del Federico, C. (2017). Il trattamento dei dati personali dei lavoratori e il Regolamento 2016/679/EU. Implicazioni e prospettive. In Patrizia Tullini (Ed.), *Web e lavoro. Profili evolutivi e di tutela*. Torino, Giappichelli Editore, p. 61.
[348] Commission of the European Communities, COM(97) 390 final on "The social and labour market dimension of the information society. People First - The Next Steps", Brussels, 23.07.1997. According to number 29, "*In all Member States comprehensive laws aim to protect individuals and their fundamental rights with regard to the processing of personal data. At Community level Directive 95/46/EC harmonises such laws with the aim of removing obstacles to the free movement of personal information while ensuring a high level of protection of fundamental rights and in particular of the right to privacy. However, some issues, such as the processing of data on employees' health, the role of workers representatives or the use of technical monitoring devices, may need to be further examined in order to assess specific needs of protection for employees*".
[349] Recommendation CM / Rec (2015) 5 of the Committee of Ministers to member States on the processing of personal data in the context of employment. Retrieved

activity is controlled remotely by means of computer tools or geolocation devices. However, as is well known, Recommendations are devoid of binding effectiveness. Ultimately, the European legislator has proceeded to regulate the protection of workers' data through the EU Regulation on the Processing of Personal Data, which marks an important turning point from Directive 95/46/EC.

2.4.1 European Data Protection Directive n. 95/46/CE

The European Economic Community, in the context of the wider plan of establishing a single market, intervened in 1995 to regulate the matter of the processing of personal data, as well as the free movement of the same, by means of the Directive of the European Parliament and of the Council n. 95/46/CE,[350] which seeks to ensure a balance between, on the one hand, the needs for the protection of fundamental rights and freedoms of the natural persons and, in particular, their right to privacy with respect to the processing of personal data and, on the other hand, the free flow of data between Member States, a prerequisite for the establishment of a unified market.[351]

According to Articles 2 and 3 of the Data Protection Directive, the Directive itself shall apply to any operation or set of operations that is performed upon personal data by automatic means, such as collection, recording, organization, storage, adaptation or alteration, use, transmission, dissemination, erasure, or destruction. The Directive also applies to data that is partly processed by automatic means and data that are part of or intended to be part of a non-automated "filing system", consisting of any structured set of personal data that are accessible according to specific criteria. The Directive does not apply to personal data processing operations concerning public security, defense, state security, and state criminal law.

---

from https://wcd.coe.int/ViewDoc.jsp?id=2306625&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

[350] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data**,** Official Journal L 281 23/11/1995, pp. 31-50.

[351] Miglietti, L. (2014, December 4). Profili storico-comparativi del diritto alla privacy. *Diritti comprati. Comparare i diritti fondamentali in Europa*. p. 10.

In accordance with the definitions provided by the Directive, "personal data" is any information relating to an identified or identifiable natural person, indicated as the "data subject". A person is identifiable when he/she can be identified directly or indirectly by reference to an identification number or to one or more factors specific to his/her physical, physiological, mental, economic, cultural, or social identity.[352] The term "controller" indicates a natural or legal person, public authority, agency, or any other body that alone or jointly with others determines the purposes and means of the processing of personal data.[353] Lastly, the term "processor" refers to the natural or legal person, public authority, agency, or any other body which processes personal data on behalf of the controller.

In defining the general conditions for the lawfulness and fairness of the processing of personal data, the Directive provides that personal data should be collected for specified, explicit, and legitimate purposes and not further processed in a way incompatible with those purposes. Specifically, personal data should be adequate, relevant, and not excessive in relation to the purposes for which they are collected and/or further processed; they should also be accurate and, where necessary, kept up to date. In this sense, the data controller must take every reasonable step to ensure that data that is inaccurate or incomplete with regard to the purposes for which they were collected or for which they are further processed are erased or rectified. Lastly, personal data should be kept in a form that permits the identification of data subject for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.[354]

[352] Article 2 of the European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).
[353] Article 2 of the European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).
[354] Article 6 of the European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).

Firstly, according to the provisions of the Directive, the processing of data appears to be legitimate only if the data subject has unambiguously and freely given specific consent after being properly informed. At the minimum, the data controller must provide the data subject with the following information: the identity of the controller and of the representative of the same, if any; the purposes of the processing for which the data are intended to be collected and any further information such as the existence of the right of access and the right to rectify the data concerning the data subject.[355] Every data subject has the right to obtain from the data controller: confirmation as to whether or not data relating to him are being processed, communication of the purpose of processing the categories of data concerned, and the nominative of the recipients or categories of recipients to whom the data are disclosed. The data subject must also be able to know the logic involved in any automatic processing of data concerning the same. Moreover, the data subject must be informed about his/her rights to the rectification, erasure, or blocking of data, the processing of which does not comply with the provisions of the Directive, in particular, because of the incomplete or inaccurate nature of the data.[356]

Secondly, the processing of data is legitimate if it is necessary: for the performance or conclusion of a contract to which the data subject is a party; for compliance with a legal obligation; for the performance of a task carried out in public interest or by official authorities; for the protection of a vital interest of the data subject; and, ultimately, the processing of data is legitimate if it is necessary for the fulfillment of legitimate interests pursued by the controller except where such interests are overridden by the protection need of fundamental rights and freedoms of the

[355] Article 10 of the European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).

[356] Article 12 of the European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).

data subject.[357] From the wording of this provision, the *ratio* of the Directive itself emerges, namely, the intent to offer a practical and valid tool to enable a fair balance to be struck between the interests of the data controller and the right to data protection of the data subject.

Member States shall prohibit the processing of specific categories of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and health or sex life unless any of the following exceptions to the ban applies. Such data can be processed if the data subject has given explicit consent to the processing, except where the laws of the Member States provide that the prohibition may not be overcome by the data subject's consent.[358] Moreover, the processing of the abovementioned special categories of data is allowed: if it is required by the employment law; if it is necessary to protect the vital interests of the data subject, who is incapable of giving his consent; if it carried out by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body; and, ultimately, if the processing relates to data which are manifestly made public by the data subject or if it the processing itself is necessary for the establishment, exercise or defense of legal claims.[359]

Directive n. 95/46/CE has proved, despite the incessant technological evolution, to be a forward-thinking tool that has established a set of principles, such as the principles of: specified, explicit, and legitimate purposes; fairness and lawfulness; adequacy, relevance, and not excessiveness; accuracy and updating – which are still valid today[360] and give effect to the principles

[357] Article 7 of the European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).
[358] Article 8 of the European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).
[359] Article 8 of the European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).
[360] Brugiotti, E. (2013). La privacy attraverso le "generazioni dei diritti". Dalla tutela della riservatezza alla protezione dei dati personali fino alla tutela del corpo elettronico. *Dirittifondamentali.it*, 2, p. 11.

laid down in the European Convention for the Protection of Human Rights of 4 November 1950 and in the Council of Europe Convention N. 108 of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data.[361] Before Regulation 2017/679/EU was issued, the system introduced by Directive 95/46/EC constituted the minimum and common protection standard with reference to the processing of personal data within each Member State.[362] The principles established by the Directive created a system of protection for the processing and flow of data that has become indispensable within the European territory to such an extent that the Charter of Fundamental Rights of the European Union proclaimed for the first time on 7 December 2000 in Article 8 guarantees for the protection of personal data, distinct from Article 7, aimed at protecting private and family life, by setting the point of arrival of the long journey of "emancipation" of the right to data protection with respect to the right to privacy.

Since the adoption of the Data Protection Directive, the European economic community has intervened to regulate the processing of data in particular sectors by means of the following regulatory instruments: Directive 97/66 /EC of 15 December 1997 on the processing of personal data and on the protection of privacy in the telecommunications sector (replaced subsequently by Directive 2002/58/EC, in turn, replaced by Directive n. 2009/136/EC); Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending (replaced by Directive n. 2009/136/EC).

[361] Colucci, M. (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of view. In Roger Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43). The Hague/London/New York: Kluwer Law International, p. 61.
[362] Miglietti, L. (2014, December 4). Profili storico-comparativi del diritto alla privacy. *Diritti comprati. Comparare i diritti fondamentali in Europa*. p. 3.

2.4.2 The privacy and data protection of worker in Directive 95/46/CE

The Directive does not specifically regulate the processing of data within the labor context, yet, in several places, it sets out provisions to regulate the dissemination of employees' data. In the first place, the general principles defined by the Directive apply to data processing in the working environment, which means that the employee must give his/her consent to the data processing, after being informed that the employer can monitor the workers themselves, who must be made aware of the reason for the remote control and the identity of the controller of such monitoring. Secondly, the worker's data can only be collected for a specific purpose known to the data subject, and once the aim has been reached, the collected data can no longer be retained. In addition, the worker must be guaranteed his/her right of access so that he/she can eventually ask the erasure or rectification of data that are inaccurate or incomplete, with regard to the purposes for which they were collected or for which they are further processed.

The Directive, then, in providing that Member States must prohibit the processing of special categories of personal data, includes in this category not only data revealing racial or ethnic origin, political opinions, and religious or philosophical beliefs, but also data revealing trade union membership.[363] The concept of the prohibition of treatment must be drawn from the broad meaning that the Directive itself assigns to the term, i.e., any operation or set of operations that are performed upon personal data, regardless of whether this is by automatic means, such as collection, recording, organization, storage, adaptation or alteration, consultation, use, dissemination, blocking, erasure, or destruction.[364]

[363] Article 8 of the European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).

[364] Article 2 of the European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).

However, the national legislator may provide for exceptions to the aforementioned prohibition. If the worker gives his/her consent to the data processing, if the processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law, or if the processing relates to data that are manifestly made public by the data subject, the employer is allowed to process such special category of data. Furthermore, Articles 25 and 26 regulate the cases in which personal data undergoing processing or intended to be processed may be transferred to a third non-European country. In particular, they may be transferred only if the third country to which the data are addressed ensures an adequate level of protection. In this regard, Article 26 provides for some exceptions to the prohibition of transfer. These include cases in which the data transfer is necessary for the performance of a contract, such as an employment contract, between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request.[365]

Article 29 of Directive 95/46/EC set up the Article 29 Working Party on the Protection of Individuals with regard to the Processing of Personal Data. The so-called Article 29 Working Party was an advisory body composed of a representative of the supervisory authority or authorities designated by each Member State and a representative of the authority or authorities established for the Community institutions and bodies and a representative of the Commission. The Article 29 Working Party was instituted in 1996 and, on 25 May 2018, was substituted by the European Data Protection Board as provided for in the EU General Data Protection Regulation 2016/679.

The tasks of the Article 29 Working Party included the examination of any question covering the national measures adopted under Directive 95/46/EC, such as the codes of conduct drawn up at the European level, the elaboration of opinions on the level of protection in the European Union

[365] Article 26 of the European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (Official Journal L 281, 23 November 1995, pp. 31-50).

and in third non-European countries, and proposals addressed to the Commission for amendments of Directive 95/46/EC on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data.

The contribution provided by the Article 29 Working Party to the awareness of the protection needs arising from the increasing use of sophisticated technologies for the monitoring at the workplace was fundamental despite the fact that, as already noted, there is still no binding legal source at the European level that governs the subject of treatment of data in the workplace. The Article 29 Working Party has also specifically dealt with the now increasingly frequent practice of supervising the online activities of candidates or employees.

Indeed, in Opinion 2/2017 issued by article 29 Working Party, the oversight of candidates' social media profiles is considered licit only on certain conditions. The personal data collection and processing must be "necessary and relevant to the performance of the job which is being applied for",[366] and "the individual must also be correctly informed of any such processing before they engage with the recruitment process".[367] This means that the employer can screen candidates' social media profiles only in the absence of "other less invasive manners"[368] to protect the employer's legitimate interests, and the monitoring must be carried out in a transparent way and be accompanied by the candidate's full awareness.

[366] Article 29 Data Protection Working Party (2017). Opinion 2/2017 on data processing at work (Adopted on 8 June 2017), paragraph 5.1 Processing operations during the recruitment process. Retrieved from ARTICLE29 Newsroom - Opinion 2/2017 on data processing at work - wp249 - European Commission (europa.eu).
[367] Article 29 Data Protection Working Party (2017). Opinion 2/2017 on data processing at work (Adopted on 8 June 2017), paragraph 5.1 Processing operations during the recruitment process. Retrieved from ARTICLE29 Newsroom - Opinion 2/2017 on data processing at work - wp249 - European Commission (europa.eu).
[368] Article 29 Data Protection Working Party (2017). Opinion 2/2017 on data processing at work (Adopted on 8 June 2017), paragraph 3.1 Directive 95/46/EC—Data Protection Directive ("DPD"). Retrieved from ARTICLE29 Newsroom - Opinion 2/2017 on data processing at work - wp249 - European Commission (europa.eu).

As a general rule, Opinion 2/2017 of WP29 states that the employees' personal data, in those cases in which the data collection and processing are allowed, should never be used for illegitimate processing, such as the tracking and evaluation of employees themselves.

2.4.3 Regulation (EU) 2016/679

More than 20 years later, the European Union has once again intervened to lay down rules on data protection within the Member States of the Union. There are two main reasons why this further intervention by the European legislator was necessary. Firstly, there was the increasing centrality of data in the context of the global digital economy[369] and, secondly, there was the now inadequate level of data protection provided by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data. In particular, the regulatory instrument of the directive has proved to be ineffective in achieving the objective of harmonizing data protection standards within the European Union. In fact, among the regulations adopted by the various Member States to implement Directive 95/46/EC, quite a few disparities in treatment have arisen, with consequent prejudice to the exercise of economic activities at the EU level.[370] For these reasons, on 8 April 2016, the Council of the European Union adopted the General Data Protection Regulation (GDPR), which supplemented Directive 2002/58/EC and replaced the 1995 Data Protection Directive and, compared to the latter, applies directly within the Member States without the need for nationally implemented legislation. Moreover, the GDPR is only one of the three

[369] Voigt, P. & von dem Bussche, A. (2017). *The EU General Data Protection Regulation (GDPR) A Practical Guide*. 1st ed. Cham: Springer International Publishing, p. 3; Commissione Europea (10 January 2017). Comunicazione della Commissione al Parlamento Europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni, Costruire un'economia dei dati europea. Retrieved in COM(2017)9/F1 - IT (europa.eu).
[370] Consideration n. 9 of Regulation (EU) 2016/679.

components of the so-called “privacy package” that also provided for the issuance of two directives for the protection of personal data in specific sectors.[371]

On the whole, even if the pre-existing system has not been radically changed, the innovations introduced by Regulation (EU) 2016/679 are numerous, and the sanctions in case of non-compliance with the established protection standards have been significantly tightened. For this reason, and to allow Member States to adapt their domestic legislation, the European legislator suspended the application of the Regulation by means of Article 99(2) GDPR for the first two years following its entry into force.

The most significant innovation lies in the introduction of an innovative approach to data processing management. The Regulation requires constant monitoring of the technological and organizational measures adopted, which, in turn, must be designed to ensure compliance with the standards on the processing of personal data.[372]

The Regulation confirms the role of the data controller but complements it with two new roles: the data processor and the data protection officer. Pursuant to Article 28, the data processor is defined as the person who processes the data on behalf of the data controller, issues directives to which the data controller must comply, and may also have to demonstrate to the supervisory authorities that he/she has done so, in accordance with the principle of accountability.[373] A data protection officer is a professional that every private and public entity must ensure compliance with the provisions of Regulation (EU) 2016/679 when the processing is particularly sensitive.

[371] Directive (EU) 680/2016 on the on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA and Directive (EU) 681/2016 on the on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

[372] Costantini, Federico (2018). Il Regolamento (UE) 679/2016 sulla protezione dei dati personali. *Il Lavoro nella giurisprudenza*, 6, pp. 545-555.

[373] Costantini, Federico (2018). Il Regolamento (UE) 679/2016 sulla protezione dei dati personali. *Il Lavoro nella giurisprudenza*, 6, pp. 545-555.

One of the most important tasks assigned to the data controller and the data processor is the obligation to keep records of processing activities. Compiling the registers makes it possible, firstly, to prove to the supervisory authorities that the GDPR has been complied with, and secondly, to fulfill the obligations to inform the data subject about the purpose of the processing, the categories of data processed, and the technical and organizational measures adopted to ensure their protection.[374] A further important innovation compared with the previous directive concerns the adoption of the data protection impact assessment in cases where the processing of data constitutes a danger to the protection of the rights and freedoms of the persons concerned. By means of the data protection impact assessment, a preventive evaluation of the impact of the processing on data protection is carried out to set up the mechanisms necessary to reduce the risks. The data protection impact assessment is, therefore, a concrete evaluation of the most sensitive data processing operations, which makes it possible to devise the most suitable solutions to reduce the risks and possible damage.[375] The data protection impact assessment tool is an expression of the more general principles of privacy by design and privacy by default, according to which it is necessary to implement a preventive data protection plan. In particular, the concept of privacy by design imposes an approach aimed at risk prevention, which, in turn, implies a constant assessment of the risks themselves so that they can be prevented early on in the design phase of processing systems. According to the principle of privacy by default, personal data must be processed only to the extent necessary and sufficient for the purposes intended and for the period strictly necessary for those purposes (the principle of minimization).

[374] Voigt, P. & von dem Bussche, A. (2017). *The EU General Data Protection Regulation (GDPR) A Practical Guide*. 1st ed. Cham: Springer International Publishing, p. 3.

[375] Pizzetti, F. (2018). La protezione dei dati personali dalla direttiva al nuovo regolamento: una sfida per le Autorità di controllo e una difesa per la libertà dei moderni. *La rivista di diritto dei media*, 1, p. 108. Retrieved from: http://www.medialaws.eu.

The Regulation then introduced stricter conditions on the subject of the lawfulness of the processing, reaffirming, first of all, what was already established by Directive 95/46/EC on the necessary legal basis of the processing itself and identifying in Article 6 of the Regulation six specific hypotheses. In particular, the processing can be performed if there is: the consent of the data subject; the necessity for the performance of pre-contractual measures or of a contract to which the data subject is a party; the necessity for the performance of a legal obligation to which the data controller is subject; the necessity for the safeguarding of the vital interests of the data subject or of another natural person; the necessity for the performance of a task carried out in the public interest vested in the data controller; and, finally, the necessity for the pursuit of the legitimate interests of the data controller or of third parties, provided that the interests or the fundamental rights and freedoms of the data subject do not prevail. Of all the conditions of lawfulness, the consent of the data subject is the one that has assumed greater centrality, along with the right to information, cancellation, and rectification of incorrect or incomplete data.

Lastly, the role which national supervisory authorities have been assigned by the Regulation 2017/679/EU is crucial in several respects, not only in relation to the supervisory power over compliance with the provisions introduced by the Regulation (EU) 2016/679 but also in terms of promoting a legal culture of sensitive data protection.[376]

The first fundamental role reserved to the supervisory authorities is to monitor the data processing. The data controller is obliged, first of all, to notify the national supervisory authority promptly of any violation that occurred in the processing of data. The authority is also attributed, pursuant to Art. 41, 35, and 36 Regulation (EU) 2016/679, a role of monitoring the codes of conduct and assessing the impact of possible treatments carried out with the aid of new technologies. An

[376] Pizzetti, F. (2018). La protezione dei dati personali dalla direttiva al nuovo regolamento: una sfida per le Autorità di controllo e una difesa per la libertà dei moderni. *La rivista di diritto dei media*, 1, p. 108. Retrieved from: http://www.medialaws.eu.

innovative role that the Regulation (EU) 2016/679 assigns to the national supervisory authority is introduced by Art. 57 letter i), which provides that *"each supervisory authority shall on its territory monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular, the development of information and communication technologies and commercial practices".*

This provision confirms the renewed role of national supervisory authorities as careful controllers of compliance with the new European provisions on data processing, but also as vigilant surveillance of possible new protection needs arising from the forthcoming technologies.

2.4.4 Data Protection Regulation 2017/679/EU in the employment context

The EU Data Protection Regulation 2017/679/EU also rules on several points of data processing in the working environment but does not lay down an exhaustive legal framework.

Article 9 regulating the processing of particular categories of data sets out the general prohibition of processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.[377] Paragraph two of Article 9 provides for exceptions to the aforementioned prohibition. Among these is the case in which processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law, in so far as it is authorized by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and

[377] Article 9 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Retrieved from http://data.europa.eu/eli/reg/2016/679/oj.

the interests of the data subject. Moreover, the General Data Protection Regulation, at paragraph 2, letter e) of Article 9, also states that if the "*processing relates to personal data which are manifestly made public by the data subject*", the prohibition set out in Article 9 shall not apply. At a closer look, this hypothesis could include personal data shared on social networks. In other words, Article 9 of Regulation 2017/679/EU generally prohibits the processing of special categories of personal data (such as personal data that can reveal: racial or ethnic origin; political opinions; religious or philosophical beliefs; trade union membership; genetic and biometric data through which it is possible to identify a natural person uniquely; data concerning health or a natural person's sex life or sexual orientation) unless – and this is one of the exceptions to the prohibition – the processing relates to personal data that are manifestly made public by the data subject.

In the wording of Article 9 of the General Data Protection Regulation, if the data subject makes public his/her special personal data concerning, for example, his/her political opinion, that specific personal data can be processed without any apparent limitations. Therefore, it might seem that the right of data protection is a renounceable right: if personal information is published by the data subject, that information can flow freely. This conclusion is no longer valid if the GDPR has to be read according to a systematic interpretation that takes into account first, the general principles of safeguarding personal data processing and second, the guidelines, recommendations, and best practices developed by the Article 29 Working Party (specifically, its Opinion 2/2017 "on the processing of personal data in the employment context").

The key principle regarding personal data processing is the consent of the data subject, who is not a passive subject, but an active one, and indeed one who has the power of control and intervention.[378] Yet, the consent in the specific context of work cannot be considered unconditional

[378] Ogriseg, C. (2017). GDPR and personal data protection in the employment context. *Labour & Law Issues,* (2), p. 8. Retrieved from https://labourlaw.unibo.it/article/view/7573.

and free due to the imbalance of power that characterizes the employment relationship,[379] as Opinion 2/2017 at point 6.2 expressly highlights: "*Employees are almost never in a position to freely give, refuse or revoke consent, given the dependency that results from the employer/employee relationship. Given the imbalance of power, employees can only give free consent in exceptional circumstances, when no consequences at all are connected to acceptance or rejection of an offer. The legitimate interest of employers can sometimes be invoked as a legal ground, but only if the processing is strictly necessary for a legitimate purpose, and the processing complies with the principles of proportionality and subsidiarity. A proportionality test should be conducted prior to the deployment of any monitoring tool to consider whether all data are necessary, whether this processing outweighs the general privacy rights that employees also have in the workplace and what measures must be taken to ensure that infringements on the right to private life and the right to secrecy of communications are limited to the minimum necessary".*[380]

It is interesting to observe that Article 7 of the Proposal for the General Data Protection Regulation,[381] in relation to the conditions for the validity of the consent, had considered that the consent should not provide a legal basis for the data processing when a significant imbalance between the position of the data subject and the controller occurs. This specific provision was not adopted in the final text of Regulation 2017/679/EU, which instead provides that when assessing whether the consent has been freely given, the utmost account must be taken of whether, among other things, the performance of a contract, including the provision of a service, is conditional upon

[379] Ogriseg, C. (2017). GDPR and personal data protection in the employment context. *Labour & Law Issues,* (2), p. 11. Retrieved from https://labourlaw.unibo.it/article/view/7573.
[380] Article 29 Data Protection Working Party (2017). Point 6.2. of Opinion 2/2017 on data processing at work (Adopted on 8 June 2017). Retrieved from ARTICLE29 Newsroom - Opinion 2/2017 on data processing at work - wp249 - European Commission (europa.eu).
[381] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM/2012/011 final - 2012/0011 (COD).

the provision of consent to the processing of personal data, which are not necessary for the performance of that contract.[382]

The text of Article 7 in the proposed 2012 version suggested a general application not only with regard to the consumer contractual relations but also possibly to employment relations. With the approval of the final text of the General Data Protection Regulation, a restrictive scope of application has been given to the provision of Article 7, according to which, in evaluating whether the consent to the processing of data has been given freely, particular consideration must be given to whether the consent is regarded as a condition, even if this is not required, for the performance of a contract.[383] With this legal framework, the European legislator has provided protection for those situations in which the position of the data subject is subordinate and faced with an economically dominant data controller, as in the case of contractual relations between consumers and suppliers of goods and services. The European legislator has therefore chosen to intervene in a well-defined area, perhaps disregarding other contractual relations that are characterized by a structural imbalance between the positions of the parties, such as the employment relationship.

For this reason, consent is not enough, and the consequent principles regulating personal data processing (in the employment context, but also in general) are aimed at balancing the employee's position of inequality. On the one hand, there are the employee's rights, such as the right to a private life and the right to the confidentiality of communications and, on the other hand, there are the company's legitimate interests; both have to be taken into account in the processing of employee's data.

[382] Article 7 Data Protection Working Party (2017). Point 6.2. of Opinion 2/2017 on data processing at work (Adopted on 8 June 2017). Retrieved from ARTICLE29 Newsroom - Opinion 2/2017 on data processing at work - wp249 - European Commission (europa.eu).

[383] Article 7 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Retrieved from http://data.europa.eu/eli/reg/2016/679/oj.

The other great guiding principle concerns the explicitness and legitimacy of purpose determining the personal data processing and the necessity, proportionality, and transparency of measures adopted for said processing. Specifically, above all, the employees should always have full awareness of the legitimate reasons behind the personal data processing, which, in turn. "*should be carried out in the least intrusive manner possible and be targeted to the specific area of risks"*.[384] Along this line, according to Article 35 of Regulation 2016/679/EU, if a specific type of processing, due to its nature, scope, and context, is likely to undermine the rights and freedoms of natural persons, the *"controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data*".[385] The GDPR itself imposes the Data Protection Impact Assessment (DPIA) when the employer puts in place "*any form of automated processing of personal data evaluating the personal aspects relating to a natural person, in particular, to analyze or predict aspects concerning the data subject's performance at work, economic situation, health, personal preferences or interests, reliability or behavior, location or movements*".[386] Furthermore, the DPIA, according to the WP29, should be adopted if there is "*a company systematically monitoring its employees' activities, including the monitoring of the employees' work station, internet activity, etc. …*".[387]

[384] Article 29 Data Protection Working Party (2017). Point 3.1.1 legal grounds (article 7) of Opinion 2/2017 on data processing at work (Adopted on 8 June 2017). Retrieved from ARTICLE29 Newsroom - Opinion 2/2017 on data processing at work - wp249 - European Commission (europa.eu).

[385] Article 35 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Retrieved from http://data.europa.eu/eli/reg/2016/679/oj.

[386] Recital 71 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Retrieved from http://data.europa.eu/eli/reg/2016/679/oj.

[387] Article 29 Data Protection Working Party (2017). Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purpose of Regulation 2016/679 (Adopted on 4 October 2017). Retrieved from https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611236.

From this general picture of the principles, the personal data collected through the screening of employees' social media profiles represents an extremely interesting circumstance for at least two reasons. First, because the monitoring of social media by the employer can occur even before the establishment of the employment relationship, i.e., during the recruitment phase; second, because of this kind of control, any sort of surveillance can allow the employer to acquire sensitive personal data regarding private opinions, interests, and habits.

For all the above observations, a different approach to the employee as a "data subject" emerges between the GDPR and Opinion 2/2017 ("*on the processing of personal data in the employment context*"). Indeed, in Regulation 2016/679/EU, the weak position of the employee is not sufficiently considered in terms of protection instruments.[388] Nevertheless, the legal nature of personal data voluntarily shared on social networks is undeniably falling within the definition of personal data, and, therefore, their collection and processing are subject to the GDPR regulations.

The only disposition of Regulation 2016/679/EU that specifically takes data processing into account in the context of employment is Article 88, which, according to par. 1, assigns to the Member States the competence to provide, by law or by collective agreements, more specific rules to ensure the protection of the rights and the freedoms in the processing of employees' personal data, in particular for the purposes of: recruitment; performance of the employment contract, including the discharge of obligations laid down by law or by collective agreements; general and specific organization of work; equality and diversity in the workplace; health and safety at work; protection of employer's or customer's property; the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment; and the termination of the employment relationship.[389]

[388] Ogriseg, C. (2017). GDPR and personal data protection in the employment context. *Labour & Law Issues,* (2), pp. 22-23. Retrieved from https://labourlaw.unibo.it/article/view/7573.

[389] Article 88 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data,

Regulation 2016/679/EU, therefore, gives a wide margin of action and discretion to the Member States and social partners who can specifically regulate the protection of workers' rights and freedoms through collective agreements or company agreements.[390] At the same time, however, paragraph 2 of Article 88 specifies that "*those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place*".[391] The intervention of the national legislator must therefore be oriented towards the protection of employees' human dignity, legitimate interests, and fundamental rights. In addition, as highlighted by Article 88 of Regulation 2017/679/EU, the employee's right to data protection must cover a wide timeframe for the employment relationship, starting from the recruitment phase, when the employment relationship has not even been established.[392]

Therefore, it follows from what is established by the General Data Protection Regulation in the employment context that in this area, each Member State retains the legislative competence to define the specific rules that govern the processing of data within the employment relationship in accordance with the general principles laid down by the regulation. For this reason, it is necessary

and repealing Directive 95/46/EC (General Data Protection Regulation). Retrieved from http://data.europa.eu/eli/reg/2016/679/oj.

[390] Del Federico, C. (2017). Il trattamento dei dati personali dei lavoratori e il Regolamento 2016/679/EU. Implicazioni e prospettive. In Patrizia Tullini (Ed.), *Web e lavoro. Profili evolutivi e di tutela*. Torino, Giappichelli Editore, p. 67.

[391] Article 88, no. 2 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Retrieved from http://data.europa.eu/eli/reg/2016/679/oj.

[392] Sprague, R. (2011, February 28). Invasion of the social networks: Blurring the line between personal life and the employment relationship. *University of Louisville Law Review*, 50, pp. 1-42. Retrieved from https://ssrn.com/abstract=1773049.

in this area *"to continue to deal with the different and specific data protection regimes of each individual Member State"*[393] and with the rulings of the European Court of Justice.

2.4.5 The employment relationship and the privacy protection in Italy

Regarding the Italian experience, the legislative decree of 10 August 2018 has transposed the GDPR's novelties into the Italian privacy codex[394] by consequently harmonizing the discipline in the field of employer's forms of controls, a subject regulated in the Italian legal system in Article 4 of the workers' statute (Law Act n. 300 of 1970). This provision applies to both public and private employers, regardless of the sector in which they operate and the number of employees (therefore, with the exception of the self-employed) and has been modified by legislative decree n. 151/2015.

According to the previous version of Article 4 of the Italian workers' statute, the installation of audio-visual equipment and other tools aimed solely at the employers' control was prohibited unless: 1) the installation of these instruments was necessary to safeguard the organizational needs and production requirements, such as those of work safety and the protection of corporate asset; and 2) as long as a trade-union agreement (with the company's trade union representatives or, failing that, with the internal commission) or, failing that, the territorial Italian Labor Direction authorized the installation in this regard. Legislative decree n. 151/2015 has modified paragraph 2 of Article 4, introducing a derogation to the authorization procedure, which establishes that such authorization is not necessary when the instruments are intended to be used by the employee to carry out the job performance or to register the employees' access and attendances. With regard to the mechanism of authorization by means of a collective agreement, recent pronouncements of

[393] Del Federico, C. (2017). Il trattamento dei dati personali dei lavoratori e il Regolamento 2016/679/EU. Implicazioni e prospettive. In Patrizia Tullini (Ed.), *Web e lavoro. Profili evolutivi e di tutela*. Torino, Giappichelli Editore, p. 67; Bevitt, A. & Stack, C. (2016). Preparing for the GDPR-advice for employers. *PDP*, 16(6), p. 11.
[394] Cuffaro, V. (2018). Quel che resta di un codice: il D.Lgs. 10 agosto 2018, n. 101 detta le disposizioni di adeguamento del codice della privacy al regolamento sulla protezione dei dati. *Corriere giuridico*, 10, pp. 1181-1185.

the Supreme Court of Criminal Cassation have deemed the existence of a collective agreement to be mandatory, as it cannot be replaced by the mere written consent of workers. This interpretation seems to confirm that the right to data protection operates only in the collective dimension in the workplace.[395]

In 2016 (the year following the entry into force of legislative decree n. 151/2015), the legislator intervened once more in paragraph 3 of Article 4 of the Italian workers' statute with legislative decree n. 185/2016, ruling that the employee's personal data, when lawfully collected (according to paragraphs 1 and 2), can be processed, with respect to the Italian privacy codex, for any of the purposes related to the employment relationship, provided that the employee has been previously and properly informed about how these controls are carried out. In this sense, therefore, if the employer has complied with the provisions of Article 4 of the Workers' Statute and has also fulfilled its obligations to inform the workers themselves, the information obtained may be used for all purposes relating to the employment relationship, including disciplinary purposes.[396] In light of these regulations regarding the usability of information collected by the employer, Italian legal theory and jurisprudence[397] consider that the personal information of the worker, obtained by means of procedures other than those prescribed by art. 4 of the Workers' Statute, are "protected

[395] Trojsi, A. (2020). Potere informatico del datore di lavoro e controllo sui lavoratori, cinquant'anni dopo. *dirittifondamentali.it*, 2. Retrieved from http://dirittifondamentali.it; Corte Suprema di Cassazione, ruling of 8 May 2017, n. 22148, in giustiziacivile.com, 2018, 2, p. 10, with comment of Frigerio, T. (2018). Consenso dei lavoratori e strumenti di controllo a distanza. Anche la Cassazione penale conferma l'orientamento garantista; Corte Suprema di Cassazione, ruling of 17 December 2019 n. 50919, in *Il Lavoro nella giurisprudenza*, 2020, 8-9, pp. 855-862, with comment of Taiani, G. (2020). Violazione dell'art. 4 Stat. Lav. e consenso del lavoratore. *Il Lavoro nella giurisprudenza*.

[396] Corte Suprema di Cassazione, ruling of 9 February 2016, n. 2531.

[397] Corte Suprema di Cassazione, ruling of 5 October 2016, n. 19922; Court of Padova, ruling of 22 January 2018, in *Rivista giuridica del lavoro e della previdenza sociale*, 2018, 4, pp. 593-604, with comment of Ambrosino, A. (2018) Sulla legittimità dei controlli "difensivi" del datore di lavoro; Corte Suprema di Cassazione, ruling of 8 November 2016, n. 22662 and resolution of 19 September 2016, n. 18302, in Rivista giuridica del lavoro e della previdenza sociale, 2017, 2, pp. 276-280, with comment of Sauro, M.E. (2017). I controlli difensivi tra tutela del patrimonio aziendale e tutela della riservatezza. *Rivista giuridica del lavoro e della previdenza sociale*.

by the prohibition of employer's treatment" and therefore not inadmissible from the evidentiary point of view.[398]

With regard to the information obligations specifically, the employer cannot carry out the controls in a hidden way. On the contrary, he/she is expressly obliged to provide adequate information to his/her own employees with regard to the tolerated and not admitted activities carried out on the network by means of telephone or computer; with regard to the modalities of exercising the employer's control (by means of the indication of the computer programs used and also of the name of the person responsible for the treatment of the data); and with regard to the information subject to conservation.[399]

The legislative change made by means of Legislative Decree No. 151/2015 was determined by the need to adapt the regulatory framework to technological evolution, which increasingly reveals that the distinction between a control tool and a work tool is now outdated.[400] In today's technological context, in fact, more and more often computers, tablets, and smartphones allow people to perform work as normal but, at the same time, allow the employer to exercise control, even remotely,[401] penetrating the activities of the worker more and more.[402]

---

[398] Trojsi, A. (2020). Potere informatico del datore di lavoro e controllo sui lavoratori, cinquant'anni dopo. *dirittifondamentali.it*, 2. Retrieved from http://dirittifondamentali.it; Gamba, C. (2016). Il controllo a distanza delle attività dei lavoratori e l'utilizzabilità delle prove. *Labour & Law Issues*, 1. Retrieved from http://labourlaw.unibo.it.

[399] Il Garante per la protezione dei dati personali, deliberazione 1° marzo 2007, Linee guida del Garante per posta elettronica e internet. Retrieved from https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/1387522.

[400] Since the mid-eighties, Article 4 of the Workers' Statute has been considered by Italian doctrine and jurisprudence to be the symbolic norm of the inadequacy of Italian labor law with respect to the advent of new technologies. The rule was conceived fundamentally with regard to the instrument of closed-circuit television cameras, despite the fact that the legislator took care to use the expression "other equipment" in order to provide the system with a rule of openness to technological progress. Trojsi, A. (2016). Controllo a distanza (su impianti e strumenti di lavoro) e protezione dei dati del lavoratore*. Variazioni su temi di diritto del lavoro,* p. 667 ff; Petrini, D. (1985). L'articolo 4 dello Statuto dei lavoratori e il controllo dell'attività lavorativa attuato con mezzi informatici. *Rivista Giuridica del Lavoro e della Previdenza Sociale*, IV, p. 375; Zoli, C. (2009). Il controllo a distanza del datore di lavoro: l'art. 4, l. n. 300/1970 tra attualità ed esigenze di riforma. *Rivista italiana di diritto del lavoro*, 2009, 4/1, pp. 485-503.

[401] The Italian doctrine using the term "remote controls", refers to those controls carried out both at the recurrence of a spatial and temporal distance. Trojsi, A. (2013). *Il diritto del lavoratore alla protezione dei dati personali.* Torino: Giappichelli, p. 311 ss.

[402] This conclusion was also reached by the European Court of Human Rights in its judgment n. 61496/08 of 12 January 2016.

The Italian legislator has therefore intervened on Article 4 of the Workers' Statute both by repealing the absolute prohibition of the use of audiovisual systems and other equipment for the purpose of remote control of workers' activities, as provided for in the first paragraph of the original text of the regulation, and by repealing the obligation of prior agreement with the trade union representatives in the event that the installation of audiovisual systems is necessary to carry out the work or concerns the provision of instruments for recording access and attendance. The *ratio* of the normative amendment was, on the one hand, to make the procedure for adopting audio-visual equipment less burdensome when the use of this equipment is necessary for the performance of work activities or for recording accesses and presences and, on the other hand, to guarantee, in any case, a minimum level of protection of the privacy of the workers themselves in the hypothesis in which the use of audio-visual equipment may result in the possibility of remote control of the workers' activities. In light of this regulatory framework, therefore, a double regime is established: first, with regard to the hypothesis in which the installation of audiovisual systems and other instruments may result in the possibility of remote control of workers' activities and, second, with regard to the instruments used by the worker to perform the work.

In the first case, that is, in the hypothesis in which the installation of audiovisual systems is necessary for organizational and productive needs, for work safety and for the protection of company assets, the legislator has confirmed the obligatory nature of the agreement stipulated with the trade union representatives.[403] In detail, the collective agreement must be stipulated with the unitary union representation or the company's union representatives. Alternatively, in the case of companies with production units in different provinces of the same region or in more than one region, such agreement may be stipulated with the most representative trade union associations at

[403] Goffredo, M.T. & Meleca, V. (2016). Jobs Act e nuovi controlli a distanza. *Diritto & Pratica del Lavoro*, 3, pp. 1894-1901.

the national level. Finally, in the absence of an agreement, the audiovisual systems in question may be installed subject to authorization by the territorial Directorate of Employment or, alternatively, in the case of companies with production units located in the areas under the jurisdiction of several territorial Directorates of Employment, of the Ministry of Employment and Social Policies (Article 4 of Law no. 300/1970). The authorization procedure just set out represents a further novelty introduced by means of Legislative Decree No. 151/2015 with regard to companies with multiple production units located in different provinces of the same region or in several regions. In this case, the agreement must be entered into with the territorial or national trade union associations that are comparatively more representative at national level or, in the absence of the agreement, the employer may apply to the Ministry of Labour and Social Policies for authorization to install audiovisual systems.

Compared to the previous text, the novelties are considerable. In the first place, the legislator has introduced a further hypothesis in the presence of which the installation of audio-visual systems and other instruments from which the possibility of remote control of the workers' activities derives is allowed, namely, the protection of the company's assets, which is therefore added to those already mentioned in the previous text (organizational and production requirements and work safety).[404] This specification became necessary in view of a jurisprudential contrast regarding the concept of "defensive control". According to a part of the sentences of the Civil Cassation in the field of labor law, there was no obligation on the part of the employer to comply with the procedure set out in Article 4 of the Statute of Workers in the case of the need to safeguard the assets and corporate image, regulating the rule in question only the control by the employer on the ways of fulfilling the obligation to work. In light of this case-law, therefore, defensive checks were permitted

[404] Goffredo, M.T. & Meleca, V. (2016). Jobs Act e nuovi controlli a distanza. *Diritto & Pratica del Lavoro*, 3, pp. 1894-1897.

under the previous legislation.[405] However, according to a different orientation, defensive controls also had to be subject to compliance with the provisions of Article 4 of the Workers' Statute.[406] By amending Article 4 of the Workers' Statute, the legislator intervened on this point, expressly subjecting the installation of audiovisual equipment for the purpose of safeguarding company assets to prior agreement with trade union representatives.

With regard to the type of instruments contemplated by the first paragraph of Article 4 of the Workers' Statute, it is believed that these include: cameras within the workplace, geolocation systems installed on vehicles, software for computer controls, personal computers, tablets and smartphones available to several workers with free access.[407] Beyond the instruments falling into the category under consideration, an interesting aspect with regard to the first paragraph of Article 4 of the Workers' Statute concerns the object of the monitoring carried out by the employer. From the tenor of the rule, it can be inferred that the remote control of employees through technological devices can only concern information relating to organizational and production needs, profiles of the safety of work, and the protection of corporate assets, with the constraint of unitability of information obtained through the controls in question concerning areas other than the three indicated by the rule.[408]

In the second case, i.e., in the hypothesis in which the installation concerns audiovisual instruments used by the worker to perform work or to record attendance, the employer, pursuant to the second paragraph of the new Article 4 of the Workers' Statute, is no longer required to reach an agreement with the trade union representatives, without prejudice to the obligation to comply with the Privacy Code as well as the duty to inform workers with regard to the methods of use of

[405] Corte Suprema di Cassazione, ruling of 12 October 2015, n. 20440, in *il giuslavorista.it* 2016, 18 January.
[406] Corte Suprema di Cassazione, ruling of 1° October 2012, n. 16622, in *Giustizia civile-massimario annotato dalla Cassazione*, 2012, 10, p. 1168.
[407] Goffredo, M.T. & Meleca, V. (2016). Jobs Act e nuovi controlli a distanza. *Diritto & Pratica del Lavoro*, 3, p 1898.
[408] Trojsi, A. (2020). Potere informatico del datore di lavoro e controllo sui lavoratori, cinquant'anni dopo. *dirittifondamentali.it*, 2. Retrieved from http://dirittifondamentali.it.

the instruments and the implementation of controls. The Italian doctrine, with regard to the category of audiovisual tools used by the worker to make the work performance, has questioned about the concrete identification of the tools belonging to this category considering to include: fixed and portable personal computers, tablets, electronic cash registers, smartphones, two-way radios and work clothes equipped with geolocation systems. On the other hand, with regard to the category of instruments for recording attendance and access, the most recent technological progress allows us to foresee forthcoming innovations also in this sector, with the overcoming of classic badges and the application of subcutaneous microchips.[409] Clearly, tools such as smartphones and computers can belong to both two different categories: first, that of the tools adopted exclusively for organizational and productive needs, for the safety of work, and for the protection of company assets, and second, that of the tools used by the worker to render the work performance and tools for recording accesses and presences. In these cases, according to jurisprudence, in order to be able to understand the function performed by the instrument in the concrete hypothesis, it is necessary to refer to the program or application in question.[410]

The legislative decree of 10 August 2018[411], implementing in the Italian legal system of Regulation (EU) 2016/679, substantially confirmed a sanction system that legislative decree n. 151/2015 had already been established in the case of infringements to the provisions of Article 4 of the Italian workers' statute about the employer's power of control. In cases of infringements upon the provisions regulating the employer's control in the work context and investigations into the

[409] On a completely experimental basis, the Stockholm-based hi-tech company Epicenter implanted a subcutaneous microchip in 2015 in all its employees who accepted it.

[410] Court of Torino, ruling of 18 September 2018, n. 1664, in *Rivista Giuridica del Lavoro e della Previdenza Sociale;* Ispettorato nazionale del lavoro, circolare 7 November 2016, n. 2 («Indicazioni operative sull'utilizzazione di impianti GPS in accordance with article 4, section 1 and 2, law n. 300/1970»).

[411] Colapietro, C. (2018). Il nuovo quadro giuridico europeo sulla protezione dei dati personali e l'adeguamento della normativa nazionale. *Studi parlamentari e di politica costituzionale,* 201-202, pp. 7-25; D'Arcangelo, Lucia (2020). L'obbligo di protezione dei dati del lavoratore: adempimento e sanzioni. *Diritti lavori mercati*, (1), pp. 75-111; Mantelero, A. & Poletti, D. (2018)., *Regolare la tecnologia: il Reg. UE 2016/679 e la protezione dei dati personali. Un dialogo fra Italia e Spagna.* Pisa: Pisa University Press.

employee's political, religious, or trade union-related opinions, as well as issues not relevant for the evaluation of the professional attitude, the employer is punished (unless the fact constitutes a more serious crime) with a minimum fine of 154 EUR to a maximum of 1,549 EUR or with an arrest from a minimum of 15 days to a maximum of a year (Article 38 of the Italian workers' statute, Law Act n. 300 of 1970).

From the analysis of the Italian legislative decree of 10 August 2018, the preference of the Italian legislator emerges for the imposition of administrative fines for injuries of data protection in the employment context. As a matter of fact, the same Regulation (EU) 2016/679 at Article 83 lays down a maximum standard (from 10,000.00 EUR to 20,000.00 EUR or, in the case of an undertaking, 2% to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher), to which amount each European Member State must adapt their legislations[412] as a sanction. This is also applicable to public authorities because of incompliance with the GDPR's specific provisions, except for the articles of Regulation (EU) 2016/679 concerning the working relationship. The case of infringements on the provisions preserving the employee's personal data falls under Article 84 of Regulation (EU) 2016/679, which states that: *"each member State shall lay down the rules on other penalties applicable to infringements of the GDPR for infringements which are not subject to administrative fines pursuant to article 83; these penalties shall be effective, proportionate and dissuasive, and the member State shall take all measures necessary to ensure that the sanctions are implemented".*

[412] Vásquez, M.V., Suhren, P. Liability for injuries according to GDPR. *Datenschutz Datensich* 42, pp. 151-155 (2018). Retrieved from https://doi.org/10.1007/s11623-018-0926-0.

2.4.6 The German privacy notion as right of personality (allgemeines Persönlichkeitsrecht)

The German legal system does not expressly recognize a right to privacy per se, yet it is undisputed that this is part of the fundamental values recognized by the German constitution as part of the more general right of personality (*Allgemeines Persönlichkeitsrecht*). In 1954, the Federal Supreme Court[413] recognized the existence of a right of personality as a derivation from the protection of human dignity against possible abuses of the state power (*Recht auf Schutz der Menschenwürde*[414]) and from the recognition of the right to free development of one's own personality (*Recht auf freie Entfaltung der Persönlichkeit* [415]). The right to personality is, therefore, a concept developed by case law, which the German legislator has never codified because it is unanimously considered pertinent to the German constitutional system.[416]

Like the protection of every fundamental right, the general right of personality must be guaranteed not only against possible interference by the state but also between private parties[417] and, therefore, also against possible interference by the employer. In other words, the worker has the right to freely develop his or her personality within the work context as long as this does not violate the rights of others or infringe upon the German Constitution.[418] As proof of this, the Federal Labour Court has confirmed the orientation of the Supreme Federal Court, recognizing in its rulings from the outset protection of the right to personality in the employment context.[419] The mechanism

[413] BGH, ruling of 25 May 1954 - IZR211/53. In *Die Entscheidungssammlung des Bundesgerichtshofes in Zivilsachen*, 13, pp. 334-341.
[414] Article 1, paragraph 1 of the Basic Law for the Federal Republic of Germany, Act n. 3 of 23 May 1949, Bundesgesetzblatt, n. 1, 23 May 1949.
[415] Article 2, paragraph 1 of the Basic Law for the Federal Republic of Germany, Act n. 3 of 23 May 1949, Bundesgesetzblatt, n. 1, 23 May 1949.
[416] Hubmann, H. (1967). *Das Persönlichkeitsrecht*. Köln, Graz: Böhlau. BVerfG, ruling of 14 February 1973 - 1BvR 112/65. In *Entscheidungen des Bundesverfassungsgerichts*, 34, pp. 269-293; BVerfG, ruling of 03 June 1980 - 1 BvR 185/77. In *Entscheidungen des Bundesverfassungsgerichts*, 54, pp. 148-158.
[417] Dietlein, J. (2005). Die Lehre von den grundrechtlichen Schutzpflichten. Berlin: Duncker & Humblot.
[418] Article 2, paragraph 1 of the Basic Law for the Federal Republic of Germany, Act n. 3 of 23 May 1949, Bundesgesetzblatt, n. 1, 23 May 1949.
[419] BAG, ruling of 10 November 1955 - 2AZR591/54. In *Neue Juristische Wochenschrift*, 1956, pp. 359-360.

by which the right to the free development of one's personality operates is that of indirect effectiveness (*Mittelbare Drittwirkung*), that is, by means of general clauses.

The activity of the works councils (elected by the entire staff of a department with at least five workers within it) is also aimed at setting up a legal guardianship to the workers' right to personality.[420] According to the provisions set out in paragraphs 87 and 75 of the Works Constitution Act (*Betriebsverfassungsgesetz*), employers and works councils have the duty to protect and promote the free development of workers' personalities.[421] Moreover, in accordance with the Works Constitution Act, works councils have the right to co-determine with the employer any choice regarding personnel management[422] and, as such, also concerning the installation of equipment to monitor the employees' conduct.[423] Therefore, if the collective agreement does not regulate the possible monitoring of workers by the employer, the employer must reach an agreement with the works council, at least with the assistance of conciliation committees. Consequently, if the employer takes measures to monitor personnel without first consulting the works council, the adopted surveillance procedure is unlawful.

An interesting aspect that emerges from the body of rules in this field in the German legal system concerns the value assigned to the consent, if any, expressed by the data subject regarding the processing of data. In this regulatory framework, the worker's consent to the processing of data is not considered sufficient in relation to those monitoring methods that may limit the free

[420] Finkin, M.W., Krause, R. & Okuno, H.T. (2015). Employee autonomy, privacy, and dignity under technological oversight. In M.W. Finkin & G. Mundlak (Eds.), *Comparative labor law* (p. 164-165). Cheltenham, Northampton: Edward Elgar Publishing.

[421] For instance, the Federal Labour Court declared invalid an agreement between the employer and the works council that allowed permanent video surveillance of the employees. BAG, resolution of 29 June 2004 - 1ABR21/03. In *Beck-Rechtsprechung* 2004, p. 41773.

[422] Section 87, n. 1 of the German Works Constitution Act (*Betriebsverfassungsgesetz*), which provides that: "*The works council has a say in the following matters, insofar as there is no statutory or collectively agreed regulation: questions of the organisation of the establishment and the conduct of employees in the establishment*".

[423] Section 87, n. 6 of the German Works Constitution Act (*Betriebsverfassungsgesetz*), which provides that: "*The works council has a say in the following matters, insofar as there is no statutory or collectively agreed regulation: the introduction and use of technical equipment designed to monitor the behaviour or performance of employees*".

development of the worker's personality and for the adoption of which it is necessary to involve the works council.[424] As far as the right of co-determination guaranteed to works councils is concerned, this has been interpreted by the judges in an extensive manner. In fact, the involvement of works councils is not only required if the device is specifically designed to monitor the employees' behavior but with respect to "*any new technical system that is capable of gathering information on an employee's behavior or performance".*[425]

Therefore, the right of co-determination under paragraph 87 of the Works Constitution Act pursues more than one objective. Specifically, the co-determination right can be a preventive measure intended to block in advance legally inadmissible monitoring methods, which could determinate possible invasions into the employees' personal sphere. Moreover, the co-determination right assures that the works council will effectively verify what impact the employees' control tools may have on the workers' rights and, in the case of legally permitted inspections, how they should be limited to the extent required by operational requirements.[426]

The contribution of jurisprudence in this matter has always been significant in defining the boundaries of the employer's powers. As will be analyzed in more detail below, the Federal Labour Court has ruled that, in principle, any control measure that leads to interference by the employer in the intimate sphere of workers is unlawful.[427] The contribution of the jurisprudence of the German

[424] Finkin, M.W., Krause, R. & Okuno, H.T. (2015). Employee autonomy, privacy, and dignity under technological oversight. In M.W. Finkin & G. Mundlak (Eds.), *Comparative labor law* (p. 169). Cheltenham, Northampton: Edward Elgar Publishing; Wiese, G. (1971). Der Persönlichkeitsschutz des Arbeitnehmers gegenüber dem Arbeitgeber. In *Fundheft für Arbeits- und Sozialrecht*, 17(112), pp. 273-317; BAG, resolution of 29 June 2004 - 1ABR21/03. In *Neue Zeitschrift für Arbeitsrecht*, 2004, pp. 1278-1284.

[425] Schwartz, R.G. (1992). Privacy in German Employment Law. *Hastings International and Comparative Law Review*, 15(2), p. 135-167; BAG, ruling of 09 September 1975. In *Sammlung der Entscheidungen des Bundesarbeitsgerichts*, 27, 256, pp. 260-61.

[426] Schulze, M.O. (2015). Datenschutz: Grundlagen und Rechte des GBR/ BR. In Arbeitsrecht für Arbeitsnehmer, p. 8.

[427] In 1994, the Federal Labour Court ruled that it was illegal to dismiss an employee on the grounds of his or her homosexuality. BAG, ruling of 23 June 1994 - 2 AZR617/93. In *Beck-Rechtsprechung* pp. 9998 - 150312. The judgment of the regional labor court Of Düsseldorf of 14 November 2005 was along the same lines, in so far as it declared unlawful the attempt by the well-known American retail store chain Wal-Mart to introduce in one of its branches in Germany a prohibition on employees going out together after working hours. LAG Düsseldorf, resolution of 14 November 2005 - 10TaBV46/05. In *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report*, 2006, pp. 81-88; Kolle, T. &

Federal Labour Court is also fundamental in relation to the consequent validity to be attributed at the evidential level to evidence gathered inadmissibly. In the German labor law system, there is no legislative provision equivalent to that in §§ 136a of the Code of Criminal Procedure (*Strafprozessordnung*), which prohibits the use of evidence obtained by means of prohibited interrogation methods. In light of the lack of an express statutory prohibition, case-law has been active in drawing up a criterion by which to admit or disallow evidence obtained in violation of data processing legislation and thus in violation of the employee's broader right of personality. In this area, case-law has tended to disallow the use of evidence obtained through serious breaches of data protection legislation, while admitting evidence obtained through mere irregularities. Following this line of case-law, for example, the Federal Labor Court has deemed evidence obtained in breach of the duty of co-determination guaranteed to works councils by the Works Constitution Act (*Betriebsverfassungsgesetz*) admissible.[428] The lack of legislation regarding the use of evidence inadmissibly collected in labor proceedings and the application of the criterion developed by case-law of the greater or lesser seriousness of the violation itself determine an uncertain legal framework regarding the usability in court of unlawfully collected employee data. The application of the criterion elaborated by jurisprudence devolves to the judge the delicate identification of the point beyond which a violation of data protection regulations is to be considered of such gravity as to preclude the use of illegally collected information as evidence.[429]

Another constitutionally guaranteed value deeply linked to the right of the personality is the right to informational self-determination (*informationelle Selbsbestimmung*), developed by the

Deinert, O. (2006). Liebe ist Privatsache. Grenzen einer arbeitsvertraglichen Regelung zwischenmenschlicher Beziehungen. *Arbeit und Recht*, pp. 177–184.

[428] BAG, ruling of 27 July 2017 – 2 AZR 681/16, in Neue Zeitschrift für Arbeitsrecht 2017, p. 1327-1332; Däubler, W. (2019). *Gläserne Belegschaften. Handbuch zum Beschäftigtendatenschutz*. Frankfurt: Bund-Verlag, Rn. 388 a ff.

[429] Weichert, T. (2020). Datenschutz-Grundverordnung - arbeitsrechtlich spezifiziert. *Neue Zeitschrift für Arbeitsrecht*, p. 1602.

German Federal Constitutional Court in a well-known ruling of 1983,[430] in the context of which the Constitutional Court judges became aware of the consequent emerging need in the digital age to control over the diffusion of one's own data in the light of the obstacle to the free determination of one's own personality that the uncontrolled diffusion of one's data can determine. In this sense, the autonomy essential for the development of one's own identity would necessarily also imply autonomy in the disclosure of one's own information to others,[431] in so far as human behavior and our decisions can be strongly conditioned if an extensive and capillary data collection practice is implemented.[432] The formulation of this concept has been taken up in Article 8 of the European Charter of Fundamental Rights, which expressly recognizes the right to informational self-determination, originally developed by the German Constitutional Court specifically as a right to data protection.[433]

The German Federal Labour Court also recognized in this case that the right to informational self-determination is not only vertically applicable as a defense against the abuse of power by the State but also horizontally in relations between private individuals,[434] and, therefore, also within the employment relationship.[435] In other terms, the collection and processing of workers' data by the employer are allowed on the condition that the right of informational self-determination is not violated (always due to the mechanism of indirect effectiveness - *Mittelbare Drittwirkung*). For this reason, the German legislator, in amending in 2009 the Federal Data Protection Act,[436] has provided

[430] BVerfG, ruling of 15 December 1983 - 1BvR209/83. In *Entscheidungen des Bundesverfassungsgerichts*, 65, p. 1.
[431] Benda, E. (1984). Das Recht auf informationelle Selbstbestimmung und die Rechtsprechung des Bundesverfassungsgerichts zum Datenschutz. *Datenschutz und Datensicherheit, Recht und Sicherheit in Informationsverarbeitung und Kommunikation*, 2, pp. 86-90
[432] Finkin, M.W., Krause, R. & Okuno, H.T. (2015). Employee autonomy, privacy, and dignity under technological oversight. In M.W. Finkin & G. Mundlak (Eds.), *Comparative labor law* (p. 170). Cheltenham, Northampton: Edward Elgar Publishing.
[433] Weichert, T. (2020). Datenschutz-Grundverordnung – arbeitsrechtlich spezifiziert. *Neue Zeitschrift für Arbeitsrecht*, p. 1599.
[434] BVerfG, ruling of 11 June 1991 - 1 BvR239/90. In *Entscheidungen des Bundesverfassungsgerichts*, 84, p. 192.
[435] BAG, ruling of 22 October 1986 - 5AZR660/85. In *Neue Zeitschrift für Arbeitsrecht*, 1987, p. 415.
[436] Bundesdatenschutzgesetz of 27.1.1977, in Bundesgesetzblatt, part I, n. 7 of 1.2.1977, as amended by Act of 30.06.2017, in Bundesgesetzblatt, part I, n. 44 of 05.07.2017.

specific safeguards for the labor law sector, also in view of the inherent subordination to the employment relationship.[437]

The objective of the Federal Data Protection Act was to protect the personal rights of individuals whenever their data are collected, processed, and used by public bodies, public authorities, or non-public agencies of the federal states.[438] Among the fundamental principles identified by the Federal Data Protection Act are: the principle of consent jointly with the principle according to which the collection, processing, and use of personal data are subject to the rule of law; the principle of immediacy by which the personal data must be collected directly from the person concerned;[439] and the principle of proportionality between the sacrifice imposed on the protection of individual rights and the regulation of data processing.[440] Moreover, the data protection act implements the principle of data avoidance and data economy by reason of which every data processing system should apply anonymization or pseudo-anonymization. Among the other principles enshrined in the Federal Data Protection Act are the principle of transparency under which the data controller must disclose to the data subject his or her own identity and the purposes of the collection, processing, or use and, lastly, the principle of earmarking by which if the data processing and collection is authorized for a particular purpose, the data utilization is limited to this purpose, except if a new consent is obtained from the data subject or a legal provision allows the data to be used for a further purpose. In addition, the Federal Data Protection Act assumes a broad definition of employee, which includes: temporary workers, volunteers, federal civil servants,

[437] BAG, ruling of 23 October 2006 - 1 BvR2027/02. In *Recht und schaden*, 2007, p. 29.
[438] Paragraph 1 of Bundesdatenschutzgesetz of 27.1.1977, in Bundesgesetzblatt, part I, n. 7 of 1.2.1977, as amended by Act of 30.06.2017, in Bundesgesetzblatt, part I, n. 44 of 05.07.2017.
[439] Paragraph 1 of Bundesdatenschutzgesetz of 27.1.1977, in Bundesgesetzblatt, part I, n. 7 of 1.2.1977, as amended by Act of 30.06.2017, in Bundesgesetzblatt, part I, n. 44 of 05.07.2017.
[440] Paragraph 4 of Bundesdatenschutzgesetz of 27.1.1977, in Bundesgesetzblatt, part I, n. 7 of 1.2.1977, as amended by Act of 30.06.2017, in Bundesgesetzblatt, part I, n. 44 of 05.07.2017.

employee-like persons[441] (*arbeitnehmerähnliche Personen*), and also candidates for employment and persons whose employment is terminated.[442]

As regards the regulation of data processing within the employment relationship specifically, the German legislator, with the 2009 amendment, intervened to lay down a series of provisions aimed at protecting workers' data with regard to any types of processing, automated or not, including special categories of personal data, whether or not it is stored in a filing system.[443] After the entry into force of Regulation 2017/679/EU, the German legislator intervened once more in 2018 on the text of the Federal Data Protection Act by transposing the principles introduced at the European level.

The text of the Federal Data Protection Act prior to the 2009 amendment did not specifically regulate the processing of data in the workplace, but the employer was required to adopt a series of general safeguards in the processing of employees' data. Among these were the provisions concerning: the keeping a register of the data collected and the processing systems, the duty to specify the purposes of the processing, and the right to store, modify, transmit or use the personal data of employees for economic purposes only in specific cases, such as for the purpose of a contractual relationship or similar and in the case of publicly available data. Each data operation was subordinate to the condition that there was no reason to assume that the legitimate interest of the data subject in excluding the data processing clearly outweighed the legitimate interest of the controller.[444]

[441] In a broad sense, persons who, because of their economic dependence, are to be regarded as persons similar to employees.
[442] Paragraph 26, number 8 of Bundesdatenschutzgesetz of 27.1.1977, in Bundesgesetzblatt, part I, n. 7 of 1.2.1977, as amended by Act of 30.06.2017, in Bundesgesetzblatt, part I, n. 44 of 05.07.2017.
[443] Paragraph 26, number 7 of Bundesdatenschutzgesetz of 27.1.1977, in Bundesgesetzblatt, part I, n. 7 of 1.2.1977, as amended by Act of 30.06.2017, in Bundesgesetzblatt, part I, n. 44 of 05.07.2017.
[444] Paragraph 28 of Bundesdatenschutzgesetz of 27.1.1977, in Bundesgesetzblatt, part I, n. 7 of 1.2.1977, as amended by Act of 20.12.1990, in Bundesgesetzblatt, part I, n. 73 of 29.12.1990.

Under the current regime according to the § 26 BDSG, employees' personal data may first be processed if this is necessary for the purposes of the establishment, implementation, or termination of the employment relationship itself. Secondly, the processing of employees' data is permitted if it is necessary for the exercise or fulfillment of the rights and obligations of employee representation provided for by a law or a collective agreement. A further hypothesis of employees' data processing provided for by the Federal Data Protection Act concerns the detecting of breaches supported by documented well-founded indications giving rise to suspicions that the data subject has committed an offense in the course of his/her working activity, provided that the processing of the data is necessary to ascertain the breach, that the interest of the employee in excluding the processing of the data is not overridden, and that the nature and extent of the processing are not disproportionate to its objective.

Where the processing of employees' personal data is based on the consent and collective agreements,[445] the assessment of the voluntary nature of the consent must take particular account of the employee's position of dependence on the employer and of the circumstances in which the consent was given.[446] The consent must be given in writing or electronically, and the employer must inform the employee in writing about the purpose of the data processing and his/her right of revocation pursuant to Article 7 paragraph 3 of Regulation 2017/679/EU. The Federal Data Protection Act expressly recalls and transposes the provisions of Article 9 of Regulation 2017/679/EU concerning the processing of special categories of personal data, the processing of which is permitted if it is necessary for the exercise of rights or for the fulfillment of legal obligations

[445] The collective agreements must, according to Article 88, paragraph 2 of Regulation 2017/679/EU, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees'' personal data in the employment context. Article 88 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Retrieved from http://data.europa.eu/eli/reg/2016/679/oj.

[446] Riesenhuber, K. (2011), *Die Einwilligung des Arbeitnehmers im Datenschutzrecht*. In *Recht der Arbeit*, pp. 257-265.

arising from labor law, social security, or social protection law and if there is no reason to assume that the legitimate interest of the data subject in the exclusion of processing prevails over the processing itself. Also, in this case, consent to the processing of special categories of personal data must be given explicitly.

As regards the way in which the processing of employees' data must be carried out, the Federal Data Protection Act provides that the controller must take any appropriate measures to ensure that the fundamental principles governing the processing of personal data set out in Article 5 of Regulation 2017/679/EU are respected.

The employer's investigation into the activity of the employee on the network raises the question of the legitimacy under the Federal Data Protection Act of the collection and processing of the employee's data on social networks. As already noted, the employee's networking activities are, in principle, part of his or her private sphere because the employee should only be active on social channels in his or her free time and also because, very often, the employee's network profiles are private and therefore not accessible to everyone.[447] Under these conditions, if the employer is not able to access the worker's online content, the employee's consent to the processing of the data should be assumed to be refused.[448] In light of these circumstances, it is complex to define in which cases and how the employer can investigate the social profiles of workers. On the one hand, the employee's interest in keeping his/her online activity private is implicit; on the other hand, German courts have ruled in certain cases that employees' personality rights can be sacrificed if it is justified by the employer's need to discover evidence of an employee's infringement.[449] The employer has been granted the right to examine the browser history of the worker's computer to check whether

[447] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. In *Neue Zeitschrift für Arbeitsrecht*, p. 787.
[448] Riesenhuber, K. (2011). Die Einwilligung des Arbeitnehmers im Datenschutzrecht. In *Recht der Arbeit*, p. 257.
[449] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. In *Neue Zeitschrift für Arbeitsrecht*, pp. 787-788.

the suspicion of unauthorized use of the Internet by the worker is well-founded.[450]

Nevertheless, in the case of surveys carried out by the employer on social networks, these are controls carried out in a channel regarded by the employee as closed. In other words, for a number of reasons, the employee tends to believe that information relating to the social network does not leave this channel,[451] and thus, there seem to be grounds for believing that the employer could process the employee's publicly available data on the Internet, provided that the employer reveals his/her identity, has no less intrusive means at his/her disposal, and the collection methods are proportional.[452]

Even in the case of controls aimed at gathering evidence of possible infringements by the worker, such as checking the history of the employee's browser, the works council has the right to co-determine with the employer the terms under which such controls actually operate, if the employment contract does not already regulate this hypothesis.[453] As already noted, the works council verifies whether the computerized control methods used by the employer may result in any infringement of workers' data protection.[454] However, the right of co-determination recognized to the works council is related to large-scale control measures of workers and not related, therefore, to the case of investigations against an individual worker.[455] However, if investigations are directed against several employees, the works council must be involved by the employer to fulfill its function as guarantor.[456]

---

[450] LAG Rheinland-Pfalz, ruling of 25 November 2014 - 8 Sa 363/14, in *Beck-Rechtsprechung*, 2015, p. 68577; LAG Berlin-Brandenburg, ruling of 14 January 2016 - 5 Sa 657/15, in *Beck-Rechtsprechung*, 2016, p. 67048.
[451] BAG, ruling of 10 December 2009 - 2 AZR 534/08. In *Neue Zeitschrift für Arbeitsrecht*, 2010, pp. 698-701.
[452] BAG, ruling of 18 October 2011 - 9 AZR 303/10. In *Neue Zeitschrift für Arbeitsrecht*, 2012, p. 143, n. 28.
[453] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. In *Neue Zeitschrift für Arbeitsrecht*, p. 788.
[454] Bundesarbeitsgerich Unterrichtungsanspruch des Betriebsrats - Einblicksrecht in Bruttolohn- und -gehaltslisten. In *Neue Zeitschrift für Arbeitsrecht*, 2007, pp. 99-103.
[455] Kania, Thomas (2021). Verhältnis zum Datenschutzrecht. In Müller-Glöge Rudi, Preis, Ulrich & Schmidt Ingrid (2021). *Erfurter Kommentar zum Arbeitsrecht*, § 87 Rn. 6.
[456] Fitting, K., Auffarth, F., Kaiser, H. et al (2012). Betriebsverfassungsgesetz: BetrVG Handkommentar, § 87, n. 17.

Lately, many employers have taken preventive measures to avoid situations in which the employee's networked behavior is detrimental to the employer's interests.[457] Among the measures taken is the provision of training courses to workers on the correct use of social networks, paying particular attention to the consequences that may arise from unwise use of social channels.[458] These courses fall into the § 98 VI Works Constitution Act, according to which the works councils are granted the right of co-determination in relation to the actual way in which the training courses are implemented.[459] A second preventive measure adopted by employers concerns the inclusion in the employment contract of a so-called "social media clause",[460] which precisely defines the terms under which the use of social media by employees during or outside working hours is permitted or prohibited. In most cases, employers prohibit the private use of all or some company network resources during working hours, as well as the private use of mobile phones to visit social media applications during working hours.[461] In contrast, during breaks from work, the employer cannot prohibit employees from using their private phones, yet often, the employer requires the employee to refrain from sharing prejudicial statements.[462]

A further means by which the use of social networks by employees can be regulated is the adoption of a "social media policy" pursuant to § 106 of the Trade Regulation (*Gewerbeordnung*) with the participation of the works council pursuant to § 87 I N. 1 of the Works Constitution Act, to the extent that the measures taken by the employer entail control over the conduct of

[457] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. In *Neue Zeitschrift für Arbeitsrecht*, pp. 790-791.
[458] Richardi, R. & Thüsing, G. (2016). *Betriebsverfassungsgesetz mit Wahlordnung*, § 98 Rn. 71.
[459] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. In *Neue Zeitschrift für Arbeitsrecht*, p. 791.
[460] Preis, U., Greiner, S., Rolfs, C., Stoffels, M. & Wagner, K. (2015). *Der Arbeitsvertrag*. Köln: Verlag Dr. Otto Schmidt, chapters II–I–10.
[461] BAG, ruling of 7 July 2005 - 2 AZR 581/04. In *Neue Zeitschrift für Arbeitsrecht*, 2006, pp. 98-101; Kramer, S. (2006). Kündigung wegen privater Internetnutzung. *Neue Zeitschrift für Arbeitsrecht*, pp. 194-197; Preis, U., Greiner, S., Rolfs, C., Stoffels, M. & Wagner, K. (2015). *Der Arbeitsvertrag*. Köln: Verlag Dr. Otto Schmidt, chapters II–I–10, Rn. 6.
[462] BAG, ruling of 25 August 1966 - 5 AZR 525/65. In *Neue Juristische Wochenschrift*, 1976, pp. 125-126; Richters, S. & Wodtke, C. (2003). Schutz von Betriebsgeheimnissen aus Unternehmenssicht "Verhinderung von Know-how Abfluss durch eigene Mitarbeiter". In *Neue Zeitschrift für Arbeitsrecht*, pp. 281-287.

employees.[463] A "social media policy" governing the use of social networks by employees is a flexible instrument, which is why it can be adapted from time to time to the new technological developments and guarantees the right of co-determination of the works council.[464] In addition, a "social media policy" regulating the use of social networks by employees makes the otherwise necessary consent of the employee under § 4a (*Bundesdatenschutzgesetz*) and the examination of the necessity of data collection under § 28 and 32 (*Bundesdatenschutzgesetz*) superfluous.[465] The "social media policies" generally determine whether and in what time frame it is permitted to use the company's network resources for private purposes; whether employees are permitted to use their smartphones during working hours to surf the net; whether the employer is permitted to check the employee's browser history and the content of obligations such as the prohibition of disclosure of company secrets.[466]

The effort to lay down specific rules on data processing in the work context is not only being made at the company level but also at the legislative level. In June 2020, the Federal Ministry of Labor and Social Affairs (Bundesarbeitsministerium) established an interdisciplinary advisory committee for the definition of new law on the protection of employee data, applying Article 88 of Regulation (EU) 2016/679, which invites Member States to dictate a detailed discipline for the work context within the general framework of principles established by the regulation itself. One of the aspects on which it is hoped the legislator will intervene concerns the strengthening of the powers of the works council. On this aspect, the German doctrine considers that in the ever-changing technological context, it is essential to ensure the full and effective participation of the works

[463] Determann, L. (2013). Soziale Netzwerke in der Arbeitswelt - Ein Leitfaden für die Praxis. Arbeitszeit, Bewerberauswahl, Ermittlungen, Plattform, Richtlinie, Soziale Netzwerke. *Betriebs-Berater*, 4, p. 181.
[464] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. In *Neue Zeitschrift für Arbeitsrecht*, p. 791.
[465] Kania, T. (2021). Verhältnis zum Datenschutzrecht. In Müller-Glöge Rudi, Preis, Ulrich & Schmidt Ingrid (2021). *Erfurter Kommentar zum Arbeitsrecht*, § 87 Rn. 61.
[466] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. In *Neue Zeitschrift für Arbeitsrecht*, p. 791.

council, in light of the fact that it often does not have the necessary skills and resources to assess the impact on employees' rights caused by the use of technology in supervision.[467] Some of the significant aspects in this matter concern: the availability to the works council of the necessary documentation, such as the list of data processing activities and the data protection impact assessment; the availability of resources for the possible appointment of consultants, and also the possibility of giving the works council a right of participation in the nomination of the data protection officer.[468]

A further area of German labor law in which there are significant legislative gaps concerns the protection of whistleblowing. In particular, the Law on the Protection of Trade Secrets (das Gesetz zum Schutz von Geschäftsgeheimnissen) precludes the employer from suing for damages but does not protect the employee against possible retaliatory sanctions.[469] Therefore, with respect to this matter as well, the regulatory intervention that the European Directive 2019/1937 will implement by December 17, 2021 on the protection of persons who report breaches of Union law is considerable.

In conclusion, the analysis of employees' data protection and privacy within the German legal system reveals a particularly significant aspect, namely, the collective conception of the right to data protection. Since 1984, the German Federal Labour Court[470] has defined data protection in the employment context as part of the co-determination rights between employee and employer representative, intended to protect employees' right of personality.[471] This system is also confirmed

[467] Weichert, T. (2020). Datenschutz-Grundverordnung – arbeitsrechtlich spezifiziert. *Neue Zeitschrift für Arbeitsrecht*, p. 1602 ff.
[468] Schuler, K. & Weichert, T. (2016, April 8). Die EU-DSGVO und die Zukunft des Beschäftigtendatenschutzes. Retrieved from https://www.netzwerk-datenschutzexpertise.de/sites/default/files/gut_2016_dsgvo_beschds.pdf.
[469] Dann, M. & Markgr, J.W. (2019). Das neue Gesetz zum Schutz von Geschäftsgeheimnissen. *Neue Juristische Wochenschrift,* pp. 1174-1179; Ulrici, B. (2021). *Geschäftsgeheimnisschutzgesetz. Handkommentar.* Baden-Baden: Nomos Verlag.
[470] BAG, ruling of 14 September 1984 - 1 ABR 23/82, BAG, ruling of 08 November 1994 - 1 ABR 20/94.
[471] Colucci, M. (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of View. In Roger Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43). The Hague/London/New York: Kluwer Law International, p. 87.

by the Workers' Constitution, which identifies, under paragraph 87, subparagraph 1, n. 6 of the Workers' Constitution, as the basis of the rights of co-determination, the protection of employees' general personal rights against the dangers of control by means of technical equipment and the promotion of the free development of the employees' personality, pursuant to paragraph 75, paragraph 2, n. 1 of the Workers' Constitution.[472]

2.4.7 The need to share

In recent years, sociologists and psychologists have begun been investigating the motivations behind the increasingly widespread practice of disclosure of personal information by users of social networks. According to the traditional definition, self-disclosure is understood *as "any message about the self that a person communicates to another"*.[473] According to some studies, the desire to show oneself on social networks is based on an addiction mechanism. On the one hand, social networks have the merit of increasing self-esteem because they are able to show a positive and desirable self-image, while on the other, they induce a decrease in self-control.[474]

One of the theories underlying the self-disclosure mechanism is the Social Exchange Theory, according to which interpersonal relations are determined by a subjective evaluation of benefits and costs.[475] The application of the Social Exchange Theory to the technological context laid the basis for the formulation of a further theory, that of Privacy Calculus, according to which "*some users feel that the returns for disclosure offset the risk of their privacy being compromised*".[476] According to this view, social network users assess the risks to their privacy when sharing personal

[472] Schulze, M.O. (2015). Datenschutz: Grundlagen und Rechte des GBR/ BR. In Arbeitsrecht für Arbeitsnehmer, p. 8.
[473] Wheeless, L.R. & Grotz, J. (1976). Conceptualization and measurement of reported self-disclosure, *Human Communication Research,* 2(4), pp. 338-346.
[474] Wilcox, K. & Stephen, A.T. (2013). Are close friends the enemy? Online social networks, self-esteem, and self-control. *Journal of Consumer Research*, 40(1), pp. 90-103. Retrieved from https://doi.org/10.1086/668794
[475] Homans, G. C. (1958). Social behavior as exchange. *American Journal of Sociology,* 63, pp. 597-606.
[476] Spiekermann, S., Krasnova, H., Koroleva, K., Hildebrand, T. (2010). Online social networks: Why we disclose. *Journal of Information Technology*, 25(2), p. 111. doi:10.1057/JIT.2010.6

information as marginal compared to the benefits they may gain from self-disclosure.[477] In this assessment, according to further studies, a key role may be played by social network users' trust in online social network providers to mitigate privacy risks.[478] Yet, there is a discrepancy between the expressed concern about data protection and the actual use of social networks by users. This phenomenon is called the "privacy paradox", a term used to indicate the inconsistency between the concern expressed by users for their privacy and the limited precautions taken by them to protect their data.[479] It would seem, therefore, that social network users' perceptions of the level of protection of their privacy would have no influence on the amount of information shared online by users.

The reasons for this paradox are to be found in the decision-making process that leads a user to consider it convenient to compromise the protection of his or her data against the benefits of disclosure of personal information. The analysis of costs and benefits by social network users is not always guided by rational criteria but rather distorted by the immediate benefits of messaging services or the possibility to stay in touch with distant people through social networks. In the comparative assessment of costs and benefits, further so-called "irrational" elements, such as gratification, influence users in their risk assessment, resulting in a distorted risk-benefit calculation.[480] Ultimately, users' attitudes towards the privacy protection provided by social networks are more driven by instinct than by objective criteria.

[477] Krasnova, H., Kolesnikova, E. & Günther, O. (2009). It won't happen to me!: Self-disclosure in online social networks. *In 15th American Conference on Information Systems* (San Francisco, USA, 2009).

[478] Dwyer, C., Hiltz, S.R. & Passerini, K. (2007). Trust and privacy concern within social networking sites: A comparison of Facebook and MySpace. In *Thirteenth American Conference on Information Systems* (Keystone, USA, 2007).

[479] Barth, S. & de Jong, M.D. (2017). The privacy paradox: Investigating discrepancies between expressed privacy concerns and actual online behavior - A systematic literature review. *Telematics and informatics*, 34(7), pp. 1038-1040. https://doi.org/10.1016/j.tele.2017.04.013.

[480] Barth, S. & de Jong, M.D. (2017). The privacy paradox: Investigating discrepancies between expressed privacy concerns and actual online behavior - A systematic literature review. *Telematics and informatics*, *34*(7), 1050. https://doi.org/10.1016/j.tele.2017.04.013.

In conclusion, therefore, the function performed by social networks is often perceived by users to be so important as to justify possible prejudices to the protection of their data. One of the solutions to the so-called privacy paradox could be to increase users' awareness of the risks associated with the use of social networks by developing IT systems from a design perspective around the user's actual awareness of the risks.[481] A further awareness-raising tool, especially effective in the workplace, is the provision of training courses aimed at informing workers of the risks associated with the careless use of social networks.

[481] Gambino, A., Kim., J., Sundar, S.S., Ge, J. & Rosson, M.B. (2016). User disbelief in privacy paradox: Heuristics that determine disclosure. Proceedings of the 2016 CHI Conference Extended Abstracts on Human Factors in Computing Systems, pp. 2837-2842.

THE RELEVANCE OF EXTRA-WORK CONDUCT FOR THE PURPOSES OF DISMISSAL

3.1 INTRODUCTION

As already observed, in the Italian and German legal systems, for a few years now, a wide range of judgments has been recorded on dismissal in relation to a worker's online activities, often on social networks. As has already emerged, there are frequently profound similarities in the concrete dynamics with which the worker's conduct takes shape. This circumstance makes it easier to compare the decisions of German and Italian courts as it is more straightforward to classify the various pronouncements by reason of the worker's conduct. For instance, this can be done by sorting the rulings on dismissal for online insults addressed by the worker to colleagues or the employer from the rulings on dismissal for photos the worker shared online that are deemed by the employer to be unsuitable for the role held by the employee.

Nevertheless, a required step before conducting research on the analysis of the pronouncements issued in Italy and Germany is to analyze the discipline of dismissals in the two legal systems in order to understand which aspects are crucial to the two different legal regimes.

Once the Italian and German legal frameworks in which the judicial decisions on dismissals for the off-duty conduct of the worker are inserted is clear, will it be possible to proceed with the examination of the rulings issued by the Italian and German courts in order to identify the predominant jurisprudential guidelines.

As will emerge, the arguments put forward by the courts do not always find consensus within the doctrine. In this regard, in the Italian legal system, there has long been a singular trend of "incommunicability"[482] between the legal labor doctrine and jurisprudence. This is because the judges, on the one hand, still practice the application of the loyalty criteria in order to individuate

[482] Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, p. 1.

private behaviors that can legitimize the exercise of the employer's withdrawal power;[483] while on the other, the legal labor doctrine has theoretically reviewed the concept of loyalty in the employment relationship.[484] It is because of this established jurisprudential practice that a methodological need arises for a critical investigation of the effective enforceability of the civil law category of loyalty to the employment relationship.[485]

3.2 TERMINATION OF THE EMPLOYMENT RELATIONSHIP IN ITALY: GENERAL PRINCIPLES

In the Italian legal system, three different forms of individual dismissal can be distinguished according to the reason behind it. The first case of dismissal, the so-called "dismissal for just cause", does not require notice and can be ordered by the employer to the employee *"if there is a cause that does not allow the continuation, even temporary, of the relationship"* (Article 2119 Civil Code). The second form, the so-called "dismissal for a justified subjective reason", concerns, according to Law n. 604 of 1966, dismissal with notice, which occurs in the event of *"a significant breach of the contractual obligations of the employee".* The last case is the case of dismissal for an objective

[483] The reference to the violation of the bond of loyalty is constant in the judgments concerning dismissals due to off-duty conduct on the Internet, as a criterion for assessing the legitimacy of the dismissal itself. The Supreme Court of Cassation held that *"the modest entity of the acts with which the employee is charged should not be related to the minor gravity of the material damage suffered by the employer, since it is necessary to assess the conduct of the employee in terms of the symptomatic value that it can assume with reference to his future conduct, as well as to question the future correctness of the performance and to affect the essential element of loyalty, underlying the employment relationship"* (Corte Suprema di Cassazione, ruling of 18 June 2009, n. 14176, in *Il lavoro nella giurisprudenza* (2009), 1166); and that *"In the matter of disciplinary dismissal, it is justify ground of dismissal, as it may affect the bond of loyalty in the employment relationship, the disclosure on Facebook of an offensive comment addressed to the employer's company, integrating this conduct the extremes of defamation, for the ability of the means used to determine the circulation of the message between an indeterminate group of people".* See Tosi, P. & Puccetti, E. (2018). Post denigratorio su "Facebook", la leggerezza che per pubblicità diventa giusta causa (note to judgment Corte Suprema di Cassazione, ruling of 27 April 2018, n. 10280). *Giurisprudenza italiana*, 8-9, pp. 1958-1962.

[484] Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, 1.

[485] In the course of the present dissertation, it will be possible to observe that not only the recourse to the civil categories is increasing in relation to the extra-work spaces, but that in the face of a renewed season of disciplining the employment relationship in the name of "flexibility" and a labor legislation marked by normative measures of an emergency nature, the doctrine of labor law seems to find in the general categories of civil law some valid instruments to reaffirm those protections that the legislation of the sector seems to have sacrificed in recent years. Poletti, D. (2017). Il c.d. diritto alla disconnessione nel contesto del "diritti digitali". *Responsabilità civile e previdenziale*, 1, p. 16; Mariucci, L. (2010). Ridare senso al diritto del lavoro. Lo Statuto oggi. *Lavoro e diritto*, pp. 5-17.

reason, which is determined exclusively by reasons related to the organization of the business activity.

Part of the doctrine suggests that the difference between dismissal for just cause and dismissal for a justified subjective reason lies in the different nature of the conduct imputable to the worker. This is because the legislator adopts a different terminology referring to a broad term, such as "cause", for the dismissal for just cause and to a specific parameter, such as that of "breach of the contractual obligations" for dismissal for the justified subjective reason. For this reason, even conduct outside the contractual relationship can lawfully lead to dismissal for just cause if it affects the employer's reliance on the accuracy and satisfaction of future job performance.[486] According to this first reconstruction, the so-called "objective or fiduciary theory", not only a breach of contract but also extra-workplace conduct could give rise to dismissal for just cause if it affects the relationship of trust between the employer and the employee.

Conversely, according to a different doctrinal reconstruction, the so-called "subjective or contractual theory", only conduct which could constitute a breach of contract attributable to the employee could give rise to dismissal for just cause, with the consequence that those facts outside the employment relationship and falling within the employee's private sphere would not be relevant.[487]

Therefore, according to the first theory, the difference between dismissal for just cause and dismissal for a justified subjective reason would be of a qualitative nature since the employment relationship could end due to private behavior that is prejudicial to the bond of loyalty between worker and employer. However, according to the second doctrinal opinion, the difference between

[486] Pera, G. (1980). *La cessazione del rapporto di lavoro*. Padova: CEDAM, p. 70; Chiantera, F. (2006). La rilevanza dei comportamenti extralavorativi ai fini della giusta causa di licenziamento. In R. De Luca Tamajo & F. Bianchi D'Urso (Eds.), *I licenziamenti individuali e collettivi nella giurisprudenza della Cassazione*. Milano: Giuffrè, pp. 193-194.

[487] Ballestrero, M.V. (1991). Giusta causa e giustificato motivo soggettivo. In F. Carinci (Ed.), *La disciplina dei licenziamenti dopo le leggi 108/1990 e 223/1991.* Napoli: Jovene, p. 109; Riva Sanseverino, L. (1978). *Diritto del lavoro*. Padova: CEDAM, 13 ed., pp. 395-400.

dismissal for just cause and dismissal for a justified subjective reason would be exclusively quantitative, in the sense that the basis of both cases of individual dismissal would always be a breach of contract, but in the case of dismissal for just cause, the breach would be of particular gravity and relevance.[488] Apart from the boundaries of the contractual relationship, the subjective or contractual theory no longer offers valid conceptual support since the worker's contractually enforceable obligations fail, and therefore, it is not possible to support the existence of an employee's breach of contract.

3.3 Termination of the employment relationship in Germany: general principles

In order to proceed with the analysis of the German case-law in the matter of dismissals due to private conduct, with particular focus on the employee's web activities, it is first necessary to consider a couple of specific features of the German dismissal regulations.

One of the peculiarities of German labor law is the absence of a constitutional provision safeguarding the worker's job retention, as well as a clear recognition of the employer's freedom to conduct an economic initiative.[489] In response to that regulatory gap, the German Federal Constitutional Court intervened by offering a broad and protective interpretation of the freedom to choose one's profession, provided for in Article 12 of the German Constitution, stating that it also concerns, firstly, the worker's right "to maintain or to give up" his or her working position[490] and, secondly, the employer's right to establish and choose how to conduct economic activity.[491] In that regard, the German Federal Constitutional Court pointed out that although the freedom to choose one's profession does not have a direct horizontal effect between private parties, it requires a definition by the German courts of the best possible balance between the opposite interests of the

[488] Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, pp. 46-50.
[489] Santagata, R. (2013). I licenziamenti in Germania: i presupposti di legittimità. *Diritto delle relazioni industriali*, 3, p. 888.
[490] BVerfG, ruling of 24 April 1991.
[491] BVerfG, ruling of 1 March 1979 - 1 BvR 533/77, in Entscheidungen des Bundesverfassungsgerichts.

employee and the employer in order to preserve the constitutionally guaranteed legal position of the worker.[492]

In particular, a well-known ruling of the German Federal Constitutional Court of 1998 has ruled on the principle whereby "*if the provisions of the Dismissal Protection Act do not apply, the employees are protected by the civil law general clauses against the immoral or unfair exercise of the employer's right to dismiss*".[493] According to this principle, which is now well established in the German courts' rulings, the employer is not allowed to order an arbitrary dismissal, for instance, by selecting the employee affected by the dismissal, without considering the social situation of each worker.[494]

These jurisprudential findings lead to an interpretation of the German Act on dismissals (*Kündigungsschutzgesetz*), which provides that the employer must justify from a social point of view the legitimacy of a dismissal, claiming an urgent business need (*betriebsbedingte kündigung*) as a reason for the withdrawal, a reason relating to the person of the employee (*personenbedingte kündigung*), or conduct attributable to the worker him/herself (*verhaltensbedingte Kündigung*).[495] Therefore, there are three different categories of dismissal allowed in Germany, each is based on different grounds and can lead to dismissal without prior notice for serious reasons or to an ordinary dismissal with notice. In relation to each of the three different categories of dismissal, once again,

[492] Dieterich, T. (2007). Unternehmerfreiheit und Arbeitsrecht im Sozialstaat. *Arbeit und Recht*, pp. 65-67; Santagata, R. (2013). I licenziamenti in Germania: i presupposti di legittimità. *Diritto delle relazioni industriali*, 3, p. 889.

[493] Literally, *"Wo die Bestimmungen des Kündigungsschutzgesetzes nicht greifen, sind die Arbeitnehmer durch die zivilrechtlichen Generalklauseln vor einer sitten- oder treuwidrigen Ausübung des Kündigungsrechts des Arbeitgebers geschützt"*.

[494] BVerfG, ruling of 27 January 1998, in BvL 15/87, according to which *"Insofar as a selection has to be made among several employees, the constitutional protection of the job in connection with the principle of the welfare state requires a certain degree of social consideration. Finally, a trust in the continuation of an employment relationship earned through many years of cooperation must not be disregarded".*

[495] According to Article 1 of the German dismissal protection act (Kündigungsschutzgesetz), the termination of the employment relationship is not socially justified under German labor law and it is therefore ineffective if it is not caused: 1) by reasons depending on the employee's person (personal termination), 2) due to the behavior of the employee (dismissal due to behavior), or 3) by urgent operational requirements (dismissal for operational reasons).

the case-law has taken on the task of specifying the scope of each and the boundaries between them.

The first hypothesis of dismissal for economic reasons, according to the law on dismissals, is intended to be applied in the presence of urgent business needs incompatible with the continuation of the employment relationship. The procedure to be followed by the employer in the event of a dismissal for economic reasons requires the employer to examine the possibility of including the worker in the company in a different way, for instance, promoting an update of the worker's professional skills or offering the employee an alternative position, possibly on less favorable economic terms.[496] Furthermore, according to § 1, subparagraphs 3-5 of the German Act on dismissals, dismissal due to urgent business needs is socially justified if the employer, in selecting the employee to be dismissed, takes into account criteria such as: length of service, age of the employee, family burdens and any disabilities of the employee. At the request of the employee, the employer is then required to indicate the specific factors on the basis of which he has chosen the person to be fired (*Sozialauswahl*).

The second case of dismissal for reasons relating to the employee's person allows the employer to withdraw from the employment relationship if the employee, for reasons not dependent on his/her own will, is no longer able to perform the contractual obligations.

The third category of dismissal due to the worker's behavior very often includes cases of termination of the employment relationship because of an employee's off-duty conduct. The German doctrine and jurisprudence agree that ordinary dismissal can occur both in the case of violation of the fundamental obligations to work and respect to the employer's directives and in the case of a breach of an ancillary obligation.[497] In this respect, it is interesting to note a principle laid

[496] Santagata, R. (2013). I licenziamenti in Germania: i presupposti di legittimità. *Diritto delle relazioni industriali*, 3, pp. 892-893.
[497] Santagata, R. (2013). Il recente dibattito dottrinale e giurisprudenziale sui licenziamenti nel diritto tedesco (parte II). *Diritti lavori mercati*, 1, p. 109.

down by the Federal Labour Court (*Bundesarbeitsgericht*), according to which, in all contractual relationships, including the employment relationship, the parties must fulfill the mutual duties of protection as well.[498]

Regarding the third form of dismissal linked to the worker's behavior, the withdrawal may be ordinary, i.e., with notice, or extraordinary, if there are serious grounds (*wichtiger Grund*) that undermine the prior notice. The hypothesis of dismissal due to a worker's behavior occurs when, because of the circumstances of the specific case and by reason of a balance of the interests at stake, it is unreasonable to expect the employment relationship to continue for the usual period of notice.[499] In this legal framework, the court must first verify whether the conduct is likely to constitute a serious reason for the employment relationship's termination and, second, whether the dismissal is justified on the basis of a balance of opposing interests.

In determining whether the dismissal due to a worker's behavior is lawful, the judge must assess if the employee will reasonably fail to fulfill his/her duties again in the future. The termination of the employment relationship due to the employee's conduct is not intended to punish past conduct but to exclude the risk of future violations of the employment contract. As a rule, therefore, there must be a danger of recurrence. The risk of repetition occurs if the employer can no longer expect the employee to behave in accordance with the contract in the future.[500] In principle, the prerequisite for a negative prognosis is that the employee receives a warning notice, and he/she nevertheless violates his/her contractual obligations. Only then can it be assumed that the employee will not change his/her behavior in the future.[501]

[498] BAG, ruling of 12 January 2006, in lexetius.com/2006, p. 1331. The Federal Labour law considered lawful the termination of an employment relationship due to the unauthorised installation of an anonymisation software on the service computer capable of detecting unauthorised use of the Internet.
[499] Santagata, R. (2013). I licenziamenti in Germania: i presupposti di legittimità. *Diritto delle relazioni industriali*, 3, p. 896.
[500] BAG, ruling of 25 October 2012 - AZR 495/11, in *Neue Zeitschrift für Arbeitsrecht*, 2013, pp. 319-322.
[501] BAG, ruling 13 December 2007 - 2 AZR 818/06, in *Neue Zeitschrift für Arbeitsrecht*, 2008, pp. 589-592.

In the event that, according to this prognostic judgment, the reasonable expectation of the claim in the correct future performance should cease to exist, the judge will then have to verify the proportionality of the dismissal, ascertaining the absence of a less afflictive measure (such as a transfer of the employee or a warning letter) to induce the worker to comply in the future with the obligations undertaken.

Finally, if it emerges that the employer could not reasonably have subjected the employee to a less afflictive disciplinary sanction, the judge is required to balance the different interests at stake, considering each circumstance of the concrete case, such as the objective gravity of the employee's conduct, the intensity of intent and guilt, and the professional position held and the years of service.[502] For an effective behavior-related termination, it must be examined whether it can be established - within the framework of a weighing of interests, taking into account all the circumstances of the individual case - that the employer's interest in the termination of the employment relationship outweighs the employee's interest in its continuation.[503]

With regard to the case of extraordinary termination of the employment relationship (i.e., without prior notice), the German case-law has clarified the notion of "serious grounds" (*wichtiger Grund*) laid down by law in Section 626(1) of the BGB, deeming that serious grounds occur whenever it is unreasonable to expect the relationship to continue in light of the specific circumstances and according to a balance of the interests at stake. The judicial assessment on the legitimacy of the dismissal for serious grounds must, in this case, too, involve a prognostic evaluation on the possible future contractual fulfillment by the employee and the balancing of the interests at stake.

The cases of dismissal for serious grounds considered by the German case-law also include the hypothesis of dismissal for an employee's private conduct. In that regard, the German case-law

[502] Santagata, R. (2013). Il recente dibattito dottrinale e giurisprudenziale sui licenziamenti nel diritto tedesco (parte II). *Diritti lavori mercati*, 1, pp. 111-112.
[503] BAG, ruling of 26 March 2009, n. 2 AZR 953/07, in *Beck-Rechtsprechung* 2009, p. 66020.

has pointed out that the behaviors that fall within the employee's private sphere may not give rise to dismissal for serious grounds because of the priority given to the protection of the employee's personal sphere, which is not affected by the contractual obligations of the employment relationship.[504] But this principle sometimes reaches its limits. If, on the one hand, the German case-law assumes that, as a matter of principle, the employee's private conduct cannot justify a dismissal for serious grounds, on the other hand, it is not uncommon within the German case-law to find an approach that considers an extraordinary dismissal without notice in response to an employee's private behavior admissible if the conduct breaches an ancillary obligation of the employment contract.[505]

Regarding the cases concerning a breach of duties of protection under German law, the loyalty element of the employment relationship is often taken as the yardstick for a decision, in the sense that a breach of the duties of protection may justify the termination of the employment relationship if it is reasonable to consider that it has undermined the bond of loyalty between the employee and the employer, understood as the creditor's expectation of the future correct fulfillment of the employment contract.[506] Having established this premise, a review of the main decisions of the German courts on dismissal for private conduct of the worker follows, with particular focus on the most recent hypotheses of dismissal for a worker's conduct on the network.

[504] BAG, ruling of 20 September 1984 - 2 AZR 633/82, in *Neue Juristische Wochenschrift*, 1985, p. 1854, according to which *"the employment relationship must include an obligation to conduct that has been violated by the employee. Violations in private life therefore do not justify dismissal due to conduct if they do not affect the employment relationship".* Santagata, R. (2013). Il recente dibattito dottrinale e giurisprudenziale sui licenziamenti nel diritto tedesco (II part). *Diritti lavori mercati*, 1, p. 114.

[505] BAG, ruling of 9 June 2011 - 2 AZR 323/10, in *Neue Zeitschrift für Arbeitsrecht*, 2011, pp. 1342-1346; BAG, ruling of 8 September 2011 - 2 AZR 388/10, in *Neue Zeitschrift für Arbeitsrecht*, 2012, pp. 400-404; Santagata, R. (2013). Il recente dibattito dottrinale e giurisprudenziale sui licenziamenti nel diritto tedesco (II part). *Diritti lavori mercati*, 1, p. 114.

[506] Santagata, R. (2013). Il recente dibattito dottrinale e giurisprudenziale sui licenziamenti nel diritto tedesco (II part). *Diritti lavori mercati*, 1, p. 110.

3.4 DISMISSAL DUE TO ONLINE OFF-DUTY CONDUCT: THE DOMINANT CASE-LAW ORIENTATIONS

3.4.1 Within the German legal system

German case-law in relation to dismissals linked to the employee's behavior frequently applies numerous different criteria that have become widely established both in the courts of merit and in the German Federal Labour Court.

According to the first thesis, the so-called principle of prognostic (*Prognoseprinzip*), the purpose of dismissal due to the employee's behavior is not to sanction the employee for the violation committed but rather to prevent the employee from committing the same in the future.[507] A second element often valued by German judges is the length of service. German judges attribute to a more lasting employment relationship a greater intensity of the bond of loyalty between the employer and the employee and, consequently, a more positive forecast for the future correct fulfillment of contractual obligations by the employee. The Federal Labour Court considers that "*that the stock of confidence built up as a result is not completely depleted*".[508]

According to an additional theory formulated by the German courts, even in the case of breaches of the employment contract that affect the bond of loyalty between the employee and the employer, the dismissal of the employee could only follow if the employer gives the employee a prior warning.[509] This requirement is directly related to the principle of proportionality of dismissal with respect to the breach committed by the employee. In other words, the dismissal is unlawful if a less drastic reaction by the employer could have safeguarded the future compliance of the employee with the contractual obligations.[510]

[507] BAG, ruling of 31 July 2014 - 2 AZR 434/13, in *Neue Zeitschrift für Arbeitsrecht* 2015, pp. 358-362; BAG, ruling of 19 November 2015 - 2 AZR 217/15, in *Neue Zeitschrift für Arbeitsrecht* 2016, pp. 540-547.
[508] BAG, ruling of 10 June 2010 - 2 AZR 541/09, in *Neue Zeitschrift für Arbeitsrecht* 2010, pp. 1227-1234.
[509] BAG, ruling of 19 April 2021 - 2 AZR 186/11, in *Neue Zeitschrift für Arbeitsrecht* 2013, pp. 27-31; BAG, ruling of 10 June 2020 - 2 AZR 541/09, in *Neue Zeitschrift für Arbeitsrecht* 2020, pp. 1227-1234.
[510] BAG, ruling of 31 July 2014 - 2 AZR 434/13, in *Neue Zeitschrift für Arbeitsrecht* 2015, pp. 358-362; BAG, ruling of 19 November 2015 - 2 AZR 217/15, in *Neue Zeitschrift für Arbeitsrecht* 2016, pp. 540-547; BAG, ruling of 3 November 2011 - 2 AZR 748/10, in *Neue Zeitschrift für Arbeitsrecht* 2012, pp. 607-610.

A further orientation of German case-law on dismissals due to the employee's behavior consider that the judicial review should necessarily be conducted by means of an in-depth weighing of all factual and legal elements with regard to the interests at stake,[511] as provided for in § 626.1 of the German Civil Code ("balancing the interests of both parties to the contract") in the hypothesis of dismissal without notice for just cause. The complete examination and weighting of all interests on a case-by-case basis in order to assess whether a legally valid reason for termination of employment in the specific case exists and whether this leads to an ordinary or extraordinary dismissal is due to the lack of any unconditionally valid grounds for dismissal.[512]

Within this framework of general principles that guide the judgment of German courts in relation to cases of dismissal due to the employee's behavior, the German courts have also developed further judgment criteria in order to formulate a resolution of the legal issues posed by the dismissals due to online claims, often on social media, of the employee. Specifically, German labor courts have considered that the crucial point in reaching a settlement lies in finding a fair balance between freedom of opinion (*Meinungsfreiheit*) recognized in Article 5(1) of the German Constitution and the employee's and personal rights and freedom of business activity of the employer.[513] In this sense, the majority of German case-law considers that, in principle, the employee's claims about the employer or colleagues are largely protected by the fundamental right of freedom of opinion[514] but that, at the same time, the employee's subsidiary obligation of loyalty to the employer, provided for in paragraph 241(2) BGB, would require the employee to refrain from defamatory criticism of the employer in social networks such as *Facebook*.[515]

[511] BAG, ruling of 10 June 2020 - 2 AZR 541/09, in *Neue Zeitschrift für Arbeitsrecht* 2020, pp. 1227-1234; BAG, ruling of 9 Juni 2011 - 2 AZR 323/10, in *Neue Zeitschrift für Arbeitsrecht* 2011, pp. 1342-1346.
[512] Willemsen H.J. (2017). Verhaltensbedingte Kündigung: Fünf Thesen und fünf Fragezeichen. *Recht der Arbeit,* p. 124.
[513] Burr, S. (2015). Kündigung wegen unternehmensschädlichen Facebook-Postings. *Neue Zeitschrift für Arbeitsrecht*, p. 114.
[514] BAG, ruling of 24 June 2004 - 2 AZR 63/03, in *Neue Zeitschrift für Arbeitsrecht*, 2015, pp. 159-161.
[515] Altenburg, S. (2020). Nebenpflichten. In I. Grobys & A. Panzer-Heemeier (Eds.), *StichwortKommentar Arbeitsrecht, Alphabetische Gesamtdarstellung*. Baden-Baden: Nomos, point 13.

The German Federal Labour Court has on several occasions stated that the protection of the fundamental right to freedom of opinion must also be guaranteed in the context of the employment relationship, specifying that "*regardless of whether the statement is rational or emotional, reasoned or unfounded, and whether it is considered by others to be useful or harmful, valuable or worthless*"[516] or if it is express in provocative[517] or offensive terms, it may under no circumstances be excluded from the scope of protection of the employee's freedom of opinion.[518] Nevertheless, within the employment relationship, the worker's freedom of opinion is limited by the employer's freedom of economic activity (*wirtschaftliche Betätigungsfreiheit*) under Article 12 of the Basic Law and the duty to mutual loyalty between the employee and the employer according to paragraph 241(2) BGB (*gegenseitigen Rücksichtnahme*). For this reason, German case-law usually balances the conflicting interests involved in the concrete situation on a case-by-case basis.[519]

By reviewing the most important rulings that the German labor judges have issued with regard to the legitimacy of dismissals due to opinions expressed by the employee by means of social networks, it is possible to trace what the conditions are, according to the German case-law, under which expressions released on the Internet are covered by freedom of opinion within the meaning of Article 5 I of the Basic Law.[520]

---

[516] BVerfG, resolution of 10.10.1995 - 1 BvR 1476/91, in *Neue Juristische Wochenschrift*, 1995, pp. 3304-3310; BVerfG, resolution of 23.3.1971 - 1 BvL 25/61, 3/62, in *Neue Juristische Wochenschrift*, pp. 1555-1559; BVerfG, resolution of 14.3.1972 - 2 BvR 41/71, in *Neue Juristische Wochenschrift*, 1972, pp. 811-814; BVerfG, resolution of 22.06.1982 - 1 BvR 1376/79, in *Neue Juristische Wochenschrift* 1983, pp. 1415-1417; BAG, ruling of 5 December 2019 - 2 AZR 240/19, in *Neue Zeitschrift für Arbeitsrecht* 2020, p. 646-657.

[517] BAG, ruling of 24 June 2004 - 2 AZR 63/03, in *Neue Zeitschrift für Arbeitsrecht*, 2015, pp. 159-161.

[518] German case-law considers that "*freedom of opinion, regardless of the form, motivation, value and correctness of the content of the expression, concerns opinions, value judgments up to the limit of formal insult or abusive criticism and also factual statements, insofar as they are a prerequisite for the formation of opinions*". See Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht*, p. 786; BAG, ruling of 24 November 2005 - 2 AZR 584/04, in *Neue Zeitschrift für Arbeitsrecht*, 2006, pp. 650-655.

[519] Altenburg, S. (2020). Nebenpflichten. In I. Grobys & A. Panzer-Heemeier (Eds.), *StichwortKommentar Arbeitsrecht.* Baden-Baden: Nomos, point 14.

[520] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht,* p. 786.

A first element taken into consideration by the labor judges is the degree of confidentiality of the statement. The wider the audience of users who can access the declaration expressed on the web, the greater the potential harm inherent in the declaration itself.[521] In this sense, German jurisprudence has sometimes also given relief to the network channel to which the employee has chosen to entrust his or her own statements by assigning a significant diversity of users operating in the various social networks. In particular, if the employee speaks out on social networks aimed at the world of work (such as LinkedIn or XING), where business partners, clients, or competitors of the employer may also be present, the damage caused to the employer's image is considerably greater than the consequences that the same declaration could have in the context of social networks aimed at another public group.[522] The aspect that characterizes the opinions shared on the net concerns the exponential and uncontrollable circulation that they can have, escaping the control of the author, who can hardly succeed in eliminating[523] content already shared on the net[524] (hence the famous expression "the net never forgets"[525]). For this reason, it is unlikely that the statements made online by the worker can be considered equivalent to opinions expressed orally in the context of a conversation among a few people. In particular, it is precisely the way social networks work that makes the content shared by a user on the web accessible to a large number of people in a very short time, even if the content is deleted by the author.[526] It is sufficient for other

[521] Bauer, J.H. & Günther J. (2013). Kündigung wegen beleidigender Äußerungen auf Facebook. *Neue Zeitschrift für Arbeitsrecht,* pp. 67-73.
[522] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht,* p. 787.
[523] With regard to the hypothesis in which the worker, as the author of an offensive content addressed to his/her employer or colleagues, eliminates what has been entrusted to the network - although, as was seen, this is not immediate - the labor judges have considered this "repentance" to be remarkable in the context of the broader balancing of interests. LAG Berlin-Brandenburg, ruling of 11 April 2014 - 17 Sa 2200/13, in *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report*, 2014, p. 468.
[524] Scheid, A. & Klinkhammer P. (2013). Kündigung wegen beleidigender Äußerungen des Arbeitnehmers in sozialen Netzwerken. *Arbeitsrecht Aktuell,* pp. 6-9.
[525] ArbG Duisburg, ruling of 26 September 2012 - 5 Ca 949/12, in *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report*, 2013, p. 18.
[526] Lützeler, M. & Bissels, A. (2011). Social Media-Leitfaden für Arbeitgeber: Rechte und Pflichten im Arbeitsverhältnis. *Arbeitsrecht Aktuell,* 20, pp. 499-502.

users to comment or activate the "like" button for a post to leave the author's sphere of control, potentially remaining accessible forever on the web.[527]

In light of the particular dynamics that distinguish communication on the web, particularly on social networks, German jurisprudence wonders, without yet having expressed a unified response, whether it is permissible to consider shared statements on the web equivalent to opinions spoken in the context of confidential conversations between colleagues, protected by the confidentiality of communication.[528] German jurisprudence oscillates between considering networked conversations not covered by confidentiality at all[529] and considering them to be related to the employee's private sphere and therefore worthy of protection.[530] According to the prevailing jurisprudential orientation,[531] *"any statement on Facebook is 'public' and is therefore not subject to the special protection of 'confidential' communication"*.[532] However, in light of the various forms that a declaration on the net can take, it appears to be necessary to evaluate how the worker's opinions were expressed case by case basis, with the possible consequence of widening or narrowing the circle of recipients[533] – for example, if the statement was made in a message in a private or group chat, by means of a post, in the form of a comment or "like" on the content of

[527] Göpfert, B. & Wilke, E. (2011). Facebook-Aktivitäten als Kündigungsgrund. *Arbeitsrecht Aktuell,* 7, pp. 159-161.
[528] Burr, S. (2015). Kündigung wegen unternehmensschädlichen Facebook - Postings. *Neue Zeitschrift für Arbeitsrecht NZA-Beilage,* pp. 115-116.
[529] Verwaltungsgericht Ansbach, resolution of 16 January 2012 - AN 14 K 11.02132, in *Beck-Rechtsprechung*, 2012, p. 46753; ArbG Dessau-Roßlau, ruling of 21 March 2012 - 1 Ca 148/11, in *Beck-Rechtsprechung*, 2012, p. 69099.
[530] Verwaltungsgerichtshof München, resolution of 29 February 2012 - 12 C 12.264, in *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report*, 2012, pp. 302-304; ArbG Bochum, ruling of 09 Febraury 2012 - 3 Ca 1203/11, in *Beck-Rechtsprechung*, 2012, p. 68181; ArbG Bochum, ruling of 29 March 2012 - 3 Ca 1283/11, in *Beck-Rechtsprechung*, 2012, p. 70844.
[531] LAG Hamm, ruling of 10 October 2012 - 3 Sa 644/12, in *Beck-Rechtsprechung*, 2012, p. 74357; ArbG Bochum, ruling of 29 March 2012 - 3 Ca 1283/11, in *Beck-Rechtsprechung* 2012, p. 70844; ArbG Dessau-Roßlau, ruling of 21 March 2012 - 1 Ca 148/11, in *Beck-Rechtsprechung*, 2012, p. 69099; ArbG Duisburg, ruling of 26 September 2012 - 5 Ca 949/12, in *Beck-Rechtsprechung*, 2012, p. 74872; Verwaltungsgericht Ansbach, resolution of 16 January 2012 - AN 14 K 11.02132, in *Beck-Rechtsprechung*, 2012, p. 46753.
[532] Bauer, J.H. & Günther J. (2013). Kündigung wegen beleidigender Äußerungen auf Facebook. *Neue Zeitschrift für Arbeitsrecht*, p. 68.
[533] Oberwetter, C. (2011). Soziale Netzwerke im Fadenkreuz des Arbeitsrechts. *Neue Juristische Wochenschrift*, pp. 417-421; Verwaltungsgerichtshof München, resolution of 29 February 2012 – 12 C 12.264, in *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report*, 2012, pp. 302-304.

others.[534] From this perspective, it is only correct to consider statements on social networks as covered by confidentiality if the circle of recipients is sufficiently restricted.[535]

In this sense, for instance, the German Federal Labour Court considered that the advancement by a worker of critiques regarding the safety of the operation of the machines present in the company by means of a video shared on YouTube accessible to a restricted circle of users was to be considered covered by the protection of freedom of expression. The video was posted on a page dedicated to trade union issues, and it was likely that the video would only be accessed by an interested audience.[536]

With regard to the nature of the online declaration itself, another important issue that is widely debated in German jurisprudence is the importance of the activation of the "like" button by the worker in relation to content shared online by other users. The basic question revolves around the value that should be attributed to a non-verbal expression such as a "like". According to a ruling of the Dessau-Roßlau labor court,[537] the activation of the "like" button in relation to an offensive post to the detriment of the employer may constitute a valid reason for an extraordinary dismissal without notice. Even the largest body of German doctrine[538] considers that the value to be attributed to the activation of the "like" button by a user is of approval and adherence to the position expressed by others to whom the like is addressed. Conversely, other scholars are more cautious in applying this automatism, believing that the activation of the "like" button can be dictated by disparate reasons since it occurs by means of a simple "click".[539] In fact, the user of the

[534] Lützeler, M. & Bissels, A. (2011). Social Media-Leitfaden für Arbeitgeber: Rechte und Pflichten im Arbeitsverhältnis. *Arbeitsrecht Aktuell,* 20, pp. 499-502.
[535] Burr, S. (2015). Kündigung wegen unternehmensschädlichen Facebook - Postings. *Neue Zeitschrift für Arbeitsrecht NZA-Beilage*, pp. 115-116.
[536] BAG, ruling of 31 July 2014 - 2 AZR 505/13, in *Neue Zeitschrift für Arbeitsrecht*, 2015, pp. 358-362.
[537] ArbG Dessau-Roßlau, ruling of 21 March 2012 - 1 Ca 148/11, in *Beck-Rechtsprechung* 2012, p. 69099.
[538] Bauer, J.H. & Günther J. (2013). Kündigung wegen beleidigender Äußerungen auf Facebook. *Neue Zeitschrift für Arbeitsrecht,* p. 67.
[539] ArbG Dessau-Roßlau, ruling of 21 March 2012 - 1 Ca 148/11, in *Beck-Rechtsprechung* 2012, p. 69099.

"like" button may simply want to express sympathy for the author of the content and not for the statement itself, or he/she may want to convey that he/she finds the content pleasant or interesting.[540] According to the opinion of this doctrine, it would therefore not be correct to believe that by activating the "like" button, the user intends to make the content to which the "like" is addressed his or her own. At the same time, it is risky to underestimate the effect of a "like" in a social network. From a technical point of view, the contents that have received a greater number of "likes" will be perceived by the algorithm as more relevant and be highlighted in the news feed of the social network in question.[541] In light of the different orientations expressed in jurisprudence and doctrine, in relation to the hypothesis of dismissal due to a worker's "like" on social networks, it seems necessary to evaluate every aspect on a case-by-case basis. If the worker should activate the "like" button in relation to a manifestly defamatory declaration against the employer, this could constitute a violation of the worker's duty of loyalty[542], and it could be equally difficult to recognize to the worker's externalization the protection provided for in Article 5(1) of the German Constitution. In such cases, it is therefore necessary to assess whether the dismissal of the employee who has expressed a "like" to an offensive content of which he/she is not the direct author is proportionate to the infringement committed by the employee.

In addition to the level of confidentiality and potential dissemination of the statements made by the worker on the network, the German courts have, from time to time, attributed importance to further elements of the concrete case, such as: the position held by the employee, the intensity of the statement, the consequences determined by the statement itself, the procedural conduct of the worker, and the possible violation of express obligations placed on the worker, such as the duty

[540] Burr, S. (2015). Kündigung wegen unternehmensschädlichen Facebook - Postings. *Neue Zeitschrift für Arbeitsrecht NZA-Beilage,* p. 116.
[541] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht*, pp. 786-787.
[542] Burr, S. (2014). *Posting als Kündigungsgrund*. Baden-Baden: Nomos, p. 156.

of business secrecy. With regard to the position held by the employee, the German labor courts consider that the higher the employee's position in the company, the more the employer can demand a discreet attitude in the case of online declarations made by the employee.[543] Another considerable aspect concerns the frequency with which the employee expresses himself or herself, i.e., whether it is a single statement or multiple statements repeated over time.[544] Finally, according to the German labor courts, it is also appropriate to check what concrete consequences arise from the employee's online declarations and whether, through them, the employee has failed to comply with other specific employment relationship obligations.[545]

Among the violations of specific duties that the worker may commit through his or her conduct on the Internet is the violation of trade secrets.[546] In the German legal system, jurisprudence and doctrine agree that every employee has a duty of confidentiality.[547] The obligation not to violate trade secrets derives, in the absence of an express contractual provision, from paragraph 241(2) BGB, whereby the employee is required to refrain from any type of conduct that may harm the sphere of the employer. Therefore, the employee must maintain secrecy with regard to all circumstances relating to the business of the company of which he/she has become aware by reason of the position held and which the employer has an interest in not disclosing.[548] The damage that can be caused by the dissemination of this information through networked channels is undoubtedly considerable, given the easy availability and accessibility of online

[543] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht*, p. 789.
[544] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht*, p. 789.
[545] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht*, p. 789.
[546] Burr, S. (2015). Kündigung wegen unternehmensschädlichen Facebook - Postings. *Neue Zeitschrift für Arbeitsrecht NZA-Beilage,* p. 115.
[547] Preis, U. (2013). BGB § 611 Vertragstypische Pflichten beim Dienstvertrag. In T. Dieterich, P. Hanau & G. Schaub (2013). *Erfurter Kommentar zum Arbeitsrecht*, BGB, § 611 Rn. 710.
[548] Göpfert, B. and Wilke, E. (2011). Facebook-Aktivitäten als Kündigungsgrund. *Arbeitsrecht Aktuell,* pp. 159-161; BVerfG, resolution of 14 March 2006 - 1 BvR 2087/03, in *Neue Zeitschrift für Verwaltungsrecht*, 2006, pp. 1041-1049.

statements.[549] In these cases, protection provided for in Article 5 of the German Constitution is not granted to the employee tendentially, since the employee's conduct is considered a violation of an obligation specifically provided for in the employment contract or interpreted by paragraph 241(2) BGB, followed by the procedure in paragraph 17(1) of Law against unfair competition (*Gesetz gegen den unlauteren Wettbewerb*).[550]

3.4.2 Within the Italian legal system

The jurisprudential guidelines that have been formed to date within the Italian legal system with regard to cases of dismissal for a worker's conduct on the Internet, on the one hand, take up the outcomes elaborated by the case-law of the Court of Cassation in relation to legal proceedings of dismissal for a worker's off-duty conduct and, on the other hand, partly deviate from the prevailing guidelines on the subject in light of the innovative elements that the use of online channels implies.

The issues most frequently considered by Italian judges concern: 1) the relevance that the worker's online activity may have on the employment relationship; 2) the employer's access to the worker's online information; and 3) the spaces of protection in the employment context of freedom of expression of thought, guaranteed by Article 21 of the Italian Constitution according to which "*everyone has the right to freely express his or her thoughts in word, writing and any other means of dissemination*".[551]

With regard to the first question concerning the impact that the worker's network activities may have on the fate of the employment relationship, the majority jurisprudence favored the

[549] Burr, S. (2015). Kündigung wegen unternehmensschädlichen Facebook - Postings. *Neue Zeitschrift für Arbeitsrecht NZA-Beilage,* p. 115.
[550] Lelley, Tibor & Fuchs, Essen (2010). My space is not your space: Einige arbeitsrechtliche Überlegungen zu Social Media Guidelines. *Corporate Compliance Zeitschrift,* p. 149.
[551] Catania, B. (2015). Responsabilità disciplinare per dichiarazioni su "social network". *Rivista giuridica del lavoro e della previdenza sociale*, (3/2), pp. 468-469.

criterion of the loyalty element of the employment relationship, which, if compromised, may legitimately lead to the dismissal of the worker for just cause within the meaning of Article 2119 of the Civil Code. According to this article, "*each contracting party may terminate the contract before the expiry of the term, if the contract is for a fixed term, or without notice, if the contract is for an indefinite period, if there is a cause that does not allow the continuation, even temporary, of the relationship*".

The case history for this matter mainly refers to two legal parameters: on the one hand, to the obligation of loyalty which, pursuant to Article 2105 of the Italian Civil Code, is incumbent on the worker and, on the other, to the now undisputed relevance that the worker's non-work behaviors may have on the performance of the employment relationship. These two concepts, the loyalty bond and the employee's off-duty behaviors, according to the prevailing Italian jurisprudence, are closely linked in so far as "*the obligation of loyalty on the part of the employee has a broader content than that resulting from Article 2105 of the Civil Code, having to be integrated with Articles 1175 and 1375 of the Italian Civil Code, which impose correctness and good faith also in extra-work behaviour, necessarily such as not to damage the employer*".[552] Therefore, even a worker's off-duty behavior may justify the dismissal of the same if the conduct is impeding the continuation of the relationship because it may bring the future correct performance of the employee into question and damage the fiduciary link between worker and employer.[553] In other words, according to the Italian judges, the notion of loyalty in Article 2105 of the Italian Civil Code must not be interpreted in a restrictive way, recognizing relevance, in terms of breach of contract, not only to the two hypotheses provided for, such as non-competition and confidentiality but to any other conduct which, due to its nature and possible consequences, is in opposition, in light of the

[552] Corte Suprema di Cassazione, ruling of 18 June 2009 - 14176, in *Il lavoro nella giurisprudenza*, 2009, 11, p. 1166.
[553] Corte Suprema di Cassazione, ruling of 11 July 2014, n. 16009, in Database Leggiditalia; Corte Suprema di Cassazione, ruling of 26 May 2001, n. 7185, in *Notiziario di giurisprudenza del lavoro*, 2001.

principles of fairness and good faith, with the duties arising from the employee's integration into the structure and organization of the employer's company.[554] From this point of view, even behaviors that do not have a decisive bearing on the future of the employment relationship, but are indicative in their current harmfulness or their symptomatic nature of a mental attitude on the part of the employee that contradicts the loyal cooperation that underlies the employment relationship, can have a decisive bearing on the future of the relationship. From this perspective, Italian jurisprudence has often recognized that facts of modest economic importance in certain factual circumstances can lead to a breach of the duty of loyalty, even though they are not sufficient on their own to cast doubt on the future correct fulfillment of the contract.[555]

With respect to the bond of loyalty between worker and employer, the majority jurisprudence considers that this bond limits the freedom of expression of thought and the right of criticism of the worker, taking into account that "*the freedom of expression of thought enjoyed by the citizen as such is not as extensive as that enjoyed by him as an employee: particularly with regard to his employer (who exercises, in addition to his managerial power, the power of control and discipline), the worker can never be considered to be released from certain specific obligations*".[556] The freedom of expression of the worker's thought must be measured against the obligation of diligence and the obligation of loyalty and confidentiality, respectively, as provided for in Articles 2104 and 2105 of the Italian Civil Code.

In relation to the legal issues concerning the legitimacy of the employer's possible access to the online activity carried out by the worker or to information on the worker that can be found

[554] Corte Suprema di Cassazione, ruling of 1 June 1988, n. 3719, in *Rivista Italiana di Diritto del Lavoro*, 1988, II, p. 978; Corte Suprema di Cassazione, ruling of 17 February 1987, n. 1711, in *Database* Leggiditalia; Corte Suprema di Cassazione, ruling of 29 July 1986, n. 4868, in *Massimario di giurisprudenza del lavoro*, 1986, p. 505.

[555] Corte Suprema di Cassazione, ruling of 25 November 1997, n. 11806, in Database Leggiditalia; Corte Suprema di Cassazione, ruling of 17 April 2001, n. 5633, in Database Leggiditalia; Corte Suprema di Cassazione, ruling of 18 September 2014, n. 19684, in Database Leggiditalia.

[556] Iodice, D. (2018). Social network e responsabilità disciplinari: le possibili tutele individuali, p. 3. Retrieved from http://www.bollettinoadapt.it/social-network-e-responsabilita-disciplinari-le-possibili-tutele-individuali/?pdf=81315.

online, Italian case-law wonders whether such data processing may constitute remote control by means of audio-visual equipment or other instruments that, pursuant to Article 4 of the Workers' Statute, require the prior conclusion of a collective agreement with the trade union representatives. The most widespread orientation among Italian judges considers that since the content is potentially accessible to anyone - and, in this respect, the settings envisaged by the employee in relation to the accessibility of the profile on social networks by third parties are obviously particularly relevant - it cannot be considered that the employer has sufficient remote control that he/she can legitimately access this data without obtaining the prior collective agreement with the trade union representatives.[557]

In particular, Italian jurisprudence recognizes, on the one hand, that the employer's power of control must necessarily be balanced with the employee's right to privacy,[558] but on the other hand, considers that the category of so-called "defensive controls" - a concept by which Italian courts refer to those controls implemented by the employer to protect company assets[559] - may also include those controls aimed at ascertaining or avoiding unlawful conduct by workers.[560] For this reason, the employer would also be allowed to carry out "defensive hidden controls" appointed in this way because they are "*aimed at ascertaining unlawful conduct other than mere failure to perform the work, from a quantitative and qualitative point of view, without prejudice, however, to*

[557] Corte Suprema di Cassazione, ruling of 1 October 2012, n. 16622, in *Rivista giuridica del lavoro e della previdenza sociale*, (1/2), pp. 32-36 with comment of A. Mattei (2013). *Controlli difensivi e tutela della riservatezza del lavoratore*; Corte Suprema di Cassazione, ruling of 8 November 2016, n. 22662, in *Il Lavoro nella giurisprudenza*, (4), pp. 348-354 with comment of Recchia, G.A. (2017). *Controlli datoriali difensivi: note su una categoria in via di estinzione*; Corte Suprema di Cassazione, ruling of 19 September 2016, n. 18302, in *Il Lavoro nella giurisprudenza*, 2017, (2), pp. 164-168 with comment of P. Salazar & L. Failla (2017). *Controlli difensivi: quali i limiti nel nuovo contesto dell'art. 4, L. n. 300/1970*.
[558] Corte Suprema di Cassazione, ruling of 17 July 2007, n. 15892, in *Massimario di giurisprudenza italiana*, 2007; Corte Suprema di Cassazione, ruling of 23 Febraury 2012, n. 2722, in *Pratica Lavoro*, 2012, 16, p. 706.
[559] Corte Suprema di Cassazione, ruling of 23 February 2012, n. 2722, in *Pratica Lavoro*, 2012, 16, p. 706.
[560] Corte Suprema di Cassazione, ruling of 1 October 2012, n. 16622, in *Il Lavoro nella giurisprudenza*, 2012, 4, p. 383.

the necessary implementation of the verification activities by means of methods that are not excessively invasive and respect the guarantees of freedom and dignity of employees".[561]

The Italian Privacy Authority[562] also expressed a positive opinion on the issue about the legitimacy of the employer's collection of the worker's data available on social networks for disciplinary purposes in the event that the profile accessibility settings set by the worker him/herself allow anyone to view the content on the web. If this is not the case, namely, when the settings of the employee's social profile limit access to online content by third parties and, therefore, also by the employer, the question of the legitimacy of the collection and processing of this data remains controversial.[563] From this perspective, an aspect of central importance in the resolution of disputes concerning the employer's processing of employee data accessible on the network is the employee's expectation of confidentiality of network communications. In fact, it seems to be precisely this element that conditions the legitimacy of the employer's collection of employee data.[564] This aspect has also been specifically formulated by the Council of State. The case brought to the attention of the highest Italian administrative judicial authority concerned the suspension from service for one month of a member of the police force for having shared on his private Facebook profile (in relation to which the image of an actress appeared as a profile photo) some photos depicting him in women's clothing and, in a further session of the same profile, accessible only upon authorization, other photos portraying some of his body parts "in skimpy clothes".[565] The Council of State annulled the

[561] Corte Suprema di Cassazione, ruling of 1 July 2009, n. 16196, in Database Leggiditalia; Corte Suprema di Cassazione, ruling of 14 February 2011, n. 3590, in Database Leggiditalia; Corte Suprema di Cassazione, ruling of 4 March 2014, n. 4984, in *Giurisprudenza italiana*.

[562] Il Garante per la protezione dei dati personali, *Lavoro: le linee guida del Garante per posta elettronica e internet*, in *Gazzetta Ufficiale n. 58 of 10 March 2007*; Il Garante per la protezione dei dati personali, *Vietato il trattamento di dati personali del dipendente ricavati da file e documenti acquisiti nell'ambito di operazioni di backup effettuate sul server aziendale*, Registro di provvedimenti n. 139 del 7 April 2011; Il Garante per la protezione dei dati personali, *Sistemi di localizzazione dei veicoli nell´ambito del rapporto di lavoro*, in Registro dei provvedimenti n. 370 del 4 ottobre 2011.

[563] Iodice, D. (2018). Social network e responsabilità disciplinari: le possibili tutele individuali, p. 5. Retrieved from http://www.bollettinoadapt.it/social-network-e-responsabilita-disciplinari-le-possibili-tutele-individuali/?pdf=81315.

[564] Salazar, P. (2016). Facebook e rapporto di lavoro: a che punto siamo. *Il Lavoro nella giurisprudenza*, 2, p. 202.

[565] Consiglio di Stato, sec. III, ruling of 21 February 2014, n. 848, in *Foro Italiano*, 2014, III, p. 501.

measure of suspension of the worker on the ground that "*In this context, the circumstance that access to the personal profile is possible only to those who know the username of the person concerned, which functions as a filter for access, and which cannot therefore be considered indiscriminately visitable by anyone, but essentially addressed to 'acquaintances', who have precisely the 'key' of access (the username) becomes decisive*".[566]

A further element which, according to broad Italian doctrine, conditions the legitimacy of an employer processing a worker's data available on the Internet is derived from paragraph 3 of Article. 4 of the Italian Workers' Statute, according to which "*The information collected pursuant to paragraphs 1 and 2*[567] *may be used for all purposes connected to the employment relationship on condition that the worker is given adequate information on the way in which the instruments are used and the checks carried out and in compliance with the provisions of Legislative Decree n. 30 June 2003. 196 of 30 June 2003 (Italian Privacy Code - Editor's note)*". In other words, the employer may legitimately make use of the information collected on the employees if they have been adequately informed about the use of computerized control and work tools as a means of monitoring conduct and if the processing carried out by the employer does not violate the provisions of the Italian Privacy Code.[568]

The legitimacy of the employer's access to online data on the employee is of central importance, as it also has important consequences in practice. If the processing of data carried out by the employer is unlawful, pursuant to Legislative Decree n. 196/2003 (Italian Code for the protection of personal data as amended by Legislative Decree n. 101 of 10 August 2018), the employer will incur possible criminal and administrative sanctions, as well as injunctions (in

[566] Consiglio di Stato, sec. III, ruling of 21 February 2014, n. 848, in *Foro Italiano*, 2014, III, p. 501.
[567] "*…such as data collected through audio-visual systems and other instruments from which the possibility of remote control of the activity of the workers or by means of instruments used by the worker to make the work performance and the tools for recording access and attendance".*
[568] Salazar, P. (2016). Facebook e rapporto di lavoro: a che punto siamo. *Il Lavoro nella giurisprudenza*, 2, p. 208.

accordance with the provisions of Article 38 of the Workers' Statute, Article 171 of the Code for the protection of personal data).

In light of this general framework of jurisprudential principles, Italian jurisprudence has formulated further principles with specific regard to the possible disciplinary consequence of the worker's online activity regarding 1) the repercussions on the employment relationship recognized to the worker's off-duty behaviors; 2) the limits to which the worker's freedom of expression of thought and right of criticism are subject within the employment relationship; and 3) with reference to the legitimacy of the employer's processing of a worker's online data.

As already noted, one aspect often highlighted by Italian labor judges concerns the effective accessibility by third parties to content shared online by the worker. Indeed, the Italian State Council has held that in cases where access to content on the web is allowed only to a restricted circle of users, a legitimate manifestation of the worker's freedom of expression occurs and, consequently, the privacy protection of the latter prevails.[569] In particular, if the contents on the web are visible only to those who are aware of the username used by the worker on the platform and who, following an express request to this effect, are authorized to view what the worker shares, the potential dissemination of the contents is limited and so is the harmfulness on a professional level. However, Italian jurisprudence is not unequivocal in ruling out a legitimate cause for dismissal in the presence of content on the web accessible to a restricted circle of users. Indeed, according to a different orientation of the jurisprudence, what is shared on the net cannot be considered limited to a certain circle of recipients but potentially accessible to anyone because just one click is sufficient for it to be re-proposed to others or elsewhere.[570]

[569] Consiglio di Stato sec. III, 21 February 2014, n. 848, in Database Leggiditalia.
[570] Court of Bergamo 24 December 2015, resolution R.G. 2137/2015.

A further profile considered decisive by the Italian case-law concerns the existence of proof of the actual sharing of online content at the hand of the employee. If, in fact, there is no evidence that the network statement was written directly by the worker, jurisprudence tends to deny the legitimacy of the ordered dismissal. In this sense, the Court of Appeal of L'Aquila has considered illegitimate the dismissal of a worker for having joined a Facebook group within which content that was disparaging for the company was disseminated.[571] According to the judges of the Court and of the Court of Appeal of Florence, the company image was not damaged by the fact that some employees on the Facebook group, exchanging information about an upcoming trade union meeting, shared an image of a Vaseline lid with the company logo on it. In this specific case, the decisive element considered by the judges was precisely the limited diffusion of the image among the ten users in the chat and the lack of proof of its diffusion outside the group.[572]

Another frequent orientation in Italian labor jurisprudence considers it illegitimate to dismiss a worker who has spread defamatory statements against his/her employer or colleagues if "*the use of offensive expressions against the employer appears as a reaction, even if excessive and abnormal (but also instinctive) with respect to promises made by the employer not kept*".[573]

The approach of the Italian labor judges with regard to the hypothesis of disciplinary sanctions (of which dismissal is the most serious possibility) against the online activity of the worker appears to be in line with the jurisprudential foundations already established with reference to cases of dismissal for the off-duty conduct of the worker. Even in cases of dismissal due to online off-duty conduct of the employee, the parameter that is constantly applied by jurisprudence in order to ascertain the legitimacy of the dismissal is that of the breach of the bond of loyalty. However, there are often decisions by Italian judges who, referring to the principle of violation of

[571] Court of Appeal of L'Aquila 31 October 2013.
[572] Court of Florence 13 March 2013.
[573] Court of Ascoli Piceno 19 November 2013 and Court of Milano resolution 1 August 2014, in *Rivista italiana di diritto del lavoro*, (1/2), pp. 82-89 with comment of F. Iaquinta & A. Ingrao (2015). *Il datore di lavoro e l'inganno di "facebook"*.

the bond of loyalty between employer and employee, fail to conduct a thorough assessment of the concrete case and therefore of the actual suitability of the conduct in question to compromise the bond of loyalty.[574] It often happens that Italian jurisprudence operates a sort of quasi-mechanical application of the formula elaborated by the jurisprudence, according to which there may be an injury of the loyalty bond if the employee's off-duty behavior causes prejudice to the moral and material interests of the employer. However, the danger of such a jurisprudential practice is to broaden the repertoire of relevant disciplinary behavior.[575]

The Court of Cassation itself, in a 2016 ruling, urged the judges of first instance to be more rigorous in identifying the private behaviors of the worker to which they attributed importance, to avoid the expansion of the hypothesis of private behavior relevant to the continuation of the employment relationship. In detail, the Judges of the Court of Cassation have observed that "*the duty of diligence, which is incumbent on the worker, finds its limit in the contractually due service, in the nature of the service and in the interest of the company, including only ancillary and instrumental behaviour to its more exact insertion in the production cycle and in the organisation of the company*".[576]

In conclusion, the approach developed by Italian jurisprudence with regard to the hypothesis of dismissal for off-duty conduct of the worker - an approach also followed, as seen, in cases where the conduct has been kept on the network by the worker - carries the risk of "subjective drifts" by the judicial authorities. Thus, there is the possible consequence that some worker conduct may be considered prejudicial to the loyalty bond between the employer and the employee, even if the

[574] Court of Bergamo, resolution of 24 December 2015, in *Il Lavoro nella giurisprudenza*, (5), pp. 476-482 with comment of Cosattini, L.A. (2016). *I comportamenti extralavorativi al tempo dei "social media": "postare" foto costa caro*.
[575] Court of Bergamo, resolution of 24 December 2015, in *Il Lavoro nella giurisprudenza*, (5), p. 481 with comment of Cosattini, L.A. (2016). *I comportamenti extralavorativi al tempo dei "social media": "postare" foto costa caro*.
[576] Corte Suprema di Cassazione, ruling of 4 October 2017, n. 23178.

conduct is not in itself unlawful but only contrary to the "particular sensitivity" of the worker and the judge.[577]

3.5 THE THEORETICAL MODELS AROUND THE DISMISSALS DUE TO ONLINE OFF-DUTY CONDUCT

3.5.1 The German experience

Broadly speaking, within the German legal system, there are no defined *a priori* reasons for dismissal due to conduct,[578] and the category of dismissals due to the worker's behavior may also include dismissals due to an employee's off-duty conduct, provided that certain conditions are met. For this reason, the present analysis will be carried out not only on the doctrinal elaborations developed with regard to the cases of dismissal for off-duty conduct but also in relation to the more general hypotheses of dismissal for employee behavior.

As already considered, a dismissal for employee conduct is socially justified if the employee has committed a breach of the contractual obligations, if the infringement specifically harms the employment relationship, and if there is no reasonable possibility of another occupation for the employee. Lastly, it is necessary to proceed with an overall weighing of interests to determine whether the termination of the employment relationship appears reasonable and appropriate considering the interests of both contractual parties.[579]

As far as the employee's private conduct is concerned, this cannot, in principle, constitute a violation of the duties deriving from the employment relationship since this is limited in time to the working hours,[580] and therefore, in abstract terms, off-duty conduct of the employee cannot

[577] Court of Bergamo, resolution of 24 December 2015, in *Il Lavoro nella giurisprudenza*, (5), p. 482 with comment of L.A. Cosattini (2016). *I comportamenti extralavorativi al tempo dei "social media": "postare" foto costa caro*.
[578] Mohnke, L. (2020). Kündigung, verhaltensbedingte. In I. Grobys & A. Panzer-Heemeier (Eds.), *StichwortKommentar Arbeitsrecht*. Baden-Baden: Nomos, point 1.
[579] BAG, ruling of 12 January 2006 - 2 AZR 21/05, in *Neue Zeitschrift für Arbeitsrecht* 2006, pp. 917-923; BAG, ruling of 24 June 2004 - 2 AZR 63/03, in *Neue Zeitschrift für Arbeitsrecht* 2005, pp. 158-161.
[580] Maties, M. (2020). Außerdienstliches Verhalten. In B. Gsell, W. Krüger, S. Lorenz & C. Reymann (Eds.), beck-online. GROSSKOMMENTAR. München, Verlag C.H. Beck**,** point 888.

constitute grounds for dismissal due to the employee's behavior. However, this postulate to the practical effects is contradicted by the obvious effects on the employment relationship that the worker's private behavior may have. The most recurrent example in doctrine is that of a worker who, due to risky or illegal activity in his/her spare time, is no longer suitable for work and consequently may be dismissed for personal reasons.[581] For example, if a driver has his driving license withdrawn for drunkenness during his free hours, this may justify a dismissal for personal reasons, as he lacks a personal aptitude that is essential for the job,[582] or a dismissal on the grounds of the worker's behavior.[583] On closer inspection, even the private conduct of the worker may justify dismissal for employee's behavior if the conduct has specific negative effects on the employment relationship or the economic interests of the employer, and the employee thereby violates contractual or duties of protection. These include the violation of the contractual prohibition of competition (§ 60 *Handelsgesetzbuch*), statements harmful to business, and the violation of the employee's obligation to behave in a way that facilitates his recovery assume relief.[584]

The employment relationship does not solely include the obligation on the part of the employee to perform his/her work and on the part of the employer to pay the employee, but, according to § 241(2), each contractual party is obliged to take into account the rights, legal assets, and interests of the other party. For this reason, therefore, it is unfounded to assume that any behavior of the worker in his/her private sphere is automatically protected as an expression of the right to free development of one's own personality, just as much as it could not be validly admitted that the worker's main and secondary obligations can unconditionally invade the employee's private sphere. For this reason, the rights and interests of the employee and the employer – with respect

[581] Mohnke, L. (2020). Kündigung, verhaltensbedingte. In I. Grobys & A. Panzer-Heemeier (Eds.), *StichwortKommentar Arbeitsrecht*. Baden-Baden: Nomos, point 44.
[582] Mohnke, L. (2020). Kündigung, verhaltensbedingte. In I. Grobys & A. Panzer-Heemeier (Eds.), *StichwortKommentar Arbeitsrecht*. Baden-Baden: Nomos, point 29.
[583] BAG, ruling of 20 October 2016 - 6 AZR 471/15, in *Arbeitsrechtliche Praxis* BGB § 626 Nr. 258.
[584] BAG, ruling of 26 August 1993 - 2 AZR 154/93, in *Neue Zeitschrift für Arbeitsrecht* 1994, pp. 63-67.

to the cases where the employee's private conduct may harm the legal sphere of the employer – must be properly weighed.

German case-law has identified three categories of behavior that may harm the employer's interests, such as: 1) those activities as a result of which the worker's ability to work may be compromised with direct damage to the employer; 2) those behaviors which may damage the employer's image and interests; and 3) the disclosure of information about the employer which could damage them.

As far as the worker's private behavior that may compromise the worker's ability to work is concerned, this category should clearly not be understood in a strict manner. In fact, if the worker were to abstain from any activity that involves a danger to health and working capacity, his/her private sphere and consequently the right to free development of his/her personality would be considerably compromised. If this interpretation can be justified for special categories of workers, such as soldiers,[585] who must maintain good health, the same interpretation cannot be applied to ordinary workers. The latter, on the other hand, are required not to further aggravate their state of illness and therefore, not to engage in any activity that might adversely affect the course of their recovery. It is therefore not a question of requiring the worker to make sure that he/she can recover as soon as possible, but rather to refrain from taking any action that might delay the resumption of work.[586]

Even with respect to the other off-duty behavior which can damage the image and, in a broad sense, the interests of the employer, it is necessary to find remedies to possible radical interpretations. The employer, taking up the words of the German Federal Labour Court, "*is not appointed by the employment contract as guardian of public morality towards employees working*

[585] Bundesfinanzhof, ruling of 20 January 1961 - III 129/59 U, in *Neue Juristische Wochenschrift* 1961, p. 848.
[586] Maties, M. (2020). Außerdienstliches Verhalten. In B. Gsell, W. Krüger, S. Lorenz & C. Reymann (Eds.), beck-online. GROSSKOMMENTAR. München, Verlag C.H. Beck, point 890.

in his company". Private conduct that can damage the employer's image can be manifold. What is crucial is that the employee's behavior has a truly negative and prolonged impact on the employer's image and interests. For this reason, it is difficult to identify private conduct that should be considered *a priori* harmful to the employer's sphere and therefore precluded to the worker. In general, if an employee's private conduct also integrates the extremes of a crime, there may be a legitimate reason for dismissal due to the worker's behavior, but even this equivalence is not automatic, and it is always necessary to examine in each individual case the question of the existence of a non-compliance of contractual or duties of protection and the specific concrete circumstances.[587]

As already noted, dismissal due to off-duty conduct falls into the broader category of dismissals due to worker behavior, but the theories developed by German courts with regard to dismissals due to employee behavior are not immune to criticism by German doctrine.

As has already been observed, German case-law applies in the first place the principle of prognosis, under which the dismissal is lawful if the employee cannot be expected to fulfill the employment contract properly in the future. However, this rule, if understood in absolutist terms, could lead to paradoxical solutions; the risk is not that the worker's default behavior will be adequately assessed, but rather the possible non-performance of the contract in the future.[588] Faced with serious unlawful conduct on the part of the worker, which often includes criminal profiles, it is difficult to imagine that the perpetrator, once discovered, may in the future commit the breach of contract again. By way of example, if an employee murders a colleague, the application of the principle of prognosis would result in a positive forecast for the future continuation of the employment relationship, in that it would be impossible for the employee to

[587] Maties, M. (2020). Außerdienstliches Verhalten. In B. Gsell, W. Krüger, S. Lorenz & C. Reymann (Eds.), beck-online. GROSSKOMMENTAR. München, Verlag C.H. Beck, point 893.

[588] Willemsen, H.J. (2017). Verhaltensbedingte Kündigung: Fünf Thesen und fünf Fragezeichen. *Recht der Arbeit*, p. 116.

commit the same offense again.[589] According to the legal doctrine, the prognosis criterion can be misleading if applied to cases where the employee is responsible for serious breaches of contract that make it unnecessary to question the possible future non-performance of the contract.[590] Moreover, according to established German case-law, in the application of the prognosis principle, particular importance must be given to the correct execution of the contract not only in relation to the evaluation of the future continuation of the employment relationship but also with reference to the performance of the relationship in the period of time prior to the employee's unlawful conduct. Under this approach, if the employment relationship has continued regularly for years, it is reasonable to expect that the relationship will continue in the future without further infractions on the part of the employee. According to the German Federal Labour Court, the employee's impeccable behavior in the course of the employment relationship would contribute to the formation of "trust capital" - a concept criticized by the German legal doctrine - which would protect the employee from being dismissed in the event of a breach of contractual duties.[591]

According to the doctrine, even this criterion, when applied indiscriminately, leads to solutions that are not convincing from a strictly legal point of view. By way of example, the Labour Court of Berlin[592] considered the dismissal of an employee who after 40 years of service had committed a fraud against the employer's company worth €150 to be unlawful, whereas the Labour Court of Dusseldorf considered the dismissal of an employee who after 16 years of service had issued a fraudulent deposit slip worth € 3.25 to be legitimate and effective.[593] German legal doctrine questions whether an employee with more seniority of service deserves greater protection against

[589] Wetzlar, R.F.A. (1998). Sanktion, Prognoseprinzip und Vertragsstörung bei der verhaltensbedingten Kündigung im Arbeitsrecht. *Neue Zeitschrift für Arbeitsrecht,* pp. 284-287.
[590] Willemsen, H.J. (2017). Verhaltensbedingte Kündigung: Fünf Thesen und fünf Fragezeichen. *Recht der Arbeit*, p. 116.
[591] Koch, U. (2010). Langjährige Mitarbeiter dürfen das! Headline of the editorial. *Betriebs-Berater*, n. 45, p. 1.
[592] LAG Berlin-Brandenburg, ruling of 16 September 2010 - 2 Sa 509/10, in *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report* 2010, p. 633.
[593] LAG Düsseldorf, ruling of 7 December 2015 - 7 Sa 1078/14, in *Beck-Rechtsprechung* 2016, p. 65271, Rn. 78.

ordinary or extraordinary dismissal for reasons of conduct or whether the opposite is true, namely, that the commission of an offense by an employee after a long period of service causes greater disappointment in the employer. This is supported by the decisions of the Federal Administrative Court (*Bundesverwaltungsgericht*) in cases of dismissal of civil servants due to gross negligence under § 13.2 of the public sector employment law (*Beamten-Dienstrechtsgesetz*). In such cases, the Federal Administrative Court has repeatedly stated its disappointment in correlating less seriousness to the employee's conduct by reason of seniority. In fact, according to a recurrent assumption of the Federal Administrative Court, "*Even many years of service without any complaints, possibly with above-average assessments, does not generally have any mitigating effect in the event of serious breaches of duty, apart from the seriousness of the breach. After all, every civil servant is obliged to provide the best possible service at all times, making full use of his or her manpower, and to behave with respect and trust both inside and outside the service. The long-term fulfilment of this obligation cannot lead to a lowering of the requirements for conduct within and outside the service. Neither the many years of observance of official duties nor above-average performance are suitable to show serious breaches of duty in a milder light*".[594] The risk inherent in attributing decisive importance to the employee's years of diligent service is that of assessing the same breach of contract differently due to greater or lesser length of service.[595] Moreover, the assessment of the conduct prior to an infringement is required for the determination of punishment but certainly not for the reaction to a breach of contract, as in the case of a dismissal for the employee's behavior.[596]

A further assumption affirmed by the majority of German labor jurisprudence and partly criticized by the doctrine concerns the necessity of a warning addressed to the employee who has

[594]Bundesverwaltungsgericht resolution of 23 January 2013, n. 2 B 63.12, in *beck-online.RECHTSPRECHUNG* 2013, p. 46742.
[595] Willemsen, H.J. (2017). Verhaltensbedingte Kündigung: Fünf Thesen und fünf Fragezeichen. *Recht der Arbeit*, p. 118.
[596] § 46 Abs. 2 Satz 2 StGB.

committed a breach of contract, undermining the bond of loyalty between the employee and the employer,[597] if, according to the principle of proportionality, the warning is suitable to arouse the future contractual loyalty of the employee.[598] "*If the breach of contractual obligations is based on the employee's controllable conduct, it must be assumed in principle that his future conduct can be positively influenced by the mere threat of consequences for the continued existence of the employment relationship. Regular and extraordinary dismissal due to a breach of contractual obligations therefore regularly requires a warning letter*".[599]

The principle thus formulated, however, could in practice represent an obstacle for the employer, who, in the face of the most serious breaches of contractual obligations by the employee and in the absence of a concrete risk of reiteration of the offense by the employee him/herself, could not proceed with the dismissal, being limited to the communication of a warning to respect the contract for the future.[600] For this reason, the Federal Labour Court has intervened to clarify two "remedials" of the principle, according to which an admonition is not necessary if 1) a change in the employee's behavior cannot be expected in the future despite the reprimand or 2) it deals with such a serious breach of duty, the unlawfulness of which was easily recognizable and the acceptance by the employer is obviously excluded.[601] With the introduction of these two clarifications, the Federal Labour Court has intervened to include elements of an "objective" nature in relation to the obligation to warn, capable of defining in a specific case if an admonition is the most appropriate means of determining an employee's future performance, thus avoiding a situation wherein the

[597] Bundesarbeitsgerich, ruling of 19 April 2012 - 2 AZR 186/11, in *Neue Zeitschrift für Arbeitsecht* 2013, pp. 27-31, Rn. 22;
[598] Bundesarbeitsgerich, ruling of 19 November 2015 - 2 AZR 217/15, in *Neue Zeitschrift für Arbeitsecht* 2016, pp. 540-547; Bundesarbeitsgerich, ruling of 31 July 2014 - 2 AZR 434/13, in *Neue Zeitschrift für Arbeitsecht* 2015, pp. 358-362.
[599] Bundesarbeitsgerich, ruling of 20 November 2014 - 2 AZR 651/13, in *Neue Zeitschrift für Arbeitsecht* 2015, pp. 294-297; Bundesarbeitsgerich, ruling of 25 October 2012 - 2 AZR 495/11, in *Neue Zeitschrift für Arbeitsecht* 2013, pp. 319-322.
[600] Willemsen, H.J. (2017). Verhaltensbedingte Kündigung: Fünf Thesen und fünf Fragezeichen. *Recht der Arbeit*, p. 119.
[601] Bundesarbeitsgerich, ruling of 31 July 2014 - 2 AZR 434/13, in *Neue Zeitschrift für Arbeitsecht* 2015, pp. 358-362; Bundesarbeitsgerich, ruling of 20 November 2014 - 2 AZR 651/13, in *Neue Zeitschrift für Arbeitsecht* 2015, pp. 294-297.

employer could determine *a priori* which conduct may be sanctioned by a warning and which may not. In practice, under a code of conduct that prohibits certain behaviors on pain of dismissal (for instance, ban on the use of company computer systems for private purposes), the employer, when faced with a violation of this requirement by a worker, would be exempted from the obligation to warn the responsible employee, as the required warning can be considered fulfilled in the provision of the code of conduct. In other terms, "*If the employer writes into such a directive that it will not be tolerated a specified breach – even a one-off one – and will react to this by immediately terminating the employee, the 'warning effect' is already given in advance in the sense of an 'anticipated warning', so that every employee must expect that the employer will show no mercy in the event of a breach and will dismiss him without prior warning (possibly even without notice)*".[602] The aspect that therefore needs to be clarified in light of the two "remedials" concerns the conditions under which the worker's behavior can be considered so serious as to exclude the employer's obligation to warn. As already considered, the function of the warning pursuant to § 314 (2) BGB is to stimulate the future proper fulfillment of contractual obligations from the employee. Therefore, the warning is only justified if, in the employer's opinion, there may still be an interest on the part of the employee in the continuation of the relationship, and it can therefore reasonably be assumed that the employee will in the future cooperate. For this reason, the duty of warning ceases if the breach committed by the worker has caused a disturbance on the basis of trust in the relationship such that it cannot be re-established by means of a warning.[603] In other words, in the event of breaches of the employee's duties, in particular, the duty of protection under paragraph 241 (2) BGB, which cause the employee to lose his/her qualification as a "fair and loyal contract partner", the duty of warning for the employer ceases to exist.[604]

[602] Willemsen, H.J. (2017). Verhaltensbedingte Kündigung: Fünf Thesen und fünf Fragezeichen. *Recht der Arbeit*, p. 120.
[603] Gaier, R. (2003). *Münchener Kommentar zum BGB*. München: Verlag C.H. Beck, § 314 BGB, Rn. 17.
[604] Willemsen, H.J. (2017). Verhaltensbedingte Kündigung: Fünf Thesen und fünf Fragezeichen. *Recht der Arbeit*, p. 121.

By way of example, if the employee is responsible for serious breaches, such as theft, damage, or fraud to the detriment of the employer, it will be difficult to consider the employee's suitability as a loyal contractual partner as persistent, resulting in the superfluity of the employer's notice and immediate dismissal (extraordinary or ordinary). On the other hand, the violation by the employee of obligations that do not indicate a "negative future potential"[605] – such as the violation of provisions of codes of conduct or the appropriation of assets of modest value – can legitimize the dismissal of the responsible employee only if the latter commits a further violation after the warning by the employer.[606]

A further methodological practice that is widespread within the German jurisprudence on dismissal and in part directly prescribed by the legislator in § 626.1 of the German Civil Code[607] concerns the complete balancing of the interests involved in each individual case. Although § 626 subparagraph 1 BGB, in its request to balance the interests of both contractual parties, refers only to the case of extraordinary contractual termination, which excludes the period of notice, German case-law agrees that this principle should be applied to all types of contractual termination.[608]

On the one hand, the weighing of the interests of all the parties involved is certainly a step in the legal reasoning that is essential to ensure the actual justice of the lawsuit.[609] On the other hand, however, the application of this principle may lead to different assessments of the same case at all three levels of judgment. On closer inspection, since there are no "suitable grounds for

[605] Willemsen, H.J. (2017). Verhaltensbedingte Kündigung: Fünf Thesen und fünf Fragezeichen. *Recht der Arbeit*, p. 121.
[606] LAG Schleswig-Holstein, ruling of 29 September 2010 - 3 Sa 233/10, in *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report* 2011, pp. 126-128.
[607] The § 626.1 BGB states that the employment relationship may be terminated by each of the contractual parties for just cause without observing a period of notice if, "*taking into account all the circumstances of the individual case and weighing up the interests of both parties to the contract*", there are facts on the basis of which the party giving withdrawal cannot reasonably be expected to continue the employment relationship until the end of the period of notice or until the agreed termination of the employment relationship.
[608] Henssler, M. (2017). *Münchener Kommentar zum* BGB, § 626 BGB, Rn. 80.
[609] Willemsen, H.J. (2017). Verhaltensbedingte Kündigung: Fünf Thesen und fünf Fragezeichen. *Recht der Arbeit*, p. 123.

dismissal per se" within the German legal system,[610] the assessment of the severity of the employee's conduct is left to the individual judge, who, very often, in the absence of defined decision-making parameters and despite the limits to the reviewability of the sentence by the higher courts, decides according to his/her own conviction.

The risk inherent in a widespread application, not inspired by other parameters, of the principle of balancing interests is that of a frequent overruling of judgments on dismissal due to the behavior of the employee, with the consequence that other fundamental values of the system are damaged, such as that of legal certainty[611] and predictability of judicial decisions. The lack of elaboration by German jurisprudence of certain criteria and abstract parameters that provide judges with a guideline in the wide range of hypotheses of dismissal due to the conduct of the employee leads to a deep uncertainty, above all, in relation to those violations of less stringent obligations and, as already considered, constitutes a risk to legal certainty, predictability of judicial decisions, and, ultimately, to the unity of the system.[612]

In conclusion, the theories developed and applied by German jurisprudence for the resolution of disputes concerning dismissal due to the employee's behavior are not immune to criticism from the German legal doctrine. In fact, the theses presented leave unresolved fundamental questions that undermine the system's systematicity and coherence. As already pointed out, the principle of prognosis entails the risk of conceiving of dismissal as a means of avoiding future violations by the worker when, on a dogmatic level, it is instead a reaction by the

[610] Stoffels, M. (2011). Die "Emmely"-Entscheidung des BAG - bloß eine Klarstellung von Missverständnissen? *Neue Juristische Wochenschrift,* pp. 118-123. The lack of absolutely valid grounds for dismissal within the German legal system can be traced back to the repeal of paragraphs 123 and 124 GewO (*Gewerbordung*) and paragraphs 71 and 72 HGB (*Handelsgesetzbuch*), which set out a catalogue of specific offences, such as: theft, misappropriation, fraud, damage to the employer's property, or assault on the employer or its representatives. The only case of conduct expressly identified by the German legislator as a cause for dismissal without notice concerns dismissal in accordance with § 67 para. 1 number 2 SeeArbG (*Seearbeitsgesetz*), which provides for the dismissal of a crew member if the crew member hides a contagious disease that may endanger others or does not declare that he/she is a permanent source of typhoid or paratyphoid fever.

[611] Ascheid, R., Preis, U. & Schmidt, I. (2021). *Kündigungsrecht*. München, Verlag C.H. Beck, (Fn. 1), § 626 BGB, Rn. 56.

[612] Henssler, M. (2017). *Münchener Kommentar zum BGB*, § 626 BGB, Rn. 76 ff.

employer to a violation of the employee of such seriousness that the worker loses the status of the loyal contractual partner, making it no longer possible to continue the employment relationship.

In the same way, the doctrine also raises criticisms in relation to the thesis that in weighing the interests of the parties in accordance with § 626.1 BGB, particular importance should be attached to any long service of the employee and the thesis that a warning to the responsible employee is always desirable rather than dismissal if this makes it possible for the employee to achieve future compliance with contractual obligations.

The methodological approach that the doctrine advocates in jurisprudence concerns the definition by the higher courts of parameters and decision-making criteria that can, in turn, be applied in relation to each individual case so as to make the "open" criteria identified by the legislator in § 626.1 BGB operational. Faced with an extremely varied and dissimilar case history, it is risky to let each judge decide freely how to regulate the conflicting interests of the individual case rather than defining a broader framework of pre-established and recognizable parameters that can provide the judges of first instance with effective decision-making aids.[613]

3.5.2 The Italian experience

Despite the contrasting views in the doctrine, Italian jurisprudence seems to have been stationary for decades in subsuming into the category of dismissals due to extra-work conduct, as legitimate grounds for dismissal, both conduct more or less directly linked to the contractual relationship, even if not strictly related to the obligation to work, and those circumstances which have very little or nothing to do with the core of the obligation to work,[614] if they are likely to prejudice the employer's loyalty or damage his/her moral or material interests.

[613] Willemsen, H.J. (2017). Verhaltensbedingte Kündigung: Fünf Thesen und fünf Fragezeichen. *Recht der Arbeit*, p. 127.
[614] Gaudio, G. (2017). Condotte extra-lavorative e licenziamento per giusta causa. *ADL Argomenti di diritto del lavoro*, 4-5/2, p. 1324.

Indeed, the almost constant principle in the decisions of the Italian courts and of the Supreme Court of Cassation is that even the employee's private conduct may irremediably damage the bond of loyalty between the employer and the employee, if the behavior reflects, either potentially or objectively, on the normal operation of the employment relationship, compromising the employer's expectation of future performance of the contractual obligation. For this reason, the prevailing and established orientation of the Italian jurisprudence on dismissal for an employee's private conduct seems to be closer to the fiduciary concept of the employment relationship. In this context, however, it is interesting to observe a group of pronouncements that deviate from this prevailing orientation.

In the context of these more recent judgments, the Italian Supreme Court of Cassation has developed a different legal classification for extra-worked conduct, intended no longer as a source of damage to the bond of loyalty between employer and employee, but as a non-fulfillment of duties of protection. One of the most important pronouncements in this regard has textually considered that extra-work conduct is suitable for justifying dismissal for just cause if it *"may affect the interests of the employer, in violation of the duties of protection: the employee is required, in fact, not only to provide the work-performance requested, but also as a duty of protection, not to behave outside the workplace in such a way as to damage the moral and the material interests of the employer or compromise the relationship of loyalty".*[615]

According to the same jurisprudential orientation, the duties of protection should be legal based on the obligations of duty of care and of duty of loyalty, provided respectively by Articles 2104 and 2015 of the Italian Civil Code, interpreted in the wider sense by means of the general clauses of fair dealing and good faith.[616] This assessment should then be carried out in accordance with the

[615] Corte Suprema di Cassazione, ruling of 24 November 2016, n. 24023, in database Dejure.

[616] Corte Suprema di Cassazione, ruling of 2 February 2016, n. 1978, in *Giurisprudenza italiana*, 2016, 3, pp. 655-659, with comment of G. Castellani (2016). *Diligenza e fedeltà del lavoratore*; Corte Suprema di Cassazione, ruling of 10 February 2015, n. 2550, in database Italgiure; Corte Suprema di Cassazione, ruling of 21 July 2004, n. 13526, in *ADL*

principle established in the Italian case-law of the so-called *"concretization of the just cause of the dismissal"*. In order to identify the duty of protection infringed, the Court should evaluate each element of the specific case, such as the professional position of the worker, the degree of reliance required by the employee's specific duties, the damage caused, the circumstances of the occurred event, and the intensity of the intentional or culpable element.[617]

Regarding these more recent rulings, it seems that a different legal classification of cases of dismissal due to employee's private conduct has been put forward in case-law. According to these judgments, the worker's conduct in the private sphere of the same could result in a dismissal for just cause only if it is possible to identify a duty of protection that was violated by means of the extra-employment behavior. This interpretation, compared to the majority jurisprudential orientation, differs from the so-called objective or fiduciary theory of the dismissal for just cause, being closer to the subjective or contractual one. This is because conduct relevant to dismissal for just cause or dismissal for justified subjective reason would, in any case, be a non-fulfillment (of the duties of protection, in the case of dismissal for private conduct) of different intensity and severity.

This jurisprudential reconstruction seems to be more coherent with the jurisprudential opinion, now unanimous,[618] which considers dismissal for just cause and dismissal for a justified subjective reason as belonging to the same category of "disciplinary dismissal" and therefore also more in line with a systematic point of view. Contrary, according to the majority orientation of the Supreme Court of Cassation, the employee's private conduct is relevant only for the dismissal for

Argomenti di diritto del lavoro, 10(1), pp. 277-303, with comment of C. Pisani (2004). *Licenziamento e sanzioni ai dipendenti per fatti privati: profili procedurali e sostanziali*; Corte Suprema di Cassazione, ruling of 9 March 2016, n. 4633, in *Rivista italiana di diritto del lavoro*, 2016, 4/2, pp. 800-805, with comment of P. Frigo (2016). *Sulla rilevanza disciplinare di condotte extralavorative illecite e... reticenti*.

[617] Corte Suprema di Cassazione, ruling of 24 January 2013, n. 1698, in database Leggi d'Italia.

[618] This jurisprudential opinion has also been expressly confirmed at the regulatory level. Law n. 92 of 2012, modifying the provisions of Article 7 of Law 604 of 1966, expressly provided that "*the applicability, for dismissal for just cause and for justified subjective reason, of article 7 of Law 300 of 20 May 1970*".

just cause, representing an injury to the bond of loyalty and not a breach of contract, which, instead, could lead to a disciplinary sanction different from that of dismissal, such as a conservative one.

The expression “disciplinary dismissal” refers to the sanction inherent in the dismissal applied by the employer when the employee, through his/her conduct, violates certain rules of law, collective agreements, or even the company’s disciplinary code. The majority considers that this category also includes dismissals for just cause and dismissal for a justified subjective reason, with the consequence that whenever the employer intends to dismiss an employee, he/she must necessarily follow the procedure provided for in Article 7 of Law 300/1970, Italian Workers’ Statute. So, briefly, the employer will have to challenge the fact, invite the worker to present his/her justifications, and, finally, wait five days from the dispute before adopting the sanction.

In light of the above considerations, it is possible to affirm that within the framework of Italian jurisprudence, some hypotheses of dismissal for ab employee’s private conduct, unrelated to work performance, have passed the scrutiny of legitimacy since they have been considered suitable to compromise the employer’s expectation of a future correct fulfillment of the work obligation by the worker.

An initial result that emerges from the rulings reviewed concerns the prevalence at the jurisprudential level of the objective or fiduciary theory, even if a series of more recent pronouncements, enhancing the category of the duties of protection, is closer to the subjective or contractual theory. The broad adherence at the jurisprudential level to the objective or fiduciary theory does not correspond to an equal acceptance by the doctrine, which has detected the inaccuracy of the assumptions underlying the objective or fiduciary theory. The aspects of the objective or fiduciary theory that have been deeply criticized by the doctrine are manifold and, for the most part, focused on the civil-law related aspects of the employment contract. The most debated element concerns the fiduciary foundation of the employment relationship itself, which,

according to the objective or fiduciary theory, would emerge as the element damaged by extra-workplace conduct.[619]

For this reason, the minority orientation of the Italian jurisprudence, which considers extra-working behavior to be relevant when it is in contrast with a duty of protection, seems more in line with what has been considered by the majority doctrine. As already stated above, according to this more recent case-law guideline, the duties of protection, which the employee may not have fulfilled by means of non-working conduct, are identifiable by means of an extensive interpretation, according to the general clauses of fair dealing and good faith, of the obligation of diligence and the obligation of loyalty on the part of the employee.

Nevertheless, the identification of the duties of protection is not immediate, and many legal issues arise. According to the most prominent doctrine, the general clauses delegate to the judge the formulation of the concrete rule of decision, being norms of a directive referring to a social standard understood as *"exemplary forms of the social experience of values"*.[620]

At the end of the analysis of the Italian dominant case-law orientations on the dismissals due to off-duty conduct, it is possible to identify at least two underlying themes. The first concerns the importance of the element of loyalty as a benchmark for verifying the legitimacy or illegitimacy of a dismissal ordered in response to an employee's non-working conduct. The second concerns the criteria suitable for the identification of private conduct that can be considered relevant for the purposes of a dismissal. The two themes, which are deeply interconnected, inevitably imply a civil law related reflection on the "area of the demanding" and on the "area the disciplinarily relevant".

[619] Ballestrero, M.V. (1991) Giusta causa e giustificato motivo soggettivo. In F. Carinci (Ed.), La disciplina dei licenziamenti dopo le leggi 108/1990 e 223/1991. Napoli: Jovene, p. 109; Tullini, P. (1999). Il licenziamento in tronco, la fiducia e i c.d. fatti extra-lavorativi. *Rivista italiana di diritto del lavoro*, 1, p. 150; Nuzzo, V. (2012). *La norma oltre la legge. Causali e forma del licenziamento nell'interpretazione del giudice*. Napoli: Satura, p. 52.

[620] Mengoni, L. (1986). Spunti per una teoria delle clausole generali. *Rivista critica del diritto privato*, pp. 13-15.

3.6 THE ELEMENTS OF INTUITUS PERSONAE AND LOYALTY IN THE EMPLOYMENT RELATIONSHIP

3.6.1 The Italian approach

As already noted, Italian jurisprudence has always widely used the reference to the irreparable damage of the loyalty bond in relation to the hypothesis of dismissal due to off-duty conduct,[621] although this concept is widely criticized by the Italian labor doctrine. For the purposes of the present investigation, it seems necessary to investigate the time when the notion of the loyalty bond regarding the employment relationship was developed and examine its validity in light of the current labor discipline.

First of all, it is essential to trace the regulations in force prior to Law 604 of 1966, which introduced into the Italian legal system the requirement of a justifiable reason reviewable by the court for the purposes of the employer's withdrawal.

In the system that existed before the Italian Civil Code of 1942, the principle of the free termination of the employment relationship by unilateral act was in force, derived from Article 1628 of the Civil Code of 1865, which prohibited a person from undertaking to work for third parties indefinitely, in order to avoid perpetual contractual relations.[622] Within this regulatory framework, in the second half of the eighteenth century in Italy, dismissal was conceived of as an innate right of the employer.[623] On the basis of the provisions of the civil code concerning the lease and mandate, the duration of the contractual obligation was left to the will of the parties, with the consequence

[621] The scholar Smuraglia C. in 1967 observed that *"In the decisions of the Supreme Court of Cassation concerning dismissal for just cause, the reference to loyalty is constantly repeated, without even giving reasons. The discussions that take place in doctrine and the evolution of legal thought do not seem to touch at all the unshakable convictions"* Smuraglia, C. (1967). *La persona del prestatore nel rapport di lavoro.* Milano: Giuffrè, p. 149. More recently, it has been observed that "*there is a tendency to see a violation of the duty of loyalty in any behaviour contrary to company interests, even if only potentially damaging*". Resolution Regional Administrative Court Milan sec. III 3 March 2016, n. 246, in *Il Lavoro nella giurisprudenza*, 2017, 4, pp. 382-387 with comment of Cottone, M. (2017). *"Social Network": limiti alla libertà d'espressione e riflessi sul rapporto di lavoro (il "Like")*.

[622] Fergola, P. (1985). *La teoria del recesso e il rapporto di lavoro*. Milano: Giuffrè, pp. 153-179.

[623] Rossi, F. (2015). L'emersione del licenziamento in età liberale (1865-1914) fra codice, dottrina e giurisprudenza. *Giornale di diritto del lavoro e di relazioni industriali*, 146, p. 240.

that each of them had the right to terminate the contract without the need to compensate the other party and without the need to provide a reason.[624]

The progressive departure from this approach came about thanks to the decisions of the judges to whom *"relationships are presented which are not contemplated in the codes*".[625] The prevailing and consolidated orientation at the end of the 1800s still considered valid the principle of the free termination of the employment relationship, in relation to which the violation of the loyalty bond was a valid motivation.[626] However, another aspect began to be affirmed in jurisprudence, namely the need for adequate notice of dismissal so that the worker's working stability was protected, applying, by analogy, to the rental of works the discipline then provided for the rental of things.[627] In this sense, the notice could not be respected if there were serious reasons[628] to be identified "*only in cases where the agent is guilty of infidelity, abuse of trust, insubordination, refusal of obedience and other serious offenses to the dignity and honour of the principal*".[629]

While in the nineteenth century, the Italian jurisprudence still lacked a complete elaboration of reasons in the presence of which dismissal could be considered legitimate (typification which began between the 1880s and 1890s in internal service regulations). The criterion to which constant reference was made was that of the violation of the loyalty bond. At the beginning of the nineties, the principle took shape according to which the worker must be compensated if he/she was dismissed without a valid reason.[630] In this sense, until 1966, dismissal with notice and dismissal for

[624] Supreme Court of Cassation of Venice, ruling of 11 June 1878, in *Giurisprudenza Italiana*, 30, pp. 802-805.
[625] Cavagnari, C. (1901). *Studi preliminari. Commissione per lo studio dei contratti agrari e del contratto di lavoro*. *Osservazioni e notizie*. Roma: Stamperia Reale Domenico Ripamonti, p. 60.
[626] Rossi, F. (2015). L'emersione del licenziamento in età liberale (1865-1914) fra codice, dottrina e giurisprudenza. *Giornale di diritto del lavoro e di relazioni industriali*, 146, p. 240.
[627] Ricci, F. (1886). *Corso teorico-pratico di diritto civile*, vol. VIII, II ed. Torino: Unione Tipografico-Editrice, p. 386.
[628] Court of Appeal of Catania 20.6.1904, *MT*, 45, p. 735.
[629] Court of Appeal of Lucca 20.12.1903, *MT*, 45, pp. 190-191; Abello, L. (1908). *Della locazione. Locazione di opere*, vol. II. Torino, Unione Tipografico-Editrice, pp. 627-658
[630] Rossi, F. (2015). L'emersione del licenziamento in età liberale (1865-1914) fra codice, dottrina e giurisprudenza. *Giornale di diritto del lavoro e di relazioni industriali*, 146, p. 253.

just cause in the Italian code were not conceived of as two distinct forms of withdrawal but as forms of exercise of the same power, distinct from the presence or absence of just reasons that had the sole function of excluding notice.[631] In the wake of these doctrinal theories, the jurisprudence of the Supreme Court began to apply the criterion of the breach of the fiduciary bond with regard to the hypothesis of dismissal for just cause, with the effect of extending the repertoire of behavior relevant to dismissal. The scholar Napoli M. observed with regard to this phenomenon of the application by the jurisprudence of the concept of trust that it "*attributed objectivity to an element caught in the purest subjectivity: any fact capable of shaking trust*".[632] This opinion finds confirmation in a concern that the Court of Appeal of Naples had already expressed in 1892, namely that the concept of trust represents "*an imponderable quid, the result of impressions that the soul derives from different circumstances*".[633] Over time, dismissal for just cause began to be understood not as a hypothesis of withdrawal without notice (as opposed to free withdrawal with notice) but as a case of dismissal that allowed the emphasis to be placed on those cases in which the bond of trust between employer and employee was broken.

With the entry into force of Law n. 604 of 1966 and the introduction of dismissal for justified reason, the Italian labor doctrine revised the loyalty conception of dismissal for just cause. In particular, Law n. 604 of 1966 defines dismissal for justified reason in the following terms: "*dismissal for justified reason with notice is determined by a significant breach of the contractual obligations of the employee or by reasons inherent to the productive activity, the organisation of work and its regular functioning*". From the tenor of the provision, two distinct hypotheses of dismissal for justified reasons emerge. The first hypothesis, that of dismissal for a justified subjective reason, occurs in cases where there is a breach of the employee's contractual obligations. The second

[631] Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, p. 19.
[632] Napoli, M. (1980). *La stabilità reale del posto di lavoro*. Milano: Franco Angeli, p. 58
[633] Court of Appeal of Milano 13.9.1892, *MT*, 43, p. 535.

hypothesis, that of dismissal for objective reasons, does not concern cases of non-fulfillment by the worker but is linked to company requirements.

The Italian labor doctrine,[634] in light of this new regulatory framework and, in particular, in light of the reference made by the legislator to the non-fulfillment of contractual obligations, began to exclude that some relevance could still be attributed to all the worker's behavior outside the contract. According to this reconstruction between dismissal for just cause and dismissal for justified reason, there would be a quantitative and not qualitative difference, with both hypotheses of dismissal originating in the worker's non-fulfillment, which, if it was considerable, would justify the loss of the notice for dismissal itself.[635] In other words, dismissal for justified reason and dismissal for just cause would differ only in the seriousness and significance of the breach, so that in the presence of a breach significant enough to impair the continuation, even temporarily, of the employment relationship, the obligation to give notice ceases.[636] According to this systematic reconstruction, the core of the employer's withdrawal is a significant or more than significant breach of contractual obligations by the employee.[637]

[634] Mancini, who was the first to theorize the importance of loyalty with regard to dismissal for just cause. Commenting on Article 18 of the Workers' Statute, he observed that "*art. 3 Law 604, recalling the contractual obligations of the employee, could not fail to involve just cause, as it is unthinkable that, for the purposes of the latter, it is lawful to disregard the terms in which the law has defined the justified reason for dismissal with notice. From the area of just cause, therefore, all those facts (irregular behaviour outside the company, suspicion of offences, criminal reports by the worker, illegal behaviour by the worker's family members, etc.) which, from 24 onwards, doctrine and jurisprudence, overestimating the personal profiles of the relationship, had considered suitable to legitimise the use of withdrawal, were to be excluded*". Mancini G.F. (1981), "Commento all'art. 18". In G. Ghezzi, G.F. Mancini, L. Montuschi, U. Romagnoli (Eds.), *Statuto dei lavoratori.* Bologna: Zanichelli, p. 91; Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 30.

[635] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 33; Napoli, M. (1983). *La stabilità reale del posto di lavoro*. Milano: Franco Angeli, p. 336; Di Majo, A. (1991). "Recensione a Mario Napoli", La stabilità reale del rapporto di lavoro. *Giornale di diritto del lavoro e di relazioni industriali,* p. 700; Altavilla, R. (1987). *Le dimissioni del lavoratore.* Milano: Giuffrè, p. 34; Ghera, E. (2000). *Diritto del lavoro.* Bari: Cacucci, p. 339; Gragnoli, E. (2001). "Conversione" del recesso per giusta causa in uno per giustificato motivo. *ADL Argomenti di diritto del lavoro*, 3, p. 813-832.

[636] Ghezzi, G. & Romagnoli, U. (1995). *Il rapporto di lavoro*. Bologna: Zanichelli, p. 335; Pera, G. (1980). *La cessazione del rapporto di lavoro*. Padova: CEDAM, p. 63; Dell'Olio, M. (1988), *Licenziamenti illegittimi e provvedimenti giudiziari. Atti delle giornate di studio di diritto del lavoro, Torino, 16-17 Maggio 1987*. Milano: Giuffrè, p. 510.

[637] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 47.

For its part, Italian jurisprudence, in spite of the change of opinion in labor doctrine, today continues with the application of the canon of the breach of the bond of loyalty, omitting the legal meaning that is attributed to the concept of loyalty today.[638] Nevertheless, as already observed, the majority labor doctrine considers that with the introduction of dismissal for justified reason by Law n. 604 of 1966, the legislator has definitively attributed importance for the purposes of both dismissal for justified reason and dismissal for just cause only to the hypothesis of breach of contract by the worker,[639] distinguishing the two hypotheses of dismissal exclusively on a quantitative level, i.e., by greater or lesser gravity of the breach itself. Consequently, it would no longer be admissible within the Italian legal system to consider that any fact can legitimize dismissal for just cause, despite not being a breach of contract and relating to the worker's private sphere, if it prevents the continuation of the employment relationship according to the criterion of breach of loyalty.[640] This interpretation is in line with the process of the "depersonalisation" of the employment relationship initiated with the workers' statute,[641] namely, the classification of the employment relationship among the economic-patrimonial contractual relationships and not those of a personal nature (i.e., those in which the subject of the contract is the person him/herself).

In a residual way, some reference by Italian doctrine to the element of loyalty with regard to dismissal sometimes resurfaces exclusively in relation to the evaluation of the seriousness of the conduct that already constitutes a contractual breach in itself.[642] The reference of the fiduciary element in these terms originates in an extensive application of Article 1564 of the Civil Code in the matter of supply contracts, which specifically provides that "*in the event of breach of contract by one of the parties relating to individual services, the other may request termination of the contract,*

[638] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 34.
[639] Ghezzi, G. & Romagnoli, U. (1995*). Il rapporto di lavoro.* Bologna: Zanichelli, p. 335.
[640] Riva Sanseverino, L. (1982). *Diritto del lavoro.* Padova: CEDAM, p. 447;
[641] Giugni, G. (1989). *Lavoro legge contratto.* Bologna: Il Mulino, p. 287.
[642] Ghera, E. (2000). *Diritto del lavoro.* Bari: Cacucci, p. 365.

if the breach is of considerable importance and is such as to undermine confidence in the accuracy of subsequent performance". Here, the reference to loyalty is made by the legislator exclusively regarding the assessment of the seriousness of the breach. In this way, the reference to loyalty cannot legitimize the attribution of importance to behavior external to the contractual constraint since, as already observed, the discipline on the subject of dismissal presupposes a breach of contract in any case.[643] The reason for the application of Article 1564 to the employment relationship lies in the consideration that all relationships of duration are stipulated for the satisfaction of a need located in the future. Therefore, in the evaluation of the seriousness of the breach, it is crucial to consider the possible termination of the safety of one party in the future performance of the other.[644]

In light of this first result regarding the irrelevance, according to the majority Italian labor doctrine, of the criterion of the breach of the loyalty bond with regard to the hypothesis of dismissal of the worker, it is appropriate to investigate whether the employment relationship falls within the category of obligatory relationships of a fiduciary nature. To this end, an aspect of crucial importance is the very notion of trust: in particular, in what terms it is understood by private law doctrine and whether and how it differs from *intuitus personae*.

The first Italian scholars[645] to take an interest in the concept of *intuitus personae* discerned that the qualifying character of *intuitus personae* is the consideration by a contractor of the person and the qualities of the other contractor as motives for consent to the conclusion of the contract. The consideration of one contracting party for the other must have been of such importance at the time of conclusion of the contract that without it, the parties would not have concluded the contract

[643] Mancini G.F. (1981), "Commento all'art. 18". In G. Ghezzi, G.F. Mancini, L. Montuschi & U. Romagnoli (Eds.), *Statuto dei lavoratori.* Bologna: Zanichelli, p. 91.
[644] Oppo, G. (1944). I contratti di durata. *Rivista di Diritto Commerciale,* I, p. 143-180.
[645] Messineo, F. (1948). *Dottrina generale del contratto.* Milano: Giuffrè, p. 397; Galasso, A. (1974). *La rilevanza della persona nei rapporti privati.* Napoli: Jovene; Castaldo, S. (2002). *Fiducia e relazioni di mercato.* Bologna: Il Mulino, p. 72.

or at least not under the same conditions.[646] The effects of *intuitus personae* are then left to the will of the parties so that if qualities of one contracting party should be lacking, the other contracting party may decide whether or not to admit the performance of a third party. The essential element would thus be the consideration that a contracting party has for the other contracting party as a condition of the contractual consent.

Loyalty is intended by Italian doctrine to be the reliance of one contractual party on the personal qualities of the other contractual party and, in these terms, represents the external manifestation of *intuitus personae*. Therefore, loyalty appears to be an element connected more to the psychological sphere of the contracting parties than to the patrimonial sphere, being the relationship based on a type of loyalty between the parties of greater intensity than the general loyalty between the contracting parties that exists in all contractual relationships.[647] In view of this reading, it is appropriate and necessary that the notion of trust should be understood as objectively as possible[648] to prevent the risk of admitting that the management of the contractual relationship is left to the discretion of the parties

With regard to the relevance of the element of *intuitus personae* and loyalty within the employment relationship, labor doctrine, at first, considering that the worker's performance was personal and therefore irreplaceable, deemed both *intuitus personae* and the element of trust to be inherent in the employment relationship.[649] More recently, labor doctrine has revised this idea. In particular, the doctrine, starting from the assumption that a performance is irreplaceable if it does not undergo significant changes when performed by a person other than the contractual

[646] Smuraglia, C. (1967). *La persona del prestatore nel rapporto di lavoro.* Milano: Giuffrè, p. 15.
[647] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 64.
[648] Smuraglia, C. (1967). *La persona del prestatore nel rapporto di lavoro.* Milano: Giuffrè, p. 32; Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 62.
[649] Lega, C. (1963). *La diligenza del lavoratore.* Milano: Giuffrè, p. 240; Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 64.

party,[650] has considered that in the specific case of the employment relationship, it is necessary to verify on a case-by-case basis whether the employer admits the performance is executable by others or whether the specific qualities of the employee's person are a determining condition of the employer's consent to the conclusion of the contract.[651] For this reason, the doctrine has come to the conclusion that work performance is not necessarily irreplaceable but depends on the will of the parties.[652]

In conclusion, from this point of view, the reference to the breach of trust in the employment relationship is not well-founded since trust is not an essential but only a possible element of the employment relationship. Moreover, as already noted, even in relation to the relevance of loyalty within the employment relationship with regard to the exercise of the withdrawal by the employer, the reference to the breach of loyalty is no longer valid. In fact, with the introduction into the Italian legal system of the discipline of dismissal for justified reason (Article 3 of Law 604/66), the general discipline of dismissals has been affected, and the previous regime of freedom of withdrawal (in identifying the justifying reasons for dismissal) has been replaced by the failure of the worker as the only legitimate reason for dismissal.[653]

3.6.2 The German approach

Within the German legal system, the concept of loyalty/trust (*Treue*) has significantly marked the evolution of legal thinking on the concept of the employment relationship. Numerous German scholars, belonging to the school of thought that conceived of the employment relationship as a personal associative relationship, identified the concept of loyalty as the distinctive element of the

[650] Smuraglia, C. (1967). *La persona del prestatore nel rapporto di lavoro.* Milano: Giuffrè, p. 78.
[651] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 65.
[652] Smuraglia, C. (1967). *La persona del prestatore nel rapporto di lavoro.* Milano: Giuffrè, p. 78.
[653] Persiani, M. (1971). La tutela dell'interesse del lavoratore alla conservazione del posto. In L. Riva Sanseverino & G. Mazzoni (Eds.), *Nuovo trattato di diritto del lavoro* (vol. II). Padova: Cedam, p. 681.

employment relationship.[654] According to this view, the parties to the employment relationship are not only obliged to exchange services, but the employer is obliged to protect the person of the employee, who is also subject to a personal duty of loyalty.[655]

According to this dogmatic reconstruction between employer and employee, of which the scholar Otto von Gierke was the main exponent, with the inclusion of the latter in the company, a personal bond would be established which, firstly, obliges the employee *"to carry out personal activities for the purposes and needs of another person"*[656] and which, secondly, entails the emergence of the fundamental obligation of loyalty between the contractual parties.[657] In this sense, in 1914, von Gierke[658] set out his theory, which prevailed until the 1960s,[659] according to which the employment relationship gave rise to a personal relationship of subordination[660] in which the employee would be subject to a duty of obedience and personal loyalty (*persönliche Treuepflicht*), in addition to the duty to perform his or her work.[661]

Von Gierke's concept was soon embraced by German jurisprudence. The Reichsgericht's ruling of 10 March 1915, which places the employee's duty not to disclose technical innovations in the relationship of loyalty (*Treueverhältnis*), is emblematic in this respect. The doctrine of the duty of loyalty was also widely followed during the Weimar Republic, not only among scholars[662] but also

---

[654] Jobs, F. (1972), Die Bedeutung Otto von Gierkes für die Kennzeichnung des Arbeitsverhältnisses als personenrechtliches Gemeinschaftsverhältnis. *Zeitschrift für Arbeitsrecht,* p. 305-343.
[655] Gierke, O.v. (1917). *Deutsches Privatrecht,* vol. III. Leipzig: Duncker & Humblot, p. 609.
[656] Gierke, O.v. (1917). *Deutsches Privatrecht,* vol. III. Leipzig: Duncker & Humblot, p. 609.
[657] Otto von Gierke, in criticising the draft of the BGB, considered that the BGB did not take into account the *"peculiar reciprocal obligations of moral and social content"* that entry into *"an enterprise or commercial body"* entails. Otto von Gierke, F. (1889). *Der Entwurf eines bürgerlichen Gesetzbuchs und das deutsche Recht*, Leipzig: Dunker & Humblot, p. 105.
[658] Reichold, H. (2018). § 53 Interessenwahrungspflichten des Arbeitnehmers - Grundlagen und Überblick. In H. Kiel, S. Lunk & H. Oetker (Eds.), *Handbuch zum Arbeitsrecht*. München: Verlag C.H. Beck, Rn. 2.
[659] BAG, ruling of 10 November 1955 – 2 AZR 591/54, in *Neue Juristische Wochenschrift*, 1965, pp. 359-360.
[660] According to this doctrinal reconstruction, the employment contract has been understood as a *"community-creating contract which finds its parallel not in the contract of sale but in the partnership agreement".* Hueck, A. & Nipperdey, H. C. (1957), *Lehrbuch des Arbeitsrechts*. Berlin Frankfurt am Main: Vahlen, p. 129.
[661] Schön, W. (1997). *Gedächtnisschrift für Brigitte Knobbe-Keuk.* Köln: Verlag Dr. Otto Schmidt, p. 879.
[662] In 1931, the scholar Otto Kahn-Freund, in developing an analysis of Reich Labour Courts (*Reichsarbeitsgericht*), observed that the employment relationship is not only based on the exchange of services but also on the duty of loyalty

at a legislative level. In fact, a draft of a general labor contract law of 1923 specifically identified the duty of secrecy and non-competition as declinations of the duty of loyalty (*Treuepflicht*).

Under the Nazi regime, the canon of worker loyalty became so central that it was laid down in paragraph 2 of the Law on the Organisation of National Work of 20 January 1934 (*Gesetz zur Ordnung der nationalen Arbeit*). According to the principle enshrined in the provision, "*the leader of the enterprise shall decide on all matters relating to the enterprise as far as they are regulated by this law. He shall look after the welfare of the followers. The followers must remain loyal to him as a result of the company community*". In this historical and political scenario, the conception of the employment relationship as a legal relationship of a personal nature prevailed, based *"exclusively on mutual loyalty"*[663] (*ausschließlich durch die gegenseitige Treue*). Even after the fall of the National Socialist regime, the idea of the employment relationship that prevailed until the 1980s, although increasingly subject to criticism, was that of a personal associative relationship governed by the principle of mutual loyalty (*beiderseitiger Treue*).[664]

The concept of the employment relationship as a personal relationship of an associative nature lost its validity in the German legal system some time ago because it was considered to have no valid legal basis.[665] German legal doctrine has come to the unanimous conclusion that the employment relationship is real and not personal in nature. At the same time, however, there is no doubt that the purpose of the employment relationship does not end with the exchange of work

and diligence (*Treue- und Fürsorgepflicht*). Ramm, T. (1966). *Arbeitsrecht und Politik.* Berlin-Spandau: Luchterhand, p. 149.

[663] Reichold, H. (2018). § 53 Interessenwahrungspflichten des Arbeitnehmers - Grundlagen und Überblick. In H. Kiel, S. Lunk & H. Oetker (Eds.), *Handbuch zum Arbeitsrecht.* München: Verlag C.H. Beck, Rn. 2.

[664] Reichold, H. (2018). § 53 Interessenwahrungspflichten des Arbeitnehmers - Grundlagen und Überblick. In H. Kiel, S. Lunk & H. Oetker (Eds.), *Handbuch zum Arbeitsrecht.* München: Verlag C.H. Beck, Rn. 2.

[665] Fischinger, P. (2018). § 3 Gegenstand und Leitprinzipien des Arbeitsrechts Rn. 1-47. In K. Heinrich, L. Stefan & O. Hartmut (Eds.), *Münchener Handbuch zum Arbeitsrecht, Band 1: Individualarbeitsrecht.* München: Verlag C.H. Beck, Rn. 19-20.

and remuneration but that both parties are also subject to duties of loyalty and care.[666] According to this different perspective, the employer and the employee are subject to additional obligations in addition to the contractual services due to the supplementary effect on the contract of the general principle of contractual loyalty (pursuant to paragraphs 241 and 242 BGB), as well as company regulations and collective agreements. These additional obligations are called accessory obligations (*Nebenpflichten*).[667]

In the current state of legal thinking on the basis of the employment contract, the duty of loyalty (*Treuepflicht*), understood in the above terms, no longer has any foundations other than in terms of strictly contractual loyalty according to the provisions of section 242 of the German Civil Code. The fundamental innovation resulting from the transition from the personalistic to the real conception of the employment contract is inherent in the different scope of the obligations recognized in respect of the employee. If, according to the view of the employment relationship as a relationship of a personal nature, the employee was required to refrain from doing "*anything harmful to the employer or the company*",[668] according to the view of the employment relationship as a relationship of a real nature, there is no basis for recognizing the autonomous validity of the duty of loyalty.[669] This does not mean admitting that the employment relationship only covers the employee's obligation to perform his work and the employer's counter-performance of remunerating the employee. Rather, the theory of the employment relationship as a real

[666] Fischinger, P. (2018). § 3 Gegenstand und Leitprinzipien des Arbeitsrechts Rn. 1-47. In K. Heinrich, L. Stefan & O. Hartmut (Eds.), *Münchener Handbuch zum Arbeitsrecht, Band 1: Individualarbeitsrecht.* München: Verlag C.H. Beck, Rn. 19-20.
[667] Wiese, G. (1996). Der personale Gehalt des Arbeitsverhältnisses. *Zeitschrift für Arbeitsrecht,* p. 7-16.
[668] Reichold, H. (2018). § 53 Interessenwahrungspflichten des Arbeitnehmers - Grundlagen und Überblick. In H. Kiel, S. Lunk & H. Oetker (Eds.), *Handbuch zum Arbeitsrecht.* München: Verlag C.H. Beck, Rn. 2.
[669] Von Staudinger, J., Looschelders, D. & Olzen, D. (2014). BGB - §§ 241-243. In J. Von Staudinger, D. Looschelders & G. Schiemann (Eds.), Berlin: Sellier - De Gruyter, § 242 Rn. 797.

relationship implies recognition of the category of so-called accessory obligations (*Nebenpflichten*).[670]

Accessory obligations are distinguished, on the one hand, between ancillary obligations to the main performance (*Nebenleistungspflichten*), which are based on the principle of good faith pursuant to Articles 242 and 241 subpara. 1 BGB, and, on the other hand, so-called obligations of consideration and protection (*Rücksichtnahmepflichten/Schutzpflichten*), which are independent of the performance of the main performance and are governed by Article 241 para. 2 BGB.[671] The two distinct categories of accessory obligations protect two different legal goods. In particular, the accessory obligations to the principal performance are intended to avoid possible disturbances of the interest in contractual equivalence (*Äquivalenzinteresses*), whereas the obligations of consideration and protection are intended to protect the integrity of the contractual parties themselves (*Integritätsinteresse*).[672]

The provision of § 242 BGB constitutes the legal basis of the accessory obligations to the main performance and provides that *"An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration"*. In this sense, the employee is obliged to act in such a way as to ensure proper performance and is likewise obliged to refrain from any action that might jeopardize proper performance.[673]

The provision in § 241(2) BGB forms the legal basis of the obligations of consideration and protection and provides that *"an obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party".* Therefore, the

[670] Reichold, H. (2018). § 53 Interessenwahrungspflichten des Arbeitnehmers - Grundlagen und Überblick. In H. Kiel, S. Lunk & H. Oetker (Eds.), *Handbuch zum Arbeitsrecht.* München: Verlag C.H. Beck, Rn. 16.
[671] Von Staudinger, J., Looschelders, D. & Olzen, D. (2014). BGB - §§ 241-243. In J. Von Staudinger, D. Looschelders & G. Schiemann (Eds.), Berlin: Sellier - De Gruyter, § 242 Rn. 793.
[672] Reichold, H. (2018). § 53 Interessenwahrungspflichten des Arbeitnehmers - Grundlagen und Überblick. In H. Kiel, S. Lunk & H. Oetker (Eds.), *Handbuch zum Arbeitsrecht.* München: Verlag C.H. Beck, Rn. 11.
[673] Von Staudinger, J., Looschelders, D. & Olzen, D. (2014). BGB – §§ 241-243. In J. Von Staudinger, D. Looschelders & G. Schiemann (Eds.), Berlin: Sellier - De Gruyter, § 242 Rn. 795 "Leistungssicherungspflicht".

obligations of consideration and protection integrate the content of the contract itself, although they have their origin in the principle of "*neminem-laedere*".[674] In fact, the obligations of protection have historically been recognized by German doctrine as playing a leading role within relationships of a personal nature, as an expression of the obligation of loyalty (*Treuepflicht*).[675] The obligations of consideration and protection acquire particular importance within the employment relationship due to the "close contact" that is established between employer and employee.[676] That said, it is difficult to classify the obligations of consideration and protection incumbent on the employee and the employer according to an unambiguous dogmatic criterion.[677] The interests of the parties to the contract are worthy of protection and therefore subject to an obligation to take account of and protect them only if they are in accordance with the principle of proportionality. For example, the restrictions to which the employee is subject in terms of competition with the employer and organizational provisions fall into the category of obligations to take account of and protect.[678]

The canon of trust is expressly recognized in the German labor law as having only a marginal function and, specifically, in relation to the institution of *"termination without notice in the case of a position of trust"* (*Fristlose Kündigung bei Vertrauensstellung*) governed by § 627 BGB. The provision provides in detail for the right of the contractual parties to terminate a service relationship (and therefore not an employment relationship) without notice and without just cause (*wichtiger Grund*) in the event that the special trust on the basis of which the obliged party must perform services of a higher nature ceases to exist. The rule in question concerns contracts of employment

[674] Picker E. (1983). Positive Forderungsverletzung und culpa in contrahendo - Zur Problematik der Haftungen "zwischen" Vertrag und Delikt. *Archiv für die civilistische Praxis,* 183, pp. 369-520.
[675] Reichold, H. (2018). § 53 Interessenwahrungspflichten des Arbeitnehmers - Grundlagen und Überblick. In H. Kiel, S. Lunk & H. Oetker (Eds.), *Handbuch zum Arbeitsrecht*. München: Verlag C.H. Beck, Rn. 15.
[676] Von Staudinger, J., Looschelders, D. & Olzen, D. (2014). BGB – §§ 241-243. In J. Von Staudinger, D. Looschelders & G. Schiemann (Eds.), Berlin: Sellier - De Gruyter, § 242 Rn. 797.
[677] Reichold, H. (2018). § 53 Interessenwahrungspflichten des Arbeitnehmers - Grundlagen und Überblick. In H. Kiel, S. Lunk & H. Oetker (Eds.), *Handbuch zum Arbeitsrecht.* München: Verlag C.H. Beck, Rn. 15.
[678] Reichold, H. (2018). § 53 Interessenwahrungspflichten des Arbeitnehmers - Grundlagen und Überblick. In H. Kiel, S. Lunk & H. Oetker (Eds.), *Handbuchzum Arbeitsrecht.* München: Verlag C.H. Beck, Rn. 15.

that imply a special competence or scientific training and a special mutual trust between the parties (such as a medical service or advice and representation by a lawyer[679]). The reason the institution of termination without notice in the case of a position of trust derogates from the general principle under which a party may terminate a contract of employment without cause, but with a time-limit, or without notice, but for just cause, lies in the particular nature of the contractual relations concerned. The scope of § 627 is thus limited to contracts of service under which the debtor must perform his/her activity without any subordination and therefore, according to an autonomous determination of time and manner.[680]

In conclusion, within the German legal system, an element emerges, namely, that the recognition of the value of the parameter of trust within the employment relationship implies as a logical premise the acceptance of the personalistic conception of the employment relationship itself. With the evolution of legal thought and, in particular, the recognition of the employment relationship as a contractual relationship in the proper sense, the element of trust no longer has a valid basis. Consequently, for this reason, even the hypotheses of lawful dismissal are limited to cases of breach of contract, understood not only as coinciding with the main services to be performed by the employee and the employer but also with reference to the failure to comply with accessory obligations. To confirm this conclusion, the German legislator took care to state expressly in § 627 BGB that the residual hypothesis of *"termination without notice in the case of a position of trust"* is not admissible for employment relationships.

[679] Henssler, M. (2020). BGB § 627 Fristlose Kündigung bei Vertrauensstellung. In F.J. Säcker, R. Rixecker, H. Oetker & B. Limperg (Eds.), *Münchener Kommentar zum BGB*, Rn. 1.
[680] Von Staudinger, J. (2016). Kommentar zum Bürgerlichen Gesetzbuch. Sellier: de Gruyter Rn. 5.

THE EMPLOYMENT RELATIONSHIP AS A COMPLEX OBLIGATION

4.1 THE ORIGINS OF THE GERMAN DOCTRINE OF SUBSIDIARY OBLIGATIONS

For the purposes of this research, it is essential to investigate the boundaries and, therefore, the scope of the obligatory relationship established between employer and employee by the employment contract. It is now undisputed that the obligation cannot be understood as coinciding solely with the service agreed upon between the parties since the entire legal sphere of the contracting parties is involved, not only their interest in the service.[681] The elaboration of the theory of the obligation as a complex relationship places among its logical presuppositions the recognition of the category of duties of protection (*Schutzpflichten*), a concept which emerged in Germany in the early 19th century and has permeated numerous foreign legal systems, including the Italian one.[682] The aim of this chapter is to retrace the salient features of the theory of duties of protection in its original and current formulation with particular attention to the effects that its application has on the employment relationship.

Historically, it was the German scholar Hermann Staub who was the first to hypothesize the scheme of duties of protection in his 1902 work "*On Positive Breaches of Contract and their Legal Consequences*" and in his 1904 work "*Positive Breaches of Contract*". Staub's thinking arose from a practical need, namely, to deal with the gaps then present in the German Civil Code. In particular, § 282 BGB, in regulating the hypothesis of delay in performance of the contract by the obligor in favor of the aggrieved party, would have included, according to the majority opinion at the time, all

[681] The conception of the obligatory relationship in terms of the subjection of the person of the debtor to the will of the creditor dates back to the archaic era of Roman law, but with the spread of commercial traffic, this reading of the obligatory relationship soon appeared insufficient. Falcone, G. (2003). *Obligatio est iuris vinculum.* Turin: Giappichelli; Guella, E. (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, p. 188.

[682] Guella, E. (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, p. 5.

hypotheses of non-performance in the sense of omission but not hypotheses of non-performance resulting from commission-based conduct.[683] Staub himself observed with reference to the rules laid down in § 286 BGB that "*a similar provision should apply to the many cases in which someone breaches an obligation by positive conduct, by doing something that they ought to omit, or by performing the performance due but in an inexact manner*".[684] In the context of his reflections, Staub came to the conclusion that the incorrect performance of an obligation (*schlechte Erfüllung*), i.e., an act of commission by which the party performs an action from which he/she was obliged to refrain (*jemand tutwas er unterlassen soll*), or by which he/she performs the service, but in an inexact manner, also gives rise to an obligation of compensation on the part of the party at fault in favor of the other party.[685] On closer inspection, the BGB in its version prior to the 2002 reform, admitted the possibility of compensation for damages resulting from incorrect performance, but only with reference to specific cases (with regard to contracts of sale under § 459 BGB, leases under § 538 BGB and contract for services under § 633 BGB), thus excluding the recognition of this principle in general.[686]

In light of these considerations, Staub came to the conclusion that the hypotheses of non-performance in the face of an obligor's negligent conduct could not be analogically included either in the hypothesis of the impossibility of performance under § 275 BGB (*Unmöglichkeit der Leistung*) because it concerned omissive conduct on the part of the obligor,[687] or in the hypothesis of liability

[683] Guella, E. (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, p. 12.
[684] Staub, H. (2001). *Le violazioni positive del contratto*. Napoli: Edizioni scientifiche italiane, p. 39 ss.
[685] Staub, H. (2001). *Le violazioni positive del contratto*. Napoli: Edizioni scientifiche italiane, p. 39 ff.; Guella, E. (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi vol. 9, pp. 11-12.
[686] Guella, E. (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, p. 14.
[687] Staub, H. (2001). *Le violazioni positive del contratto*. Napoli: Edizioni scientifiche italiane, p. 43.

under § 276 BGB because it expressed a definitional provision according to which "- *whoever acts with intent or negligence is guilty and liable*".[688] Therefore, Staub concluded that it was not possible to find in the rules of the German Civil Code on contracts an express provision recognizing the right of the contracting party harmed by an incorrect performance to damages and rescission of the contract,[689] but that this principle could be inferred from the general clauses.[690] In other words, according to Staub's theory, in the presence of a "*positive Vertragsverletzung*", i.e., a breach of contract due to a commission rather than an omission, which was different from the hypotheses of delay or impossibility of performance, it would have been possible to infer from the systemic structure of the Code both the right of the injured party to compensation for damages and the right of the latter to withdraw from the contract.[691]

Staub's insight underlying the theorization of duties of protection concerns the nature of the injuries that a contracting party may suffer as a result of the other contracting party's failure to perform. According to the author, a positive *Vertragsverletzung* may result not only in the other contracting party's interest in the exact performance of the contractual obligation being impaired (*Mangelschaden*) but also in further damage to the person or property (*Mangelfolgeschaden*).[692] The major contribution of Staub's theory lies precisely in the identification of these subjective legal positions of the parties to the contract, in addition to their interest in performance, which, being exposed to possible injury during the performance of the contract, constitute "*the object of an autonomous duty of protection*".[693]

---

[688] Fikentscher, W. & Heinemann A. (2006). *Schuldrecht*. Berlin: De Gruyter, p. 322 ff.

[689] With regard to the possibility of granting the aggrieved party the right to withdraw from the contract, the Reichsgerichtshof of 17 December 1901 had already granted an innkeeper the right to withdraw from a beer delivery contract that did not meet the promised quality level in light of the fact that only the compensation for damages would not contain all the damages. Reichsgericht, ruling of 17 December 1901, in *Deutsche Juristen Zeitung*, 1901, p. 118 ff.

[690] Staub, H. (2001). *Le violazioni positive del contratto*. Napoli: Edizioni scientifiche italiane, p. 47 ff.

[691] Von Bülow, O. (1885). *Gesetz und Richteramt.* Leipzig: Duncker & Humblot.

[692] Lambo, L. (2007). *Obblighi di protezione*. Padova: Cedam, p. 38 ff.

[693] Guella, E. (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, p. 22.

The reflections on duties of protection that have developed since Staub's theory in the German legal system have led to a new conception of the obligatory relationship. The studies of the scholar Heinrich Stoll, formulated in the two works "*Abschied von der Lehre von der positiven Vertragsverletzungen"*[694] and "*Die Lehre von den Leistungsstörungen*",[695] are those that revised Staub's theory most. The change of perspective adopted by Stoll can be perceived even in the adoption of different terminology. Stoll no longer speaks of *Vertragsverletzung* but of *Forderungsverletzungen*, i.e., no longer of non-performance of the contract but of the obligation in general.[696] Stoll wondered in particular about the nature for the *Mangelfolgescahden*, i.e., of the injuries to which the legal sphere of the contracting parties are exposed in the performance of a contract,[697] coming to the conclusion that the parties to a contract pursue in the contractual relationship not only an interest in performance (*Leistungsinteresse*) but also an interest in the preservation of their own person and property from possible damage resulting from the performance of the obligation (*Schutzinteresse*). According to the thinking of Stoll, this further interest in being protected corresponds to duties of protection (*Schutzpflicht*) incumbent on each party as a corollary to the principal obligation.[698]

According to this interpretation, the obligatory relationship would have a complex structure since there would be further obligations alongside the performance agreed between the parties, by reason of the principle of good faith, to protect the person and the assets of the other party. From this perspective, the duties of protection would be clearly distinguished from the main service since

[694] Stoll, H. (1932). *Abschied von der Lehre von der positiven Vertragsverletzungen*. In *Archiv für die zivilistische Praxis*.
[695] Stoll, H. (1936). *Die Lehre von den Leistungsstörungen*. In *Archiv für die zivilistische Praxis*.
[696] Castronovo, C. (1990). *Obblighi di protezione*. In *Enciclopedia giuridica Treccani*, Roma, vol. XXI.
[697] Guella, E. (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, p. 25.
[698] Castronovo, C. (1990). *Obblighi di protezione*. In *Enciclopedia giuridica Treccani*, Roma, vol. XXI.

their breach would be distinct from that of the main obligation, as they would result from facts other than the one determining the non-performance in the strict sense.[699]

As regards the remedies available to an injured party, German legal doctrine includes the cases of breach of the duty to protect within the scope of contractual liability.[700] This approach, which excludes the application of the remedies provided for by the German legal system in terms of non-contractual legal liability, responds first of all to practical needs. Specifically, non-contractual liability in the German legal system is based on the enumeration principle (*Enumerationsprinzip*), according to which only cases of damage expressly provided for by the legislator give rise to non-contractual liability.[701] More specifically, the types of damage that give rise to non-contractual liability in the German legal system are, according to § 823 BGB, damage resulting from the infringement of absolute rights as well as from the infringement of a legal rule protecting third parties and, according to § 826 BGB, damage caused by any breach of morality. In light of this legal framework, a distinctive feature of the German legal system clearly emerges, namely, the absence of non-contractual protection for purely economic damage (*reine Vermögensschäden*). Thus, duties of protection were also originally postulated in relation to this further lacuna in the German Civil Code.

With the enactment in 2002 of the German Act on the Modernisation of the Law of Obligations (*Gesetz zur Modernisierung des Schuldesrechts*), the gaps in the BGB, in respect of which the duties of protection had been developed by legal scholars, were filled by the legislature, which replaced the reference to the two hypotheses of non-performance due to delay and impossibility of

[699] Guella, E. (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, p. 26.
[700] Lambo, L. (2007). *Obblighi di protezione*. Padova: Cedam, p. 43 ff.
[701] Dilcher, H. (1982). *Schuldrecht. Besonderer Teil: in Programmierter Form*. Berlin: De Gruyter Lehrbuch, p. 472 ff; Grundmann, S. (2005). *Risarcimento del danno contrattuale. Sistema e prospettive nell'interazione fra gli ordinamenti tedesco e italiano in Europa*. *Diritto e giurisprudenza*, 2, p. 169 ff.

performance with a general clause referring to "breach of obligation" (*Pflichtverletzung*).[702] The application of such a broad formula makes it possible to include within the category of non-performance not only cases of delay and impossibility of performance but also all cases of breach of the duties of protection.[703] Moreover, with the 2002 reform, the German legislature introduced into the German Civil Code in § 241(2) the obligation of the contracting parties to protect the other party against any damage to the person and property that may arise during the course of the contractual relationship.[704]

The disappearance of the gaps in the German Civil Code, i.e., the practical reasons which had led German legal doctrine to develop the category of duties of protection, does not deprive the theory itself of any foundation. With the reform of the BGB, legal reflection on duties of protection has developed not around practical requirements but around the concept of obligation itself, leading to the conclusion that the obligation relationship should be recognized as complex in nature.

The innovative conception of the obligatory relationship that has thus resulted from the theory of duties of protection circulating in several foreign systems, including the Italian one, has received particular attention from scholars of other legal systems.

4.2 The assimilation of the German model within the Italian legal system

The development of the theory of duties of protection in the German legal system was strongly influenced by the rules in the field of obligations then in force, which had significant gaps in the area of non-performance and non-contractual liability. This circumstance was perceived by authoritative Italian scholars as an impediment to the acceptance of the category of duties of

[702] Canaris, C.W. (2003). *La riforma del diritto tedesco delle obbligazioni*. Contenuti fondamentali e profili sistematici del Gesetz zur Modernisierung des Schuldrechts. Padova: Cedam, pp. 11 and 137 ff.
[703] Schenk, A. (2007). *Die Pflichtverletzung (Leistungsstörung): Arten und jeweilige Rechtsfolgen nach dem neuen Leistungsstorungsrecht*. München: Grin Verlag.
[704] Literally, according to subpara. 2 of § 241 BGB, *"das Schuldverhältnis kann nach seinem Inhalt jeden Teil zur Rücksicht auf die Rechte, Rechtsgüter und Interessen des anderen Teils verpflichten"*.

protection within the Italian legal system.[705] According to these authors, it would not be admissible to recognize operativity to the duties of protection within the Italian legal system in view of the specific aspects that distinguish non-contractual liability within the German legal system. Indeed, unlike the German legal system, Art. 2043 of the Italian Civil Code defines non-contractual liability using a general clause that allows it to cover multiple types of damage.[706] Therefore, the gaps in protection that existed in the German legal system by virtue of the principle of enumeration (*Enumerationsprinzip*) originally adopted by the German legislature to identify cases of non-contractual liability do not arise in the Italian legal system. As already observed in relation to the German legal system, this consideration appears to be belied by the development of the theory of duties of protection in the German legal system. Since 2002, the reform of the Civil Code in the German legal system has eliminated the gaps in protection that existed in the previous version of the Civil Code and formed the logical basis of the theory of duties of protection. Nevertheless, the theory of duties of protection has not lost its validity in the German legal system but has taken on a different profile, relating more to the abstract theorization of the obligatory relationship itself, now understood as a complex organism.

This reflection on the foundation of the obligatory relationship has also engaged numerous Italian lawyers. According to some Italian scholars, the obligation fulfills not only the creditor's interest in seeing the performance realized but also the debtor's interest in being freed from the obligation through performance. In light of this interpretation, the result pursued by the obligation

[705] Natoli, U. (1984). *L'attuazione del rapporto obbligatorio*, vol. II, Il comportamento del debitore. In A. Cicu & M. Messineo (Eds.), *Trattato del diritto civile e commerciale*, XVI. Milano: Giuffrè, p. 18 ss.; Bigliazzi Geri, L. (1970). *Note in tema di interpretazione secondo buona fede*. Pisa: Pacini, p. 14 ss.

[706] Visintini, G. (2009). *Trattato della responsabilità contrattuale*. Padova: Cedam; Stanzione, P. (2012). *Trattato della responsabilità civile*. Padova: Cedam.

is really useful only if the interest of the creditor and the debtor in maintaining their legal sphere unharmed is satisfied by means of the duties of protection.[707]

Conversely, according to a different doctrinal current, the nature of the obligation as a complex relationship can already be deduced from the provisions of Articles 1173, 1174, and 1175 of the Italian Civil Code.[708] In particular, according to this doctrinal reconstruction, the duty of fairness prescribed in Art. 1175 of the Italian Civil Code would constitute not only a criterion for assessing the correctness of the contractual performance but also a legal instrument for supplementing the contract itself, in the event that the parties have not provided for reciprocal duties to ensure the proper performance of the obligation.[709] According to this reconstruction, the constitutional principle of social solidarity finds its way into private-law obligations.[710] From this perspective, therefore, the contractual obligation would no longer be understood as oriented towards the exclusive satisfaction of the creditor's interest but towards the superior and reciprocal objective between the parties that their legal sphere should not be damaged in the performance of the contract.[711]

In light of these reconstructions, centered on the evaluation of the different interests of the contracting parties, the majority of Italian legal doctrine embraces the German conception of the obligation as a complex relationship.[712] Indeed, the German elaboration of duties of protection has

[707] Guella, Elena (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, p. 41.
[708] Lambo, L. (2007). *Obblighi di protezione*. Padova: Cedam, chapter II, par. 7.
[709] Sangermano, F. (2007). *L'interpretazione del contratto, profili dottrinali e giurisprudenziali*. Milano: Giuffré, p. 131 ss.
[710] Lambo, L. (2007). *Obblighi di protezione*. Padova: Cedam, p. 65.
[711] Guella, Elena (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, p. 45.
[712] Guella, Elena (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, p. 41 ff.

been widely circulated within the Italian legal system[713] without, however, taking on features distant from the characteristics they have assumed in the German legal system.

The doctrinal reconstruction that has been most widely followed within the Italian legal system is the one according to which the general principles of fairness and good faith - i.e., Article 1175, which states that the parties must act fairly, and Article 1375 of the Civil Code, according to which a contract must be performed in good faith - give rise to duties of protection.[714] Within the Italian legal system, duties of protection, therefore, take the form of reciprocal obligations distinct from the principal obligation because they are intended to protect the legal sphere of both contracting parties from possible damage resulting from the performance of the obligation and are not aimed at satisfying the exclusive interest of the creditor in the performance itself. The duties of protection are therefore of a reciprocal nature since they are incumbent on all the parties to the contract[715] and have their source in the law and supplementary effects on the obligatory relationship, although they remain distinct from the principal obligation in terms of liability for non-performance.[716] In other words, duties of protection do not seek to satisfy the main obligation but are intended to protect a different interest of each of the contractual parties, and their non-performance may be invoked independently of the non-performance of the main obligation.

The mechanism of the integration of the contract is an institute expressly provided for by the Italian legislator in Article 1374 of the Italian Civil Code, according to which "*the contract binds the parties not only to what is expressed therein, but also to all the consequences arising therefrom according to law, or, failing that, according to custom and equity*". Therefore, according to authoritative Italian doctrine, the constitutional principles, such as social solidarity, proportionate

[713] Zoppini, A. (2006). Fonti del diritto privato, concorrenza tra ordinamenti giuridici e riforma del diritto delle obbligazioni (note minime). *Rivista di diritto civile*, 6, pp. 123-129.
[714] Lambo, L. (2007). *Obblighi di protezione*. Padova: Cedam.
[715] Fava, P. (2008). *Le obbligazioni*, vol. I. Milano: Giuffré, p. 424 ss.
[716] Rodotà, S. (2004). *Le fonti di integrazione del contratto.* Milano: Giuffré.

and sufficient remuneration, equality between men and women in the workplace, and freedom of private economic initiative, would thus also be applied to relations between private individuals, irrespective of the will of the parties, through the integration of the obligatory relationship in light of the canons of fairness and good faith.[717]

In contrast to the German legal system, in the Italian legal system, the category of duties of protection has not yet been expressly recognized in general terms by the legislator, with the exception of specific areas such as for the discipline of the employment relationship. Despite the fact that the category of duties of protection has remained a doctrinal elaboration, it has been widely applied by case law.[718] In addition, compared to the development that the theory of duties of protection has undergone within the German legal system, in the Italian legal system, the aspect that has been most closely examined by legal doctrine concerns the existence of possible duties of protection on the part of persons not involved in an obligatory relationship (so-called "*contatto sociale*").[719] According to this different perspective, in the presence of certain conditions, even in the absence of a contractual relationship, the reliance placed by a person on the technical and professional skills of another person would give rise to a duty of care on the part of the second person.

As already mentioned, within the Italian legal system, the only obligatory relationship in relation to which the legislator has expressly codified a duty of protection on the part of a contractual party is that of the employment relationship. In particular, Article 2087 of the Italian Civil Code expressly provides that "*the entrepreneur is obliged to adopt in the exercise of the enterprise the measures which, according to the particular nature of the work, experience and*

[717] Venosta, F. (2011). Profili della disciplina dei doveri di protezione. *Rivista di diritto civile*, 6(1), pp. 839-885.
[718] Guella, Elena (2016). *Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità*. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, p. 143.
[719] Lambo, L. (2007). *Obblighi di protezione*. Padova: Cedam, p. 358.

technique, are necessary to protect the physical integrity and moral personality of the employees".[720] Correspondingly, the Italian Civil Code recognizes the employee's obligation of loyalty to the employer, according to which, pursuant to Article 2105 of the Civil Code, "*the employee shall not deal with business, on his own account or on behalf of third parties, in competition with the employer, nor shall he disclose information relating to the organisation and production methods of the undertaking, or use such information in a way that may prejudice the latter*".[721] Regarding the employment relationship, the doctrinal debate has focused on the possible configurability of additional duties of protection both for the employer and the employee.

From this perspective, for the purposes of this research, it is crucial to understand whether the category of duties of protection may require the worker to comply with certain behaviors in his or her private sphere as well, with the consequence that failure to comply with these obligations may justify the dismissal of the worker.

As already considered in relation to the Italian legal system, the frequent reference by jurisprudence to the criterion of the breach of the fiduciary bond is not shared by labor doctrine. From the analysis developed in the previous chapters, in fact, a principle that is now well established in the doctrine clearly emerges: the relevance only of the hypothesis of breach of contract for the purposes of dismissal due to the conduct of the worker. On closer inspection, however, recognizing that only breach of contract is relevant in terms of termination of the employment relationship does not mean that the breach of the obligation to perform exhausts the hypothesis of breach of contract, since not only the breach of the main obligation to perform one's work but also the breach of duties of protection by the employee can legitimize the dismissal of the same.[722] In this sense,

[720] *"il più specifico obbligo di protezione dell'integrità psico-fisica del lavoratore sancito dall'art. 2087 c.c. ad integrazione ex lege delle obbligazioni nascenti dal contratto di lavoro (la cui violazione è fonte di responsabilità contrattuale)"* ruling of 24 February 2006, n. 4184.
[721] Mazzotta, O. (2008). *Diritto del lavoro*. Milano: Giuffrè, p. 493 ss.
[722] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, pp. 85-86.

Italian doctrine has adhered to the German theory framing the working relationship between complex contractual relationships. Because of this conception of the employment relationship, the two fundamental obligations of the worker to perform his/her work and on the part of the employer to pay the salary are flanked by a series of additional obligations.[723]

In relation to those behaviors of the worker that are not part of the employment relationship and do not even constitute a breach of secondary obligations, it is necessary to verify whether these can justify dismissal for objective reasons, i.e., for reasons not linked to the worker's behavior (which would lead to dismissal for "subjective" reasons) but for reasons relating to production activity, work organization, and the regular functioning of the company.[724]

Since the mid-1960s, Italian doctrine has adhered to this conception of the employment relationship as a complex contractual relationship[725] originating in the German doctrine of the second half of the 19th century. The scholar Pesiani – whose theory was also adhered to by Mengoni – was the first to realize that the worker "*is not simply obliged to perform his work in certain tasks, but is obliged to perform these tasks in view of the purpose of the organisation created by the employer*".[726] Therefore, there would be a set of additional duties of protection around the main performance in the contract, whose purpose would be to ensure the achievement of the result the parties have set out to achieve with the contract.[727]

Within Italian doctrine, as within German doctrine, numerous classifications of duties of protection have been identified, not only in the context of the general theory of obligations but also with specific reference to the employment relationship.[728] Among these, the best known is that of

[723] Mancini, G.F. (1957). *La responsabilità contrattuale del prestatore di lavoro*, Milano: Giuffrè, p. 4-5; Mengoni, L. (1965), Il contratto di lavoro nel diritto italiano, in Boldt, G., Camerlynck, G., Horion, P., Kayser, A., Levenbach, M.G., Mengoni, L. (Eds). Il contratto di lavoro nel diritto dei paesi membri della CECA. Milano: Giuffrè, p. 475.
[724] Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, p. 87.
[725] Mancini, G.F. (1957). *La responsabilità contrattuale del prestatore di lavoro*, Milano: Giuffrè, p. 53;
[726] Mengoni, L. (1965). Contratto e rapporto di lavoro nella recente dottrina italiana. *Rivista delle società*, p. 685-686.
[727] Mengoni L. (1954). Obbligazione "di risultato" e obbligazione "di mezzi", in Rivista del Dritto Commerciale, p. 193.
[728] Mancini, G.F. (1957). *La responsabilità contrattuale del prestatore di lavoro*, Milano: Giuffrè, p. 90.

the scholar Mengoni, who distinguishes the obligations arising from the contract into obligations of performance (*obblighi di prestazione*) and obligations of correctness (*obblighi di correttezza*).[729]

The first category, that of obligations of performance, includes all conduct other than the main contractual performance that still contributes to its proper fulfillment. For example, the following fall into this category: the obligation to observe specific technical instructions, the obligation to keep and guard work tools, and the obligation to observe a particular dress code in the workplace.[730]

The second category of duties of protection of correctness includes obligations preparatory to the performance of the main obligation (*obblighi preparatori all'adempimento della prestazione principale*) and duties of protection or security (*obblighi di protezione o di sicurezza*). Preparatory obligations and duties of protection or security have their origin in Articles 2094[731] and 2104[732] of the Italian Civil Code and in the principles of good faith and fairness, which require the parties to adjust their conduct to the interests of the counterparty. The preparatory obligations are instrumental to the insertion of the employee's main service within the employer's organization but do not have autonomous content. Therefore, their non-observance cannot be enforced unless there is a breach of the obligation to perform.[733] Thus understood, the preparatory obligations may also consist of conduct that the employee is required to observe outside working hours in order to preserve his/her ability to work. In other words, the employee may be required to refrain outside of the working time and place from carrying out activities that may cause him/her harm and thus

[729] Mengoni, L. (1965). Il contratto di lavoro nel diritto italiano. In G. Boldt, G. Camerlynck, P. Horion, A. Kayser, M.G. Levenbach & L. Mengoni (Eds.), *Il contratto di lavoro nel diritto dei paesi membri della CECA*. Milano: Giuffrè, p. 473.
[730] Pisani, C. (2004). *Licenziamento e fiducia*. Milano: Giuffrè, p. 93.
[731] "*An employee is a person who undertakes, for remuneration, to collaborate in the undertaking by performing intellectual or manual work in the employ and under the direction of the business owner*".
[732] "*The employee shall exercise the diligence required by the nature of the work to be performed, by the interests of the undertaking and by the higher interests of national production.*
He shall also comply with the instructions for the performance and discipline of work given by the employer and by the employer's employees to whom he is subordinate".
[733] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 97.

impair his/her ability to perform the employment contract.[734] As already noted in connection with the experience of the German legal system, this principle, if strictly applied, risks hindering the worker's freedom. For this reason, a balance must be struck between the employer's interest in the employee maintaining his/her own ability to work and the right to freely dispose of his/her free time.[735]

In light of the reconstruction of the duties of protection developed so far, it is necessary to question the configurability of such obligations on the part of the worker in his/her free time. As will become clear, dismissals are often declared legitimate because they concern conduct of the worker that is detrimental to the bond of trust, rather the violation of a duty of protection, without any importance to the bond of trust which, as has already been shown, is not supported by valid doctrinal foundations.

Italian labor doctrine is mostly in agreement that the risks to which the contract between employer and employee gives rise are particularly significant duties of protection, in light of the substantial involvement of the legal sphere of the contracting parties, compared to other contractual relationships.[736] In fact, the person of the worker is also physically included in the business of the employer, operating with the means and within the structure of the company, with the consequence that the damage caused by the worker can be of considerable gravity. Precisely because of the specific insertion of the worker within the corporate structure, the duties of protection incumbent on the worker to protect the employer are aimed overall at preserving the employer's organizational structure for the exercise of the business activity.[737]

---

[734] Mancini, G.F. (1957). *La responsabilità contrattuale del prestatore di lavoro.* Milano: Giuffrè, p. 155; Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 97.
[735] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 105; Mancini, G.F. (1957). *La responsabilità contrattuale del prestatore di lavoro*. Milano: Giuffrè, p. 147; Smuraglia, C. (1967). L*a persona del prestatore nel rapporto di lavoro.* Milano: Giuffrè p. 337.
[736] Mancini, G.F. (1957). *La responsabilità contrattuale del prestatore di lavoro*. Milano: Giuffrè, p. 131; Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 119.
[737] Mancini, G.F. (1957). *La responsabilità contrattuale del prestatore di lavoro*. Milano: Giuffrè, p. 89.

The Italian legislator has already typified the duties of protection incumbent on the employer[738] but only explicitly taken into consideration one hypothesis regarding the duties of protection incumbent on the employee to protect the employer: that governed by Article 2105 of the Civil Code relating to the obligation of confidentiality. However, the Italian doctrine, by means of the principle of good faith and fairness, has identified further duties of protection incumbent on the employee not typified by the legislator. The duties of protection identified by Italian labor doctrine concern: the obligation to preserve work tools in general (machinery, plant, equipment);[739] the obligation not to disturb the regular functioning of the organizational structure;[740] the obligation not to prejudice the company's position on the market;[741] the obligation to protect the person of the employer and his family members.[742]

With regard to the obligation to preserve work tools, the worker is obliged not to carry out acts of theft, misappropriation, and damage to the goods by means of which the work is carried out.[743] The obligation not to disrupt the regular functioning of the organizational structure does not concern cases in which the functioning of the production activity is compromised due to an external and blameless event, but rather cases in which it is the worker's own behavior that causes disturbances to the regular performance of the activity.[744] For example, the worker breaches the obligation not to disrupt the regular functioning of the organizational structure if he/she causes a fight.[745] The obligation not to undermine the company's position on the market requires the

[738] Mancini, G.F. (1957). *La responsabilità contrattuale del prestatore di lavoro.* Milano: Giuffrè, p. 89.
[739] Montuschi, L. (1973). *Potere disciplinare e rapporto di lavoro.* Milano: Giuffrè, p. 182.
[740] Mancini, G.F. (1965). *Il recesso unilaterale e i rapporti di lavoro,* vol. I. Milano: Giuffrè, pp. 102-103.
[741] Giugni, G. (1063). *Mansioni e qualifica nel rapporto di lavoro.* Napoli: Jovene, p. 257.
[742] Napoli, M. (1983). La stabilità reale del posto di lavoro. *Rivista Giuridica del Lavoro e della Previdenza Sociale*, I, p. 221.
[743] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, pp. 124-125.
[744] Mancini, G.F. (1965). *Il recesso unilaterale e i rapporti di lavoro,* vol. I. Milano: Giuffrè, pp. 102-103.
[745] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 126.

employee to refrain from taking any action that could discredit the employer's image, from the perspective of "*protection from harm and not only from damage*".[746]

The majority of the Italian doctrine considers that not only the conduct of the employee within the working environment but also the private conduct of the employee can harm the interests of the employer in the market. from this perspective, however, the limits within which the employee's private activity should be oriented to the protection of the employer's interests must be clearly defined in order to avoid a situation wherein "*the entire private life of the employee is at the service of the other party*".[747] For example, if the employee spreads negative news about the employer, it is necessary to identify the extent to which the obligation not to prejudice the company's position on the market may restrict the employee's freedom of expression, given that if the dissemination of prejudicial news results in damage to the employer's image, a breach of the obligation to protect the company's position on the market by the employee can arise. Thus, for example, if the allegations disclosed by the employee concerning the employer's unlawful conduct are true, the employee may not be charged with any breach of the obligation to protect, provided, however, that the means of disclosure was adequate and appropriate for the purpose.[748] In general, therefore, it is not possible to identify in an abstract way when the employee's freedom of speech or the employer's interests, which are the subject of duties of protection, prevail. It is necessary to refer the assessment to the judge so that he/she can make a case-by-case evaluation in light of the general clauses and implement the best balance between the conflicting interests involving the least damage to the parties.[749] Therefore, it is crucial to identify the limit beyond which the employee's conduct takes on the characteristics of a breach of a protection obligation.

[746] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 127.
[747] Mancini, G.F. (1957). *La responsabilità contrattuale del prestatore di lavoro.* Milano: Giuffrè, p. 155.
[748] Mattarolo, M.G. (2000). *Obbligo di fedeltà del prestatore di lavoro. Art. 2105.* Milano: Giuffrè, p. 197.
[749] Pisani, C. (2004). *Licenziamento e fiducia.* Milano: Giuffrè, p. 146.

4.3 CASE BY CASE ANALYSIS

4.3.1 *The scanning of applicants' online reputation*

As has already emerged throughout this survey, an increasingly common practice is the screening of candidates' information online. The search is often carried out on Google without access to specific channels, but also with the help of social networks. The potential of "digitalized" recruitment and selection procedures is evident: the employer is often able to learn information about candidates that he/she could not request directly from the person concerned.[750] For this reason, the protection of the rights and interests of both the employer and the candidate must be ensured during a digitized selection procedure. On the one hand, the employer is free to reject an application on the basis of entirely subjective preferences, but on the other hand, the reasons for rejection cannot be discriminatory.[751]

With particular regard to social networks, a distinction should be made between those that are purely for communication purposes and therefore designed for private use (e.g., Facebook) and those that are clearly designed to cultivate business contacts (e.g., LinkedIn, Xing).[752] The distinction is not insignificant because it allows us to assume a different use of the social network by the user. In particular, it is fair to assume that a person who creates a profile on a social network such as LinkedIn is motivated by work-related purposes, for example, because he/she is looking for a job. A person who registers on Facebook, on the other hand, is likely to do so for a different reason, for example, to keep in touch with old friends or to create a new circle of "virtual" acquaintances. It is certainly not possible to draw a clear-cut line between social networks for private and professional

[750] Gola, P. (2019). Das Internet als Quelle von Bewerberdaten. Vorgaben von DS-GVO, BDSG und UWG. *Neue Zeitschrift für Arbeitsrecht,* p. 658.
[751] Gola, P. (2019). Das Internet als Quelle von Bewerberdaten. Vorgaben von DS-GVO, BDSG und UWG. *Neue Zeitschrift für Arbeitsrecht,* p. 654.
[752] Ruge, J., Krömer, M., Pawlak, K. & Rabe von Pappenheim, H. (2020). *Lexikon Arbeitsrecht im öffentlichen Dienst.* Heidelberg: Rehm Verlag, Rn. 5.3 Bewerberscreening mittels sozialer Netzwerke; Forst, Gerrit (2010). Bewerberauswahl über soziale Netzwerke im Internet? *Neue Zeitschrift für Arbeitsrecht,* p. 428.

use since these are constantly evolving platforms that in some ways even invite an increasingly hybrid use, but it is generally safe to assume that the same users will have a different use in mind for each social channel.[753] This distinction between social networks for private and professional use is also reflected in use expressly permitted by the general terms and conditions of network operators. In particular, the general terms and conditions of social networks for private use limit access for private purposes and expressly prohibit use for commercial or business purposes, whereas professional platforms do not provide for restrictions on use for commercial purposes.[754] For this reason, the collection of candidates' data on social networks for private use, which prohibits use for commercial purposes in their general terms and conditions, is generally not permitted.[755]

The legal question that arises most urgently in relation to the widespread practice of screening candidates through social networks concerns the protection of an applicant's data. According to the principles of direct collection and consent of the data subject, established in the Italian and German legal system even before the entry into force of Regulation (EU) 2016/679 (GDPR), the employer/recruiter should obtain information about a candidate directly from the candidate him/herself. The use of network resources to acquire information, therefore, conflicts with the principle of direct collection.[756] The collection of information accessible on the network without the direct involvement of the person concerned is an exception to the rule and can only be allowed under certain conditions.[757]

With regard to consent, Article 7 of Regulation (EU) 2016/679 (GDPR) has introduced stringent requirements, providing in particular for written consent as well as the obligation of the

[753] Ruge, J., Krömer, M., Pawlak, K. & Rabe von Pappenheim, H. (2020). *Lexikon Arbeitsrecht im öffentlichen Dienst*. Heidelberg: Rehm Verlag, Rn. 5.3 Bewerberscreening mittels sozialer Netzwerke.
[754] Forst, G. (2010). Bewerberauswahl über soziale Netzwerke im Internet? *Neue Zeitschrift für Arbeitsrecht,* p. 429.
[755] Forst, G. (2010). Bewerberauswahl über soziale Netzwerke im Internet? *Neue Zeitschrift für Arbeitsrecht,* p. 429.
[756] Gola, P. (2019). Das Internet als Quelle von Bewerberdaten. Vorgaben von DS-GVO, BDSG und UWG. *Neue Zeitschrift für Arbeitsrecht,* pp. 654-655.
[757] Gola, P. (2019). Das Internet als Quelle von Bewerberdaten. Vorgaben von DS-GVO, BDSG und UWG. *Neue Zeitschrift für Arbeitsrecht,* p. 655.

data controller to inform the data subject about the purpose of the data processing and his/her right of withdrawal. More specifically, Article 14 of Regulation (EU) 2016/679 (GDPR) provides that when the data has not been obtained from the data subject, the data controller shall provide adequate information to the data subject about the data stored, the legal basis of the processing, the contact details of the data protection officer, the purposes of the data processing, the duration of storage, a list of the data subject's rights (including the right to appeal to the supervisory authority), and the source from which the data originates. Only when the provision of such information proves impossible or would involve a disproportionate effort, for example, because of the large number of recipients,[758] may the controller exempt him/herself from the obligation to provide such information, provided that he/she takes appropriate measures to protect the rights, freedoms, and legitimate interests of the data subject.

Under certain circumstances, however, the obligation of express, free, and informed consent is waived. One of these exceptions is provided for in Article 9 II (e) of Regulation (EU) 2016/679 (GDPR) and concerns the case in which data belonging to particular categories has been made manifestly public by the data subject him/herself. In this sense, it has been argued that the processing of information disseminated through social networks and made available to an indefinite number of users without a significant restriction on access does not require the data subject's consent.[759] In light of the requirements of Regulation (EU) 2016/679 (GDPR), the employer as a recruiter is obliged to obtain the consent of the data subject to the processing (e.g., by means of a questionnaire), unless the data has been made public by the data controller him/herself. In this case, however, according to Article 14(2)(f) of Regulation (EU) 2016/679, the data controller must provide the data subject with information regarding the source of the publicly accessible data. Furthermore,

[758] Gola, P. (2019). Das Internet als Quelle von Bewerberdaten. Vorgaben von DS-GVO, BDSG und UWG. *Neue Zeitschrift für Arbeitsrecht,* pp. 656-657.
[759] Gola, P. (2019). Das Internet als Quelle von Bewerberdaten. Vorgaben von DS-GVO, BDSG und UWG. *Neue Zeitschrift für Arbeitsrecht,* pp. 656-657.

pursuant to Article 22 of Regulation (EU) 2016/679, the employer must refrain from engaging in the practice of candidate profiling, i.e., any form of automated processing of personal data consisting of the use of such personal data to evaluate certain personal aspects relating to a natural person, in particular, to analyze or predict aspects of that person's professional performance, economic situation, health, personal preferences, interests, reliability, behavior, location, or movements.[760]

In the following analysis of the Italian and German data protection legislation, the data protection standards introduced at the European level by Regulation (EU) 2016/679 (GDPR) will be considered.

In the German legal system, according to Section 26 (1) sentence 1 BDSG, in general, personal data of employees may be processed for employment-related purposes where necessary for hiring decisions and if, according to the criterion of proportionality, the interest of the employee in keeping the data confidential does not outweigh the interest of the employer in collecting it.[761] It is required that the data collected on the network must be necessary for the final decision on the outcome of the selection, and the processing of such data must be carried out strictly for employment purposes. In this regard, the prevailing opinion in German doctrine to date is that the collection of a candidate's data shared in a social network for "private" and non-professional use cannot be considered necessary for the purposes of the decision on possible employment, with the result that their collection by the employer in his/her capacity as a recruiter cannot be considered permissible under § 26 (1) sentence 1 BDSG.

However, the processing of data accessible on professional social networks (such as LinkedIn and Xing) is a different matter. In this case, the processing can generally be considered lawful

[760] Schröder, G. (2019). Social Communities und deren datenschutzrechtliche Auswirkungen auf die Unternehmenspraxis. In N. Forgó, M. Helfrich & J. Schneider (Eds.), *Betrieblicher Datenschutz*. München: Verlag C.H. Beck, Kapitel 5. Rn. 45.

[761] Gola, P. (2019). Das Internet als Quelle von Bewerberdaten. Vorgaben von DS-GVO, BDSG und UWG. *Neue Zeitschrift für Arbeitsrecht,* p. 656.

because the information shared by the candidate or by former employers or collaborators is of a professional nature and is either not contained in the "paper" *curriculum vitae* or confirms what is indicated by the candidate him/herself in his/her own documentation.[762] Thus, it may be necessary for the final decision and is therefore also subject to processing for strictly employment-related purposes. However, a distinction must be made. The legal regime changes if the information on the social platform of a professional nature has been made visible by the candidate to all users or only to those who fall within his/her circle of virtual friends. In the first case, the recruiter, once registered on the social network, can access the candidate's information because it is accessible to all users, but in the second case, the employer must forward a friend request to the candidate in order to see what the candidate has shared on the network. In this hypothesis, it is considered that the employer must expressly refer to the intention to collect the data and the purpose pursued through the processing in formulating his/her request for connection.[763] In the German legal system, the employee has a further duty as a recruiter, namely, the obligation to inform the company's data protection officer in advance of the intention to collect and process online data on his/her candidates, pursuant to § 4g I Nr. 1 BDSG.

As regards the legislation on the processing of candidates' data during the selection phase, introduced into the Italian legal system with the entry into force of Regulation (EU) 2016/679, there are two provisions that regulate the matter, on the one hand, Article 10 of Legislative Decree N. 276 of 10 September 2003 and, on the other, Article 8 of the Italian Workers' Statute (Law N. 300 of 20 May 1970). Pursuant to Article 10 of Legislative Decree N. 276 of 10 September 2003, employers in their general capacity are prohibited from processing workers' personal data that is not strictly related to their professional aptitudes and job placement. In addition, the employer is prohibited in

[762] Forst, G. (2010). Bewerberauswahl über soziale Netzwerke im Internet? *Neue Zeitschrift für Arbeitsrecht,* p. 431; Däubler, W. (2001). Das neue Bundesdatenschutzgesetz und seine Auswirkungen im Arbeitsrecht. *Neue Zeitschrift für Arbeitsrecht,* pp. 874-881.

[763] Forst, G. (2010). Bewerberauswahl über soziale Netzwerke im Internet? *Neue Zeitschrift für Arbeitsrecht*, p. 431.

his/her capacity as a recruiter from carrying out any investigation and processing, even with the consent of the person concerned, information that may give rise to discriminatory behavior (such as personal beliefs, trade union, or political affiliation, religious belief, sex or sexual orientation) unless it concerns characteristics that affect the way in which the work is carried out or that constitute an essential and determining requirement for the purposes of carrying out the work.

With regard to surveys carried out on social communication networks and therefore of a private nature, even within the Italian legal system, it is considered that the collection and processing of data by the employer in his/her capacity as a recruiter are not permitted since the data thus collected is in principle not strictly relevant to the professional aptitudes and job placement of the candidates. Moreover, the information shared by users on social channels, such as Facebook and Twitter, often concerns those aspects of life that may lead to discriminatory treatment by the employer. For this reason, the processing of such data by the employer is precluded. For these reasons, the screening of candidates' information on social communication networks is considered prohibited within the Italian legal system. As regards the collection of data available on social networks of a professional nature (even those elements that could determine a discriminatory treatment), this is allowed, provided that the information has an impact on carrying out the work activity or concerns an essential and determining requirement for carrying out the work activity.

In conclusion, the Italian and German rules applicable to the collection and processing of applicants' online data by the employer in his/her capacity as a recruiter are similar in their underlying principles, if only because of the direct applicability of Regulation (EU) 2016/679 in the Member States' legal systems. However, the Italian and German data protection rules show their weaknesses in relation to these specific cases of collecting and processing data available on social networks. It is difficult for a person to know the reason why he/she has been excluded during a selection procedure, with the consequence that the contractual freedom of the employer could also

conceal a decision dictated by discriminatory reasons or incompatible with the candidate's right to the protection of his/her personality.[764] If a candidate discovers a discriminatory reason for rejection, he or she would have to prove not only the unlawful processing of his or her own data but also the resulting rejection itself in order to establish his or her claim for damages. In other words, the candidate would have the burden of proving that if the recruiter had not carried out the unlawful processing of data, the candidate would have been hired. The difficulties in the evidentiary field are not indifferent, despite the fact that in this hypothesis both legal systems (§ 22 of German *Allgemeines Gleichbehandlungsgesetz* and article 40 of Italian legislative decree 198/2006 *Codice delle pari opportunità tra uomo e donna*) provide a mitigated evidentiary regime for the victim of the alleged discrimination, requiring the latter to allege only circumstantial evidence. It is not surprising that in German literature, the data protection rules in the employment context have been described as a "toothless tiger".[765]

4.3.2 *The dismissal for online activity during working time*

In recent years, German and Italian courts have often dealt with cases of dismissal for excessive use of smartphones or communication devices such as the iPad in the workplace.

In particular, an Italian case is paradigmatic and has also earned the interest of the press due to the topicality of the subject matter and, perhaps, due to the ever-increasing instances in which conduct of this kind may be the subject of labor disputes. The case allows us to see, firstly, that the computer as a common tool for work expands the opportunities for use for private purposes in the workplace and, secondly, at the judicial level, how the application of the canon of trust is misleading

[764] Gola, Peter (2019). Das Internet als Quelle von Bewerberdaten. Vorgaben von DS-GVO, BDSG und UWG. *Neue Zeitschrift für Arbeitsrecht,* p. 654.
[765] Oberwetter, C. (2008). Bewerberprofilerstellung durch das Internet - Verstoß gegen das Datenschutzrecht? *Der Betriebsberater,* 29, pp. 1562-1565.

when assessing the legality of dismissal for excessive surfing of the web for private purposes in the workplace.

Before proceeding with the analysis of the Italian case, it is necessary to make some clarifications. First of all, the use of Internet resources is defined as commercial if there is a specific link between it and the employee's work duties; otherwise, Internet use is considered to be private.[766] In this respect, it is also crucial to consider that the employer, as the owner of the equipment, is responsible for deciding whether employees can use the network resources not only for commercial but also for private purposes.[767] The employer's permission for employees to use the Internet for private reasons may be explicit or implicit.[768] Permission is explicit if it is provided for in writing in company regulations, in an agreement with the works council, or even in the employment contract itself.[769] Alternately permission is implied if it can be inferred from a so-called "company practice" established for the use of the Internet for private purposes by employees at the workplace, which is known or at least recognizable to the employer and tolerated by the latter for a significant period of time, to the extent that it creates an expectation for the employees that they will be able to use the company's computer resources for private purposes in the future.[770]

Coming to the possible scenarios, if the employer has completely prohibited the use of the company computer for private purposes, the employee's use of network resources for non-work-related purposes will constitute a breach of the prohibition with the consequent possibility of applying the most serious sanction. Where the employer has expressly permitted the use of the Internet connection for private purposes, the manner in which this option may be exercised is

[766] Hanau, P. & Hoeren, T. (2003), *Private Internetnutzung durch Arbeitnehmer*. München: Verlag C.H. Beck, pp. 23 ff.
[767] Kramer, S. (2004). Internetnutzung als Kündigungsgrund. *Neue Zeitschrift für Arbeitsrecht,* p. 458.
[768] Geyer, F. (2003). Die private Nutzung von Kommunikationsmitteln am Arbeitsplatz. *Fachanwalt Arbeitsrecht,* p. 102
[769] Kramer, S. (2000). Gestaltung arbeitsvertraglicher Regelungen zur Telearbeit. *Der Betrieb,* p. 1329.
[770] Kramer, S. (2004). Internetnutzung als Kündigungsgrund. *Neue Zeitschrift für Arbeitsrecht,* p. 459.

specified in the rules laid down by the employer,[771] with the result that any use of the Internet beyond that permitted by the employer is inadmissible.[772] If, however, the instructions provided by the employer do not clearly indicate the permissible times for private use of the network, this option is in principle only considered to refer to times when there is a break from work and if this does not interfere with company activities (e.g., because it takes place during breaks), does not lead to high additional costs for the employer, and, finally, does not represent a risk for the company's operating system.[773]

The hypothesis that poses the most uncertainty, however, is the case in which the employer has not prepared any specific regulations on the use by employees of network resources for their own private purposes. In this case, Italian and German doctrine holds that the employee is precluded from using the company computer for private purposes since there is no right for the employee to do so.[774] In general, therefore, there is no permissible use of the employer's network resources if the employee violates the ancillary obligation to take the employer's business interests into account (*Pflicht zur Rücksichtnahme*).[775] A further fundamental criterion for assessing whether excessive use of the Internet is inadmissible is the extent to which the performance of the employee's duties is impaired.[776]

An episode of dismissal for excessive use of company Internet resources for private purposes by the employee is represented by the case decided by the Court of Brescia with judgment n. 782 of 13 June 2016, whose decision was also confirmed by the Supreme Court of Cassation with

[771] The employer could, for example, provide that the use of the Internet for private purposes can only take place on specific devices available to all in common areas. Kramer, Stefan (2004). Internetnutzung als Kündigungsgrund. *Neue Zeitschrift für Arbeitsrecht,* p. 460.
[772] Küchenhoff, G. (2020). BGB § 626 Fristlose Kündigung auswichtigem Grund. In B. Gsell, W. Krüger, S. Lorenz & C. Reymann (Eds.), *beck-online. Grosskommentar.* München: Verlag C.H.Beck Rn. 452-455.
[773] Vehslage, T. (2001). Privates Surfen am Arbeitsplatz. *Anwaltsblatt*, pp. 145-146.
[774] Geyer, F. (2003). Die private Nutzung von Kommunikationsmitteln am Arbeitsplatz. *Fachanwalt Arbeitsrecht,* p. 102.
[775] Kramer, S. (2004). Internetnutzung als Kündigungsgrund. *Neue Zeitschrift für Arbeitsrecht,* p. 460.
[776] Beckschulze, M. & Wolfram, H. (2001). Der Einfluss des Internets auf das Arbeitsrecht. *Der Betrieb,* pp. 1491-1497.

judgment n. 3133/2019. In this case, the applicant, a part-time secretary in a medical practice, was dismissed on 26 February 2014 due to improper use, for private reasons, of a company computer. In particular, after accessing the history of the company computer used by the employee, the employer discovered that in the space of 18 months, the employee had made a total of about 6,000 accesses to social networks, games, music, and other web addresses unrelated to the performance of work.

In contesting the dismissal, the appellant claimed that it was unlawful for lack of just cause since the employer's termination, according to the appellant, was intended to punish the employee because she had applied for social security benefits under Law N. 104 of 1992 in order to assist her ailing mother. The first instance judge considered that a sufficient amount of evidence of the alleged retaliatory nature of the dismissal had not been reached, unlike the conduct alleged against the appellant, which the first instance judge considered to have been established in light of the evidence gathered (such as, among other things, the secretary's computer history). The aforementioned conduct was therefore held by the judge at first instance to be in breach of the obligations of diligence and good faith to which the employee is bound in the performance of his/her duties and therefore constituting grounds for dismissal for just cause. The appellant appealed against the order of the court of first instance, claiming, first, that the employer had become aware of the conduct complained of in breach of the employee's right to privacy and, secondly, stating that she had always been allowed completely free access to the Internet, especially during "downtime". In accordance with the findings and assessment of the court of first instance, the court of appeal held that the dismissal was lawful and that the grounds put forward were unfounded, considering that the appellant's conduct was liable to undermine the employer's trust, given that she had constantly and for a long time taken time off work and improperly used a work tool, taking advantage of the fact that the employer did not subject her to strict controls.

The case at hand is paradigmatic and offers a valuable opportunity to analyze more than one relevant issue. First of all, there is an urgent need to reflect on the lawfulness of control over the work of the employee carried out by the employer by means of the history of the company computer. There is also the analysis of the conduct alleged against the employee herself, whose habitual use of social networks and other sites not related to the work performance during working hours was evident.

The remote control carried out by the employer by means of a work tool, such as a computer, is not *in re ipsa* legitimate. Despite the fact that, by default, every computer records the history of the accesses to the web pages, the personal data of the employee, which an analysis of the computer can detect, is subject to the discipline of the European Regulation on the processing of personal data (EU 2016/679).[777] It is precisely on this point that a more in-depth reflection is needed in light of the more general regulations drawn up at the European level on workers' right to privacy.[778] The reference principles concerning the monitoring of workers in the workplace – already developed by legislative sources prior to Regulation 2016/679 (such as Directive 96/45/EC), then applied by the European Court of Human Rights and finally confirmed by the recommendations of the Article 29 Working Party and transposed by Regulation 2016/679 – are legitimacy, transparency, proportionality, and purpose of processing. Translating these principles into the concrete dynamics

[777] Understanding "personal data" as the textual definition set out in the European Regulation 2016/679, i.e., "*any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, by reference in particular to an identifier such as a name, an identification number, location data, an online identifier or to one or more features of his or her physical, physiological, genetic, mental, economic, cultural or social identity*".

[778] On this point, reference should be made both to European legislative sources, such as Directive 96/45/EC on remote controls carried out within the company by means of electronic equipment, now repealed by Regulation 2016/679, and to soft law sources, such as the contributions of the Working Party provided for by Article 29 of Directive 96/45/EC (in particular, the "Working Document concerning the monitoring of electronic communications in the workplace", dated 29 May 2002) and Recommendations R(2015)5, R(2989)2, the latter drawn up by the Council of Europe. On this point, see: Ingrao, A. (2016). Il "cyberslacking" e i diritti del lavoratore "catturato nella rete informatica". Note critiche a margine della sentenza della Corte Europea dei diritti dell'uomo, sec. IV, 12 January 2016, n. 61496, "Barbulescu vs. Romania", in attesa della pronuncia della Grande Camera. *Osservatorio costituzionale*, 3, p. 625. Retrieved from: http://www.osservatorioaic.it/download/NfXr_qr_FN9aXUd2eKcfEwljeuls6Tagf7i3bjUIUUg/ingrao-definitivo.pdf.

for the employment relationship means imposing on the employer a series of substantive and procedural requirements aimed at preventing the employer from carrying out "*unjustifiable and unreasonable interference in the private life of the employee*".[779] Therefore, the employer has a non-generic information obligation towards the employees, who must be aware in advance of the possible control to which they may be subjected and of the modalities (i.e., in relation to the instrumentation by means of which such control may be carried out), the timing, the purposes, and the use of such employer control. The employer will only comply with this obligation if he/she prepares specific information notice on privacy within the company and brings it to the attention of each individual employee.

Within the Italian legal system, the aforementioned principles officially became part of the rules applicable to controls in the work context of our legal system with the reform of Article 4 of the Labour Code in 2015,[780] specifically with the introduction of the third paragraph, under which it is now provided that "*the information collected pursuant to paragraphs 1 and 2 may be used for all purposes related to the employment relationship provided that the worker is given adequate information on the methods of use of the instruments and of carrying out the controls and in compliance with the provisions of Legislative Decree N. 196 of 30 June 2003*" (the so-called "*personal data protection code*"). The legislative provision requiring employers to provide information (in addition to the additional requirements set out in the Privacy Code and the Guidelines drawn up by the Italian Personal Data Protection Authority[781]) on the processing of employees' personal data

[779] Article 14 of the 2015 Recommendation N. 5 of the Committee of Ministers to Member States on the processing of personal data in the employment context.

[780] Salazar, P. & Failla, L. (2017). Controlli difensivi: quali i limiti nel nuovo contesto dell'art. 4, L. n. 300/1970. *Il Lavoro nella giurisprudenza*, 2, pp. 164-168; G.A. Recchia (2017). Controlli datoriali difensivi: note su una categoria in via di estinzione. *Il Lavoro nella giurisprudenza*, 4, pp. 348-354.

[781] These include the employer's duty to prepare an information document setting out the employer's controls and the way in which they are carried out, and the employer's need to draw up a company policy setting out the permitted uses of company electronic devices. On this point, see: Paissan, M. (2010). *E-mails e navigazione in internet: le linee del Garante*, in P. Tullini (Ed.), *Tecnologie della comunicazione e riservatezza nel rapporto di lavoro. Uso dei mezzi elettronici, potere di controllo e trattamento dei dati personali*, in *Trattato di diritto commerciale e di diritto pubblico dell'economia*. Padova: Cedam, pp. 14-15; 20-23.; Tullini, P. (2009). Comunicazione elettronica, potere di controllo e tutela del

acquired by means of remote controls carried out with audiovisual equipment has consequently introduced a condition of legitimacy for the possible use of the data collected for disciplinary purposes.[782]

In this case, the Italian court does not seem to have fully considered the possible recurrence of the necessary prior, adequate information on the modalities of use of the instruments and the possible employer's controls (in compliance with the provisions of EU Regulation 2016/679). Only if the employee had been previously informed by appropriate means of the possibility for the employer to analyze the history of the computer could the personal data thus collected have been legitimately used for disciplinary purposes.

Further reflection appears necessary on the second aspect concerning the ascertained legitimacy of the dismissal imposed. The Court of Brescia (which was considered well-founded by the Court of Appeal as well as by the Supreme Court of Cassation) considered the secretary's conduct to be unquestionably serious. "*If one takes into account that there were approximately 6,000 accesses in 18 months, of which 4.500 to Facebook, made during working hours, equal to about 16 accesses per day [...] on an average of three hours of work [...] this is conduct likely to undermine the confidence of the employer, having the applicant [ed.] constantly and for a long time subtracted hours from work and improperly used the tool of work*". The territorial court expressly refers to the canon of trust, considered to be the basis of the relationship between employer and employee. Indeed, as we have already seen, the statement is not at all clear in the doctrine, and often, the reference in the case law to the breach of trust has been assessed more like a "style clause"[783] concealing a lack of an actual assessment phase. In relation to the concept of "breach of

lavoratore. *Rivista Italiana di Diritto del Lavoro*, 3(1), p. 324 ff.; Lavoro: Le Linee Guida del Garante per Posta Elettronica e Internet (resolution n. 13 of 1 March 2007 Guarantor Authority for the protection of personal data), in Official Journal n. 58 of 10 March 2007.

[782] Aimo, M.P. (2003). *Privacy, libertà di espressione e rapporto di lavoro.* Jovene: Napoli, pp. 320-332;

[783] Avondola, A. (2010). Il licenziamento per motivi soggettivi nel settore pubblico e privato. Sulla rilevanza della "inidoneità morale" del lavoratore. *Diritto delle Relazioni Industriali*, 4, p. 1034.

trust", the generality and the implicit personification of the employment contract inherent in this concept raise many critical issues (in addition to the uncertain regulatory reconstruction[784]).

The argument that is open to criticism in the present case is precisely the reference to the bond of trust regarding the secretary's conduct during working hours, in the workplace, and by means of the work tool made available to her. In essence, given that the conduct is fully within the scope of the contract, it did not result in an infringement of the fiduciary bond but in a genuine breach of the contractual obligation. On closer inspection, the frequent accesses to Facebook and to other web addresses not related to the work performance appear to integrate a hypothesis of poor performance (*scarso rendimento*)[785] rather than a hypothesis of conduct detrimental to the bond of trust, although it is undeniable that the hypothesis of poor performance constitutes an inexact and therefore not diligent performance.[786] On this point, according to the Italian Court of Cassation, the hypothesis of poor performance occurs when the employee fails to achieve the minimum level of performance that makes the work usable by the employer due to negligent conduct (as Supreme Court of Cassation specifies, "*that the cause of poor performance derives from the employee's negligence in the performance of the services forming the subject of the contract"*[787]).[788] In terms of the repercussions that poor performance can have on the fate of the

[784] As has already emerged, the legal basis of the fiduciary nature of the employment relationship is to be found in Article 1564 of the Civil Code concerning the termination of the supply contract.

[785] A clarification is necessary here. Italian doctrine and jurisprudence do not attribute the same importance to the "performance" factor attributable to the employee. Part of the doctrine considers performance as a component of the work obligation to be irrelevant, while for other authors, the achievement of a quantum, even if minimal, is still part of the performance due. On this point see: Napoli, M. (1980). *La stabilità reale del rapporto di lavoro.* Franco Angeli: Milano, p. 186; Santoro Passarelli, G. (2008). *Diritto dei lavori*. Giappichelli: Torino, p. 195; Marazza, M. (2004). Lavoro e rendimento. *ADL Argomenti di Diritto del Lavoro*, 9(2), p. 539-570.

[786] Di Stasi, S. (2015). Obbligo di diligenza ed obbedienza del lavoratore nel diritto vivente: una lettura ragionata dell'art. 2104 Cod. Civ. alla luce dei principali orientamenti giurisprudenziali. *ADL Argomenti di diritto del lavoro*, 3(2), p. 755.

[787] Angiello, L. (1983). Brevi note su un caso di licenziamento per scarso rendimento (note to ruling of Corte Suprema di Cassazione, ruling of 23 April 1983, n. 2797). *Rivista italiana di diritto del lavoro*, 3(00), pp. 648-652.

[788] Part of the jurisprudence requires the demonstration of a causal link between the negligent conduct attributable to the employee and the poor performance that occurred: Nannipieri, L. (1996). Licenziamento per scarso rendimento, minimi di produzione e onere della prova (Nota a Trib. Torino 3 maggio 1995). *Rivista italiana di diritto del lavoro*, 1996, 1(2), pp. 172-175.

employment relationship, the Italian Supreme Court has ruled that poor performance is included among the hypotheses of justified subjective grounds for dismissal[789] of a disciplinary nature.[790]

Returning to the case in question, the negligent conduct of the secretary undoubtedly resulted in a significant "quantitative" deficiency of the work service provided under the contract, preventing the employer from usefully including the employee's activity in the production of the organization. In light of the above, the reference to the bond of trust regarding conduct involving frequent access from the company computer to social networks and other entertainment sites during working hours appears unconvincing. Certainly, the common root of the hypothesis envisaged by the judge for dismissal for breach of trust and the hypothesis of dismissal for poor performance is to be found in the negligence of the conduct; but if in the first case, a worker who was more astute and deleted history of the computer would have managed to "take cover" from possible repercussions, in the second case, the "performance" of the same would be difficult to hide, as it is linked to certain data and freely and legitimately ascertainable by the employer.

Within the German legal system, in relation to the hypothesis of unauthorized use of the Internet for private purposes by the employee, there are principles very similar to those in force within the Italian legal system, despite the specificities dictated by the German law on the protection of dismissals (*Kündigungsschutzgesetz*). According to the principles operating within the German legal system, the use of a company computer for private purposes can lead either to dismissal for behavior, which, as already analyzed, requires a warning if infringements are committed by means of behavior that can be controlled by the employee, or to extraordinary dismissal without notice for the most serious infringements.[791] In particular, according to the German doctrine, an employee

[789] Ruggiero, L. (2004). Scarso rendimento ed inidoneità attitudinale sopravvenuta per modernizzazione tecnologica dell'impresa. *Massimario di Giurisprudenza del lavoro,* 1(2), p. 66.
[790] Pedrazzoli, M. (2011). Sul licenziamento per scarso rendimento e per il sopravvenire di incompatibilità personali. In M. Pedrazzoli (Ed.). *Licenziamento e sanzioni nei rapporti di lavoro*. Padova: CEDAM, p. 86.
[791] Dismissal without notice occurs in cases where the employee's breach of duty is so serious that the illegality of the action and its unacceptability to the employer must have been obvious to the employee. Küchenhoff, G. (2020). BGB §

who makes unauthorized use of the company computer not only breaches ancillary obligations to the employment contract but, if the breach continues over a considerable period of time, also his/her primary duty to perform his/her work.[792] In this regard, the German courts have held that there is a legitimate ground for dismissal without notice in the case of non-compliance with the express prohibition on the use of the company computer for private purposes by a worker who had surfed the net between 14 minutes and three hours per day, totaling 51 hours in a two-month period.[793] According to German case-law, in such cases, the distinction between dismissal with notice and extraordinary dismissal without notice is to be found in the weighing up of all factual elements, such as previous conduct length of service, age, the employee's employment prospects, and the consequences of the breach of duty.[794]

In conclusion, the use of a company computer for private purposes by an employee raises several legal issues. First of all, it must be considered that according to the current European legislation and the orientation of the European Court of Human Rights[795] on the protection of employee data, the employer is entitled to monitor the online activity of its employees at work only if the latter have been informed in advance of the possibility, type, and extent of such monitoring. Secondly, the most debated issue with regard to the use of corporate network resources by employees for private purposes concerns the criterion to be adopted to assess the employee's conduct. In this regard, within the Italian legal system, recourse to the alleged bond of trust between employee and employer is misleading because it prevents an effective analysis of the factual circumstances. Within the German legal system, the same difficulties are encountered in drawing a

626 Fristlose Kündigung auswichtigem Grund. In B. Gsell, W. Krüger, S. Lorenz & C. Reymann *beck-online. Grosskommentar*. München: Verlag C.H. Beck Rn. 452-455.

[792] Beckschulze, M. (2003). Internet-, Intranet- und E-Mail-Einsatz am Arbeitsplatz. *Der Betrieb,* pp. 2777-2781.

[793] BAG, ruling of 27 April 2006 - 2 AZR 386/05, in *Neue Zeitschrift für Arbeitsrecht*, 2006, pp. 977-980, Außerordentliche Kündigung wegen privater Internetnutzung pornografischer Seiten.

[794] Kramer, S. (2004). Internetnutzung als Kündigungsgrund. *Neue Zeitschrift für Arbeitsrecht*, p. 460.

[795] European Court of Human Rights, ruling of 5 September 2017 - 61496/08, in *Beck-Rechtsprechung* 2017, p. 123332.

clear dividing line between lawful and unlawful use, whether or not there is company authorization to that effect. In any case, a decisive criterion may be the concrete amount of time devoted to online activities for private purposes and, therefore, removed from work duties. Only an analysis in these terms can determine the actual seriousness of the breach of both the principal obligation and the accessory obligations of the employment contract, such as that of not damaging the employer's operating system, for example, by downloading "malware".[796]

4.3.3 *Dismissal due to the off-duty use of social networks*

The communication possibilities offered by digital connections are countless and constantly evolving. Among these, social networks allow a peculiar form of participation for individual users. First and foremost, all social platforms allow messages to be sent and received between users, establishing a real digital conversation between two or more subjects (so-called group chat).[797] Second, another form of communication between users is through "posts", which consist of messages on a virtual wall visible to several people. The circle of people to whom the content of posts is visible varies depending on the privacy settings chosen by the author of the post. Finally, most social networks include a photo-sharing function, i.e., the sharing of content with or without text. Each user is then offered the possibility to interact with the creator of a post by commenting, sharing, or pressing the "like" button.

The legal issues that arise are numerous. In particular, because of the particular dissemination potential of the medium used, the online activity carried out by an employee in his/her free time outside working hours may cause considerable damage to the interests of the

[796] Küchenhoff, Günther (2020). BGB § 626 Fristlose Kündigung auswichtigem Grund. In B. Gsell, W. Krüger, S. Lorenz & C. Reymann (Eds.), *beck-online. Grosskommentar*. München: Verlag C.H. Beck Rn. 456.
[797] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht,* p. 786.

employer. That being said, it is also true that the contractual link between the employee and the employer is not as intense as during working hours.

Among the legal issues that arise due to the technological peculiarities of the medium used, the most relevant is that of the employer's access to and use of the employee's information accessible on the network as data. Italian and German jurisprudence initially held that everything that a worker shares on the web is considered public domain and therefore usable.[798] More recently, however, in both legal systems, more recent rulings have drawn a distinction between digital content reserved to a limited group of users and that which is potentially visible to anyone. In this sense, the former would be considered unusable by the employer, and the latter would be useable.[799] This element makes it possible to assess the degree of confidentiality of a conversation both in the case of an oral conversation between colleagues[800] and in the case of an exchange of virtual messages or the publication of a post on one's user profile. Still, the orientation of part of the jurisprudence according to which virtual conversations in social networks must automatically be considered non-confidential seems to be too strict and not very relevant to reality.[801] The broadly applicable criterion that seems to be most weighted is that "*the less the employee has limited the target group of his statement by adjusting his privacy settings, the more likely it is that a statement will be inadmissible".*[802] The Italian Council of State is of the same opinion, which in the context of

[798] Fameli, E. (2019). La rilevanza giuslavoristica dei social network, tra diritti dei lavoratori e prerogative datoriali di controllo. *Rivista italiana di informatica e diritto*, 1, p. 24. Retrieved from: http://www.rivistaitalianadiinformaticaediritto.it; Court of Ivrea 28 January 2015, resolution n. 1008, in *Il Lavoro nella giurisprudenza*, 2015, 8-9, p. 837, with comment of P. Salazar (2015). *"Facebook" e licenziamento per giusta causa: quando si travalicano i limiti del privato influendo sul rapporto di lavoro.*

[799] Corte Suprema di Cassazione, ruling of 31 January 2017, n. 2499, in *ADL Argomenti di diritto del lavoro*, 2017, 3, p. 3 ff., with comment of M. Matarese (2017). *Diritto di critica sui social network e licenziamento ritorsivo*.

[800] The German courts held that statements made in the context of a confidential conversation between work colleagues fell within the scope of the protection of general personality rights. Kort, M. (2012). Kündigungsrechtliche Fragen bei Äußerungen des Arbeitnehmers im Internet. *Neue Zeitschrift für Arbeitsrecht*, pp. 1321-1322.

[801] LAG Hamm, ruling of 10 October 2012 - 3 Sa 644/12, *Beck-Rechtsprechung* 2012, p. 74357; ArbG Duisburg, ruling of 26 September 2012 - 5 Ca 949/12, in *Neue Zeitschrift für Arbeitsrecht* - Rechtsprechungsreport 2013, p. 18-20.

[802] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht,* p. 787; Klinkhammer, P. & Müllejans, G. (2014). Veröffentlichen von Fotos in sozialen Netzwerken - ein Überblick über mögliche Rechtsfolgen. *Arbeitsrecht Aktuell,* pp. 503-506.

one of its pronouncements, held that if "*access to the personal profile is only possible for those who know the username of the person concerned, which acts as a filter for access, [...] it cannot be considered, therefore, indiscriminately visitable by anyone, but essentially addressed to 'acquaintances' who have the access 'key' (the username)*".[803]

Ultimately, the legitimacy of the processing of the employee's online data would depend on the level of accessibility of the information itself. Such an approach is also in line with what has been established in paragraph 2, letter e) of Article 9 of the General Data Protection Regulation, which states that *"processing relates to personal data which are manifestly made public by the data subject".* In particular, Article 9 of Regulation 2017/679/EU generally prohibits the processing of special categories of personal data (such as personal data that can reveal: racial or ethnic origin; political opinions; religious or philosophical beliefs; trade union membership; genetic and biometric data through which it is possible to identify a natural person uniquely; data concerning health or a natural person's sex life or sexual orientation) unless – and this is one of the exceptions to the prohibition – the processing relates to personal data that is manifestly made public by the data subject. However, the level of accessibility of the information itself by third parties is not a decisive criterion, given the imponderability to which the dissemination of data shared on social networks is subject. The level of accessibility of the information itself by third parties is, however, not a decisive criterion, given the imponderable nature of the data shared on social networks.[804] In other words, if the employee is justifiably confident in the degree of confidentiality of the communication channel used (private chat room or chat room of a restricted group of users), access by the employer to the opinions expressed by the employee him/herself must be considered to be precluded to a greater

[803] Consiglio di Stato, sec. III, ruling of 21 February 2014, n. 848, in *Foro Italiano*, 2014, III, p. 501.
[804] Thüsing, G. & Wurth; G. (2020). § 10 Sanktionen unzulässiger SocialMedia-Nutzung. In G. Thüsing & G. Wurth, *Social Media im Betrieb. Arbeitsrecht und Compliance.* München: C.H. Beck, Rn. 39-48; BAG, ruling of 10 October 2002 - 2 AZR 418/01, in *Neue Zeitschrift für Arbeitsrecht* 2003, p. 1295; Bauer, J.H. & Jens G. (2013). Kündigung wegen beleidigender Äußerungen auf Facebook. Vertrauliche Kommunikation unter Freunden? *Neue Zeitschrift für Arbeitsrecht*, p. 67-73.

extent.[805] On the contrary, an employee who publishes criticisms of his/her employer on his/her own wall or in an open group, which are accessible to all users with whom he/she is connected and also to so-called "friends of friends", cannot invoke the confidentiality of his statement.[806]

Once the legitimacy of the processing of data by the employer has been ascertained, insofar as the data is accessible to third parties on the network without any particular access filters, the subject of the assessment will focus on the existence of an actual breach of contractual duties, both main and ancillary, by the employee. As has already emerged on several occasions in the course of this study, the online activity of the employee, even if carried out outside working hours and the company premises, may still damage the interests of the employer. In this sense, the most critical issues concern the identification of the legal criteria to be applied in order to verify whether a violation of the main or ancillary duties arising from the employment relationship is committed through conduct on the employee's network.[807] The criterion most widely applied by Italian and German case law is that of breach of trust. The notion of a fiduciary relationship within the employment relationship has historically originated in the personalistic concept of the employment relationship. In other words, recognizing the existence of a bond of trust between employee and employer implies accepting that the employment relationship establishes a bond between the parties that is not only economic but also personal, whereby the employee places his or her own person at the service of the employer. However, in light of the evolution of legal thinking on the basis of the employment relationship, a conflict undeniably emerges between the established mandatory nature of the employment relationship and the judicial application of the criterion of the fiduciary relationship. Moreover, the dangers of applying this criterion to judgments on the

[805] BAG, ruling of 10 October 2002 - 2 AZR 418/01, in *Neue Zeitschrift für Arbeitsrecht* 2003, p. 1295.
[806] Thüsing, G. & Wurth; G. (2020). § 10 Sanktionen unzulässiger SocialMedia-Nutzung. In G. Thüsing & G. Wurth (Eds.), *Social Media im Betrieb. Arbeitsrecht und Compliance*. München: C.H. Beck, Rn. 45.
[807] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht,* p. 786.

legitimacy of dismissals based on network conduct by the employee are not negligible. Above all, there is the danger of recognizing the relevance of conduct which is in itself irrelevant to the contractual level with the consequent shifting of the criterion of judgment from an objective to a subjective level. This is because the judge, having recourse to the general clause of the bond of trust, often lets him/herself be guided by his/her own personal sensitivity.[808]

As emerged in the course of this study, the legal reflection on the employment relationship did not end with the disavowal of the personal nature of the employment relationship but went hand in hand with the affirmation in civil law doctrine of the concept of the obligatory relationship as a complex relationship. Therefore, including the employment relationship among relationships of a compulsory nature implied the recognition of ancillary obligations within the employment relationship. In other words, the doctrine of labor law has undoubtedly denied that the employment relationship is limited to the mere exchange of work for remuneration and has recognized that a series of ancillary and reciprocal obligations occur alongside the main services. In this sense, therefore, with regard to the online activity of the employee that is detrimental to the legal sphere of the employer, it is essential to understand whether the employee's conduct is in conflict with one of the accessory obligations incumbent on him/her.

Finally, once the breach of contract has been established, it must be assessed whether the sanction imposed on the employee is proportional to the breach. To this end, the balancing of the legal position of the employee and the employer is guided by a number of factual and legal criteria. In particular, on the one hand, it is necessary to resort to the criteria developed by the courts with regard to the hypothesis of insult and defamation expressed by the employee verbally or using other non-technological means of communication (such as the press) rather than through the network.

[808] Fameli, E. (2019). La rilevanza giuslavoristica dei social network, tra diritti dei lavoratori e prerogative datoriali di controllo. *Rivista italiana di informatica e diritto*, 1, p. 29. Retrieved from: http://www.rivistaitalianadiinformaticaediritto.it.

On the other hand, it is also appropriate to develop specific criteria related to the peculiarities of the medium of dissemination used, such as a social network.

4.3.4 *Inconvenient wordings on social media*

With regard to disparaging statements against the employer by the employee on social networks, it is necessary to balance the employee's freedom of opinion (or right of criticism) against the employer's right to honor, reputation, and economic interests. The balancing of these legal assets is not straightforward since they are primary rights and freedoms that may be in conflict with each other within the employment relationship. The value[809] underlying the right to criticism and the right to one's reputation and image is not only recognized at the national level by individual constitutional charters but is also protected at the supranational level by international treaties. In this regard, the European Court of Human Rights has on more than one occasion been called upon to settle disputes, the resolution of which required the identification of specific limits to freedom of expression in the employment context.

A first relevant aspect of the European Court of Human Rights' interpretation of Article 10 of the Convention concerns the extent of protection afforded to freedom of expression. According to one of the recurrent maxims, *"freedom of expression applies not only to information or ideas that are welcomed or regarded as harmless and indifferent, but also to information or ideas that are disturbing or upsetting: this conclusion is imposed by pluralism, tolerance and the spirit of openness, without which there can be no 'democratic society'"*.[810] Even though freedom of expression also covers improper or offensive expressions of thought, the right of expression is not absolute, and the

[809] The European Court of Human Rights itself has held that freedom of expression "*occupies an eminent place in a democratic society and constitutes one of the primordial conditions of its progress and the development of individuals*" (European Court of Human Rights, 25.3.1985, application n. 8734/79, Barthold v. Germany, § 58, infra, sec. III).

[810] European Court of Human Rights, 24.5.1988, application n. 10737/84, Müller v. Switzerland; European Court of Human Rights, 21.9.2017, application n. 51405/12, Axel Springer SE v. RTL Television GmbH/Deutschland; European Court of Human Rights, 13.1.2015, application n. 62716/09, Łozowksa v. Polen.

limits to it are set out in Article 10(2) of the Convention. The limits to this right are specified in Article 10(2) of the Convention, which recognizes the right of States to subject the exercise of freedom of expression by law to formalities, conditions, restrictions, or sanctions in order to ensure the protection of other equally fundamental legal rights, whether public or private (for example, national security, the protection of the reputation or rights of others, to prevent the disclosure of confidential information, or to guarantee the authority and impartiality of the judiciary).[811]

With regard to the employment relationship, the Court held that the limitations on the employee's exercise of freedom of expression arising from the employee's obligation of loyalty, confidentiality, and discretion were justified.[812] Moreover, according to the Court, among the conditions in the presence of which the public expression of criticism by the employee can be considered legitimate, the accuracy and reliability of the information disseminated[813] and the public interest in knowing the facts reported are of primary importance.[814] Therefore, according to the European Court of Human Rights, the exercise of the right of criticism by an employee can only be considered legitimate if it complies with this set of principles – otherwise, the employee could be subject to disciplinary sanctions by his/her employer.

In both Italy and Germany, as already noted, the legislator has defined precise limits to the freedom of criticism of the employee. In Italy, the duty of loyalty is articulated in the two obligations provided for in Article 2105 of the Italian Civil Code, namely, the obligation not to compete and the obligation of confidentiality, to be understood as expressions of the general principles of fairness (Article 1175 of the Civil Code) and good faith (Article 1375 of the Civil Code).[815] In contrast, as

[811] European Court of Human Rights, 26.11.1991, application n. 13166/87, Sunday Times v. United Kingdom.
[812] European Court of Human Rights, 16.7.2009, application n. 20436/02, Wojtas-Kaleta v. Poland.
[813] European Court of Human Rights, 12.2.2008, application n. 14277/04, Guja v. Moldova; European Court of Human Rights, 20.5.1999, application n. 21980/93, Bladet Tromsø e Stensaas v. Norway.
[814] European Court of Human Rights, 3.5.1988, application n. 11389/85, Morissens v. Belgium.
[815] Riva Sanseverino, L. (1960). *Il lavoro nell'impresa*. Torino: Utet, p. 267-270; Mancini, G.F. (1957). *La responsabilità contrattuale del prestatore di lavoro*. Milano: Giuffrè, p. 99.

regards the basis of the employee's freedom of criticism, according to the majority Italian doctrine, this does not lie in the obligation of non-competition and confidentiality (since these relate exclusively to the prohibition of disclosing information relating to the company's organization or production methods[816]) but is rather an expression of the broader freedom of expression referred to in Article 21 of the Italian Constitution, guaranteed within the employment relationship by all the contractual obligations.[817]

In the German legal system as well, the employee's right to criticism has its origins in the freedom of opinion constitutionally guaranteed in Article 5 of the German Constitution (Grundgesetz) and is also applied within the employment relationship as a result of the principle of the horizontal effect of fundamental rights.[818] However, the employee's right to criticism is limited by the duties arising from the employment relationship, which could be violated by the exercise of the right to criticism.[819] Among the contractual obligations of the employee that circumscribe his/her freedom of criticism are the prohibition of obstructing the orderly activity of the company[820] and the prohibition of disclosing company secrets. In addition, according to constant case law, the employee must also refrain from spreading false information and making defamatory statements.[821]

Therefore, it can be said that according to the prevailing orientation in the two legal systems considered, freedom of criticism in the employment relationship is further restricted by the duty of

[816] Mattarolo, M.G. (2000). *Obbligo di fedeltà del prestatore di lavoro. Art. 2105.* Milano: Giuffrè, p. 191.
[817] Corte Suprema di Cassazione, ruling of 25 February 1986, n. 1173; Corte Suprema di Cassazione, ruling of 22 October 1998, n. 10511; Tardivo, D. (2017). Libertà di espressione nel rapporto di lavoro: diritto di critica e di replica del lavoratore. *La Nuova giurisprudenza civile commentata*, 9(1), p. 1151.
[818] Thüsing, G. & Wurth; G. (2020). § 10 Sanktionen unzulässiger SocialMedia-Nutzung. In G. Thüsing & G. Wurth (Eds.), *Social Media im Betrieb. Arbeitsrecht und Compliance*. München: C.H. Beck, Rn. 30.
[819] Wiese, G. (2012). Internet und Meinungsfreiheit des Arbeitgebers, Arbeitnehmers und Betriebsrats. *Neue Zeitschrift für Arbeitsrecht*, p. 1-8; Reinfeld, M. (2021). § 33 Loyalitäts- und Rücksichtnahmepflichten, Nebentätigkeitsbeschränkungen. In W. Moll (Ed.), *Münchener Anwaltshandbuch Arbeitsrecht.* München: C.H. Beck, Rn. 49.
[820] BAG, ruling of 10 November 1955 – 2 AZR 591/54, in *Neue Juristische Wochenschrift*, 1965, pp. 359-360; BAG, ruling of 09 December 1982 - 2 AZR 620/80, in *Neue Juristische Wochenschrift*, 1984, pp. 1142-1143.
[821] BAG, ruling of 19 November 2015 - 2 AZR 217/15, in *Neue Zeitschrift für Arbeitsrecht* 2016, p. 540-547; BAG, ruling of 27 September 2012 - 2 AZR 646/11, in *Neue Juristische Online-Zeitschrift* 2013, pp. 1064-1069.

loyalty and fidelity under the law.[822] In the event that the employee expresses criticism of the employer by means of an online statement, the judgment as to whether the employee is liable for a breach of the duties of loyalty and fidelity (such as, among others, the obligation not to disclose business secrets) is complicated by the peculiarities of the medium used. The criteria that must guide the judgment as to whether there has been a breach of contractual duties include, as already mentioned, the scope of the actual and potential readers of the statement shared on the network,[823] especially if the statement is entrusted to a social network of a professional nature, in which the employer's business partners are also registered.[824] Other criteria that may guide the judgment concern: the frequency of the statement, i.e., whether it is a one-off or repeated assertion, the impact of the statements within the social network itself (whether the action takes on a viral character or remains viewable to a restricted group of people),[825] and, finally, the reasons that led the employee to express a negative opinion online. With regard to the reasons for the employee's conduct, it is particularly relevant whether the employee's utterance represents an emotional reaction to a particular emotional situation, such as a previous provocation by colleagues or the employer.[826]

In conclusion, the judgment on the lawfulness of opinions expressed online by employees presents major complexities linked to the peculiarities of the medium used. It is not possible,

[822] BAG, ruling of 24 November 2005 - 2 AZR 584/04, in *Neue Zeitschrift für Arbeitsrecht*, 2006, p. 650-655; Tebano, L. (2017). Employees' Privacy and employers' control between the Italian legal system and European sources. *Labour & Law Issues*, 2. Retrieved from: http://labourlaw.unibo.it

[823] Thüsing, G. & Wurth; G. (2020). § 10 Sanktionen unzulässiger SocialMedia-Nutzung. In G. Thüsing & G. Wurth (Eds.), *Social Media im Betrieb. Arbeitsrecht und Compliance*. München: C.H. Beck, Rn. 39-48

[824] Kort, M. (2012). Kündigungsrechtliche Fragen bei Äußerungen des Arbeitnehmers im Internet. *Neue Zeitschrift für Arbeitsrecht*, pp. 1321-1326; Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht,* p. 788.

[825] Fuhlrott, M. & Oltmanns, S. (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht,* p. 790.

[826] Thüsing, G. & Wurth, G. (2020). § 10 Sanktionen unzulässiger SocialMedia-Nutzung. In G. Thüsing & G. Wurth (Eds.), *Social Media im Betrieb. Arbeitsrecht und Compliance*. München: C.H. Beck, Rn. 33-34.

therefore, to define an absolute criterion or an unambiguous principle of judgment – it is necessary to give importance to each aspect of the concrete case.

4.3.5 *Non-verbal communication on social networks*

Social network functionalities also allow users to express their opinions through non-verbal means, for example, by sharing pictures and videos or through the use of the "like" button, as well as emoticons representing reactions[827] to one's own or other users' content. Once a user has clicked the "like" button in relation to a piece of content, a note with the name of the user will appear immediately below it so that anyone who has access to the content can see the name of the person who liked it.[828] A message that receives a large number of likes can spread without either the author of the content itself or the user who clicked on the "like" button having any real control over the content. Therefore, the legal question arises of whether an employee who reacts virtually by using one of these non-verbal means to express his/her dissent or approval of an insulting statement made by a third party can be held to be as liable as the person who made the insult directly.[829]

The European Court of Human Rights (ECtHR) ruled in *Palomo Sánchez and Others v. Spain* on the dismissal of members of a trade union's executive committee for publishing and distributing a sarcastic caricature and critical writings about the conduct of their colleagues in the union's monthly newsletter. The main issue before the Grand Chamber concerned the determination of a possible infringement committed by Spain with regard to the respect of the applicants' freedom of expression. The Court held in this case that, first of all, the applicants' membership of the trade union had no bearing on their dismissal, which was caused solely by the publication of the offensive

[827] Facebook was the first social network in 2016 to introduce additional reaction options to the "like". It is now possible to express one's position on the content of other users by selecting one of the following options: "Love", "Haha", "Wow", "Sad", and "Angry".
[828] Vossen, K. (2020). § 10 Sanktionen unzulässiger SocialMedia-Nutzung. In G. Thüsing & G. Wurth (Eds.), *Social Media im Betrieb. Arbeitsrecht und Compliance.* München: C.H. Beck, Rn. 49-50.
[829] Vossen, K. (2020). § 10 Sanktionen unzulässiger SocialMedia-Nutzung. In G. Thüsing & G. Wurth (Eds.), *Social Media im Betrieb. Arbeitsrecht und Compliance.* München: C.H. Beck, Rn. 51.

caricature of their colleagues. Second, the Court held that the criticisms made by the workers were damaging to the reputation and honor of others and serious enough to exceed the limits inherent in the exercise of the right of criticism. Finally, the Court also considered the sanction of dismissal to be proportionate to the degree of seriousness of the conduct in question, in particular, in light of the fact that the caricature and the critical writings had been published in the monthly newsletter, which is subject to wide circulation, itself causing actual harm.[830] The hypothesis of a "like" in relation to content that is offensive to the employer or colleagues is more complex because the user who gives the "like" is not always the author of the content itself. Because of this element, it is possible to draw an initial conclusion that, in general, an employee cannot be held responsible for the statements of a third party.[831]

Clicking on the "like" button should not be understood too strictly as an expression of qualified consent either since, in practice, it may be the result of an instinctive reaction or even a mistake. However, the consequences of liking cannot be underestimated, especially in terms of the dissemination of content on the network. A further hypothesis of the expression of one's own thoughts through non-verbal behavior on the net concerns the membership of a user in a virtual group directed against the employer. In this case, it is possible to deduce a commonality of opinions among the members of the group but certainly not to automatically attribute the individual statements made in the group by other members.[832]

In conclusion, for the reasons set out above, even in relation to the expression of one's dissent or approval by means of the "like" button or other non-verbal means, it is necessary to assess each circumstance of the individual case, with particular attention to the actual cause of damage to the employer's image.

---

[830] Palomo Sánchez and Others v. Spain of 12 September 2011, in *Global Freedom of Expression*.
[831] Vossen, K. (2020). § 10 Sanktionen unzulässiger SocialMedia-Nutzung. In G. Thüsing & G. Wurth (Eds.), *Social Media im Betrieb. Arbeitsrecht und Compliance*. München: C.H. Beck, Rn. 51.
[832] ArbG Cottbus, ruling of 5 June 2008 - 8 Ca 325/08.

RESEARCH FINDINGS AND CONTRIBUTIONS

The conclusions that can be drawn from this research are numerous and indicate horizons for possible future investigations. Many of the reflections that arise transverse the two legal systems considered, while others are closely linked to the experience of the German rather than the Italian legal system. The main result concerns the concept of the power of control of the employer. From the analysis of the principles governing the protection of privacy and the processing of employee data, it is possible to appreciate the plurilateral nature of the power of control itself. This power performs more than one function and also involves interests of a different nature. First, the power of control is placed at the contractual level as a means of enabling the employer to organize and direct the workforce. This first function necessarily implies a further and consequential function of the power of control - that which identifies it as the logical/legal prerequisite for the exercise of the employer's power of sanction. However, in view of the radical human involvement of the employee and his/her fundamental rights and freedoms, the legislator has removed certain aspects of the exercise of the power of control from the negotiating freedom of the parties. In both legal systems considered, then, this necessary and fundamental "guardian" role has been assigned by the legislator to the workers' representative bodies, called upon to define in collective bargaining the detailed rules on the limitations of the power of control.

In this context, the multiplication of digital technologies offers the power of control innumerable new forms of exercise with disruptive effects in the private sphere of the worker. Consequently, even private behavior, very often on the part of the worker in the virtual dimension, can provoke the most extreme sanction against the worker, namely his/her dismissal. Manifestations of this phenomenon can be found in both legal systems and not only in these. In fact, there is an increasing number of case law rulings on the legitimacy or otherwise of dismissals inflicted due to off-duty conduct of the employee on the Internet.

With regard to these pronouncements, significant legal issues arise both in relation to longstanding issues in labor doctrine and jurisprudence and, more specifically, linked to the changes brought about by the new technologies. The first issue that emerges concerns the limitations on the employer's power of control, which, in view of the involvement of the employee and, in the new digital context, of the increasing exposure of the employee to the digital dimension, must necessarily become more stringent. The second question concerns the admissibility of private conduct in terms of disciplinary relevance. In this regard, in both legal systems, labor doctrine has historically come to the conclusion that any element extraneous to the actual work performance (such as political orientation, lifestyle, religious faith)[833] must be excluded from the employment relationship. As a result of this doctrinal approach, the employer's power to terminate the employment contract has been largely resized since it is no longer based on arbitrary criteria, such as breach of trust, but on certain and defined categories. According to this approach, the very concept of the bond of trust between employer and employee has been subjected to a process of "objectification" that has led to recognizing relevance to the fate of the employment relationship only "*to socially relevant conduct, assessed according to id quod plerumque accidit*".[834]

This evolution of legal thinking around the employment relationship has been profoundly conditioned by the introduction of the conception of the protection of privacy in terms of the protection of data processing. The elaboration of the concept of data and data processing arose in response to the ever-increasing importance in today's legal and economic context that data assumes, to the point of being almost a "projection of the human person".[835] The supranational

[833] Carinci, F., De Luca Tamajo, R., Tosi, P. & Treu, T. (2005). *Diritto del lavoro. Il rapporto di lavoro subordinato,* vol. II. Torino: UTET, p. 213; Carinci, F. (Ed.) (1991). *La disciplina dei licenziamenti dopo le leggi 108/1990 e 223/1991,* vol. I. Napoli: Jovene editore, pp. 109-110; Mancini, G.F. (1957). *La responsabilità contrattuale del prestatore di lavoro*. Milano: Giuffrè, p. 32.

[834] Tosi, P. (1974). *Il dirigente d'azienda. Tipologia e disciplina del diritto del lavoro.* Milano: Franco Angeli, p. 142.

[835] Ferrante, V. (2020). Potere di controllo e tutela dei lavoratori: riflessioni sparse sulle disposizioni dello "Statuto", alla luce delle più recenti modifiche. *JusOnline*, 1, p. 292. Retrieved from http://jus.vitaepensiero.it

sources that have regulated the matter of data processing with regard to the employment relationship, most recently Regulation (EU) 2016/679 at the European level, have not provided detailed rules but have rather referred to the application of principles and general clauses, which are better suited to be used for the definition of a specific and concrete case rather than the enunciation of a systematic discipline. We are therefore witnessing a considerable number of case-law rulings whose outcome is not always predictable because they are an expression of the application of the principle of proportionality as a tool for balancing opposing interests and enhancing factual circumstances.

The implications arising from this approach are significant. A first consequence concerns the reaffirmation in the case-law of the criterion of the breach of trust as a parameter for judging the relevance of the employee's private conduct on the fate of the relationship. In fact, regarding private online conduct by the employee that is, in a certain sense, deemed disreputable, case-law has often reached a judgment of legitimacy for the dismissal inflicted precisely by referring to the criterion of the bond of trust. A second result concerns the particular casuistic development that characterizes the pronouncements on the subject. If, on the one hand, this approach of jurisprudence is contrary to the principle of legal certainty and compromises the predictability of the jurisprudential pronouncement[836], on the other hand, it can provide valuable elements for the elaboration of regulatory solutions. The legislator's objective must be to define a detailed, certain, and complete discipline. In this sense, the detailed analysis of case-law provides the necessary elements to understand the criteria needed to strike the right balance between the conflicting interests at stake.

With regard to the application of the criterion of breach of trust by case law, there are many critical points that arise regarding the validity of this canon. In light of a historical reconstruction, it

[836] The possible damage to the principle of legal certainty that the difficult predictability of the outcome of the judgment entails represents an element of uncertainty for both contractual parties, the employee and the employer. For both, therefore, this can be a deterrent, in that it can deter the employee from taking legal action, and the employer from penalizing the employee.

has emerged that there is a close link between the application of the notion of the fiduciary bond to the employment relationship and the conception of it in terms of an obligatory personal relationship. In particular, the conception of the employment relationship as a condition of the subjection of the employee has had the consequence of admitting, at the level of sanctions, the power of the employer to dismiss the employee at his/her discretion, and therefore also due to the private conduct of the employee him/herself because of the breach of trust that has been determined or the loss of the employer's confidence in the future performance of contractual obligations by the employee. The revision of the conception of the employment relationship as a relationship of personal subjection of the employee to the employer has deprived the reference to the breach of trust in the matter of dismissal of its foundation. The recent debate on the employment relationship has, in fact, initiated the so-called process of depersonalization of the employment relationship, which, from time to time, has denied the importance of strictly personal aspects of the employee within the employment relationship. Therefore, a first criticism regarding the jurisprudential application of the criterion of the breach of trust concerns the implications on the nature of the relationship that derive from the fiduciary conception of the relationship itself. Admitting that the employer may legitimately exercise the power of termination due to conduct affecting the personal sphere of the employee means considering the employee subject to the perpetual control of the employer. A second critical point arising from the application of the criterion of breach of trust to cases of dismissal for private conduct of the employee concerns the repercussions on the subject of judicial assessment in the event of a dispute. The breach of trust is understood as a loss of the employer's confidence in the future fulfillment of the contractual obligations by the employee, with the result that the judgment is addressed to the future and not focused on the conduct challenged to the employee and the current effects resulting from it.

To deny the validity of the fiduciary bond within the employment relationship certainly does not mean reducing the content of the contract to the exchange of work for remuneration alone. In civil law, in fact, the category of protective obligations, developed in the German legal system, has been established, according to which each of the parties to the contract, in addition to the main obligation laid down in the contract, have further obligations to protect the legal sphere of the other party from possible injuries that may occur due to or in connection with the conduct of the relationship. According to this thesis, therefore, the employee and the employer have additional obligations that are functional to the performance of the main obligation (e.g., the obligation to take care of work tools) or autonomous with respect to it but nevertheless related to the main performance (e.g., the obligation to give notice). In light of this reconstruction, the content of the obligation is complex because it is supplemented by further obligations of a legislative source. This conception of the obligatory relationship, unlike the conception, does not imply impermissible outcomes in terms of the nature of the employment relationship itself. The nature of the employment relationship in obligatory terms is not questioned, but the scope of the services deduced from the contract is extended by the protective obligations.

The category of protective obligations, which is more convincing on a dogmatic level than the notion of a fiduciary bond, has a new scope for development in the digital age. In fact, digital reality, in many respects, replicates the mechanisms of real life but exposes individuals and their actions to unforeseeable consequences. In light of the repercussions that an employee's online activity may have on the fate of the employment relationship, the need arises to clarify the boundaries within which an employee's online activity may be considered protected by the right to privacy as an expression of his/her freedom of criticism, and boundaries beyond which a breach of contract may arise, in the sense of failure to comply with an obligation to protect in the digital dimension. Therefore, the reconstructive effort has been twofold because, on the one hand, the

problem has been posed of going back to the normative discipline to which the treatment of the employee's data found on the social networks is subject, and, on the other hand, the necessity has arisen to identify the criteria by reason of which the online conduct of the employee can be considered prejudicial to an obligation of protection on the part of the same.

From this perspective, one of the decisive elements concerning the processing of the employee's data found on the web concerns the employee's expectation of privacy with regard to the online environment in which he/she is exposed since this may be open to anyone or closed except to a few. A further aspect concerns the insufficiency in the employment context of the requirement of consent to the processing of data since this is not free from external constraints, such as, among others, the economic dependence of the employee on his/her employer.

With regard to the assessment of a possible breach of contract by the employee by means of his/her conduct on the Internet, the decisive aspect was instead the actual harmfulness of the conduct, which, in turn, was subject to further elements such as verbal continence, the actual dissemination of the content on the Internet, and any repercussions on the regular operation of the company.

The conclusions drawn so far are valid for both legal systems considered. However, one particularly interesting aspect relates more closely to the German legal system. In the German labor law context, works councils (elected by the staff of an establishment and composed of at least five employees of the establishment, irrespective of their trade union membership) are entrusted with the fundamental task of promoting the free development of the personality of employees (Section 75, para. 2 Works Constitutional Act), as a guarantee of which the works councils themselves are granted important co-determination rights in the area of personnel management and also of employee control. Because of the key role played by works councils, company policy in establishments with more than five employees is removed from the monopoly of the employer and

is shared with works councils, which, in turn, exert a progressive influence by means of the mere right to information, consultation, or co-determination. For this reason, in the German legal system, there have been provisions for some time now in company protocols that expressly regulate the conduct of employees on the Internet, providing not only the employee but also the judge with a valid instrument of guidance.

In light of what has been said, it is clear, firstly, that there is an urgent need for certain and precise rules at the European level to regulate the protection of employee data retrieved from sources outside the company and, secondly, that there is the need for the management of the employment contract to expressly define the limits within which the employee is entitled and protected to exercise his/her right to criticize in the digital dimension.

BIBLIOGRAPHY

SCHOLARLY CONTRIBUTIONS

Abello, Luigi (1908). *Della locazione. Locazione di opere*, vol. II, Torino: Unione Tipografico-Editrice.

Acquisti, Alessandro & Gross, Ralph (2006). Imagined communities: Awareness, information sharing, and privacy on the Facebook. In G. Danezis & P. Golle (Eds.), *Privacy Enhancing Technologies. PET 2006. Lecture Notes in Computer Science* (4258, pp. 36-58). Berlin Heidelberg: Springer.

Adecco (2012). Digital reputation & social recruiting. Retrieved from https://adeccogroup.it/PDF/Digital-Reputation-Social-Recruiting-Adecco-infografica-2012.pdf.

Agree, Philip E. & Rotenberg, Marc (2001). *Technology and privacy. The new landscape*. Cambridge, Massachusetts: MIT Press.

Aimo, Mariapaola (2003). *Privacy, libertà di espressione e rapporto di lavoro*. Napoli: Jovene.

Altavilla, Renata (1987). *Le dimissioni del lavoratore*. Milano: Giuffrè.

Altenburg, Stefan (2020). Nebenpflichten. In I. Grobys & A. Panzer-Heemeier (Eds.), *StichwortKommentar Arbeitsrecht*. Baden-Baden: Nomos, point 14.

Ascheid, Reiner, Preis, Ulrich & Schmidt, Ingrid (2021). *Kündigungsrecht*. München: C.H. Beck.

Avondola, Arianna (2010). Il licenziamento per motivi soggettivi nel settore pubblico e privato. Sulla rilevanza della "inidoneità morale" del lavoratore. *Diritto delle Relazioni Industriali*, 4, pp. 1031-1053.

Avondola, Arianna (2010). Sulla rilevanza della "inidoneità morale" del lavoratore. *Diritto delle relazioni industriali*, 4, pp. 1031-1053.

Balandi, Gian Guido (1980). Il procedimento penale a carico del lavoratore. *Rivista trimestrale di diritto e procedura civile*, 3, pp. 904-949.

Baldassarre, Antonio (1997). *Diritti della persona e valori costituzionali*. Torino: Giappichelli.

Ballestrero, Maria Vittoria (1991). Giusta causa e giustificato motivo soggettivo. In F. Carinci (Ed.), *La disciplina dei licenziamenti dopo le leggi 108/1990 e 223/1991*. Napoli: Jovene, p. 109.

Barassi, Lodovico (1901). *Il contratto di lavoro nel diritto positivo italiano*. Milano: Sel, 1 ed.

Barassi, Lodovico (1915-1917). *Il contratto di lavoro nel diritto positivo italiano*. Milano: Sel, 2 ed., vol. 1.

Barnes, Susan B. (2006). A privacy paradox: Social networking in the United States. *First Monday*, 11(9), pp. 1-9. doi: https://doi.org/10.5210/fm.v11i9.1394.

Barra Caracciolo, Francesco (2018). La tutela della personalità in internet. *Il Diritto dell'informazione e dell'informatica*, 2, pp. 201-212.

Barth, Susanne & de Jong, Menno D. (2017). The privacy paradox: Investigating discrepancies between expressed privacy concerns and actual online behavior - A systematic literature review. *Telematics and informatics*, 34(7), pp. 1038-1040. https://doi.org/10.1016/j.tele.2017.04.013.

Bauer, Jobst Hubertus & Günther Jens (2013), Kündigung wegen beleidigender Äußerungen auf Facebook. *Neue Zeitschrift für Arbeitsrecht*, pp. 67-73.

Beckschulze, Martin & Wolfram, Henkel (2001). Der Einfluss des Internets auf das Arbeitsrecht. *Der Betrieb*, pp. 1491-1497.

Beckschulze, Martin (2003). Internet-, Intranet- und E-Mail-Einsatz am Arbeitsplatz. *Der Betrieb*, pp. 2777-2781.

Benda, Ernst (1984). Das Recht auf informationelle Selbstbestimmung und die Rechtsprechung des Bundesverfassungsgerichts zum Datenschutz. *Datenschutz und Datensicherheit, Recht und Sicherheit in Informationsverarbeitung und Kommunikation*, 2, pp. 86-90.

Bernstein, Anita (2005-2006). Foreword: What we talk about when we talk about workplace privacy. *Louisiana Law Review*, 66(923), p. 1.

Bevitt, Ann & Stack, Chris (2016), Preparing for the GDPR-advice for employers. *PDP*, 16(6), p. 11.

Bigliazzi Geri, Lina (1970). *Note in tema di interpretazione secondo buona fede*. Pisa: Pacini.

Birk, Rolf (2001). Arbeitsrecht und Rechtsvergleichung - Die Kontrolle der Einhaltung der Europäischen Sozialcharta. *Zeitschrift für vergleichende Rechtswissenschaft*, 100, pp. 48-61.

Bobbio, Norberto (1992). *L'Età dei diritti*. Torino: Einaudi, pp. XII-XIII.

Bonneau, Joseph & Preibusch, Sören (2010) The privacy jungle: On the market for data protection in social networks. In T. Moore, D. Pym & C. Ioannidis (Eds.), *The eighth workshop on the economics of information security and privacy* (pp. 121-167). Boston, MA: Springer.

Boyd Danah M. & Ellison Nicole B. (2008). Social network sites: Definition, history and scholarship. *Journal of Computer-Mediated Communication*, 13, pp. 210-230. Retrieved from https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1083-6101.2007.00393.x.

Brandtzæg, Petter Bae & Heim, Jan (2009). Why people use social networking sites. In A. Ant Ozok & Panayiotis Zaphiris (Eds.), *OCSC Online Communities and Social Computing. Lecture Notes in Computer Science* (vol. 5621, pp. 143-152). Berlin; Heidelberg: Springer.

Brouwer, P.W. & Hage, J. (2007). Basic concepts of European private law. *European Review of Private Law*, p. 4.

Brugiotti, Emanuela (2013). La privacy attraverso le "generazioni dei diritti". Dalla tutela della riservatezza alla protezione dei dati personali fino alla tutela del corpo elettronico. *Dirittifondamentali.it*, 2, pp. 1-30.

Burr, Steffen (2014). *Posting als Kündigungsgrund*. Baden-Baden: Nomos.

Burr, Steffen (2015). Kündigung wegen unternehmensschädlichen Facebook-Postings. *Neue Zeitschrift für Arbeitsrecht*, pp. 114-117.

Calcaterra, Luca (2000), Il licenziamento per fatti e comportamenti estranei al rapporto di lavoro. *Diritti Lavori Mercati*, 3, pp. 603-620.

Canaris, Claus Wihelm (2003). *La riforma del diritto tedesco delle obbligazioni. Contenuti fondamentali e profili sistematici del Gesetz zur Modernisierung des Schuldrechts*. Padova: Cedam.

Carinci, Franco (Ed.) (1991). *La disciplina dei licenziamenti dopo le leggi 108/1990 e 223/1991*, vol. I. Napoli: Jovene editore.

Carinci, Franco, De Luca Tamajo, Raffaele, Tosi, Paolo & Treu, Tiziano (2005). *Diritto del lavoro. Il rapporto di lavoro subordinato*, vol. II. Torino: UTET.

Carta, Mario (2014). Diritto alla vita privata ed Internet nell'esperienza giuridica europea ed internazionale. *Il Diritto dell'informazione e dell'informatica*, 1, pp. 1-19.

Castaldo, Sandro (2002). *Fiducia e relazioni di mercato*. Bologna: Il Mulino.

Castronovo, Carlo (1990). Obblighi di protezione. In *Enciclopedia giuridica Treccani*, Roma, vol. XXI.

Castronovo, Carlo (2011). L'utopia della codificazione europea e l'oscura Realpolitik di Bruxelles dal DCFR alla proposta di regolamento di un diritto comune europeo della vendita. *Europa e diritto privato*, 4, pp. 837-859.

Catania, Bruno (2015). Responsabilità disciplinare per dichiarazioni su "social network". *Rivista giuridica del lavoro e della previdenza sociale*, (3/2), pp. 465-469.

Cataudella, A. (1972). Intuitus personae e tipo negoziale. In *Studi in onore di F. Santoro Passarelli* (vol. 1). Napoli, Jovene, pp. 621 ff.

Cavagnari, Camillo (1901). *Studi preliminari. Commissione per lo studio dei contratti agrari e del contratto di lavoro*. Osservazioni e notizie. Roma: Stamperia Reale Domenico Ripamonti.

Cavallo, Marino & Spadoni, Federico (2010). *I social network. Come internet cambia la comunicazione.* Milano: Franco Angeli.

Cazzetta, Giovanni & Sciarra, Silvana (2013). "Un puente doctrinal". Scienza giuridica ed evoluzione del diritto del lavoro. Intervista a Miguel Rodriguez-Pinero y Bravo-Ferrer. *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 42, pp. 739-766.

Cazzetta, Giovanni (1988). Leggi sociali, cultura giuridica ed origini della scienza giuslavoristica in Italia tra Otto e Novecento. *Quaderni fiorentini per la storia del pensiero giuridico moderno*, XVII, pp. 154-262.

Cazzetta, Giovanni (1996). Il diritto del lavoro e l'insostenibile leggerezza delle origini (a proposito di Umberto Romagnoli, il lavoro in Italia. Un giurista racconta, Bologna, il Mulino, 1995). *Quaderni fiorentini per la storia del pensiero giuridico moderno*. Milano: Giuffrè, pp. 543-572.

Cessari, Aldo (1967). Tradizione e rinnovamento del diritto del lavoro. *Rivista di diritto del lavoro*, 1, pp. 24-50.

Chiantera, Francesca (2006). La rilevanza dei comportamenti extralavorativi ai fini della giusta causa di licenziamento. In R. De Luca Tamajo & F. Bianchi D'Urso (Eds.), *I licenziamenti individuali e collettivi nella giurisprudenza della Cassazione*. Milano: Giuffrè.

Chieco, Pasquale (1998). Il diritto alla riservatezza del lavoratore. *Giornale di diritto del lavoro e di relazioni industriali*, 1, p. 3.

Chieco, Pasquale (2000). *Privacy e lavoro. La disciplina del trattamento dei dati personali del lavoratore*. Bari: Cacucci.

Cian, Giorgio (1998). Il diritto civile come diritto privato comune (ruolo e prospettive della civilistica italiana alla fine del XX secolo). *Rivista di Diritto civile*, 1(1), pp. 1-20.

Clark, David S. (Ed.) (2012) Comparative law and society. Cheltenham (UK)-Northampton (MA): Edward Elgar Publishing.

Colapietro, Carlo (2017). Tutela della dignità e riservatezza del lavoratore nell'uso delle tecnologie per finalità di lavoro. *Giornale di diritto del lavoro e delle relazioni industriali*, 155, pp. 439-469.

Colapietro, Carlo (2018). Il nuovo quadro giuridico europeo sulla protezione dei dati personali e l'adeguamento della normativa nazionale. *Studi parlamentari e di politica costituzionale,* 201-202, pp. 7-25.

Collins, Hugh, Ewing, Keith & McColgan, Aileen (2012). *Labour law*. Cambridge: Cambridge University Press, pp. 414- 422.

Colucci, Michele (2002). The impact of the internet and new technologies on the workplace. A legal analysis from a comparative point of view. In R. Blanpain (Ed.), *Bulletin of Comparative Labour Relations* (n. 43, pp. 14-16). The Hague/London/New York: Kluwer Law International.

Costantini, Federico (2018). Il Regolamento (UE) 679/2016 sulla protezione dei dati personali. *Il Lavoro nella giurisprudenza*, 6, pp. 545-555.

Cross-tab (2010, January). Online reputation in a connected world. Retrieved from https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf.

Cuffaro, Vincenzo (2018). Quel che resta di un codice: il D.Lgs. 10 agosto 2018, n. 101 detta le disposizioni di adeguamento del codice della privacy al regolamento sulla protezione dei dati. *Corriere giuridico*, 10, pp. 1181-1185.

D'Antona, Massimo (1991). L'autonomia individuale e le fonti del diritto del lavoro. *Giornale di diritto del lavoro e relazioni industriali*, 51, pp. 529-565.

Dann Matthias & Markgr, Jochen W. (2019). Das neue Gesetz zum Schutz von Geschäftsgeheimnissen. *Neue Juristische Wochenschrift*, pp. 1174-1179.

D'Arcangelo, Lucia (2020). L'obbligo di protezione dei dati del lavoratore: adempimento e sanzioni. *Diritti lavori mercati*, (1), pp. 75-111.

Däubler, Wolfgang (2001). Das neue Bundesdatenschutzgesetz und seine Auswirkungen im Arbeitsrecht. *Neue Zeitschrift für Arbeitsrecht*, pp. 874-881.

Däubler, Wolfgang (2019). *Gläserne Belegschaften. Handbuch zum Beschäftigtendatenschutz*. Frankfurt: Bund-Verlag.

De Cupis, Adriano (1973). *I diritti della personalità*, vol. I. Milano: Giuffrè.

De Giacomo, Claudio (1999). *Diritto, libertà e Privacy nel mondo della comunicazione globale*. Milano: Giuffrè.

De Luca Tamajo, Raffaele, Carinci, Franco, Tosi, Paolo & Treu, Tiziano (2016). *Diritto del lavoro. Il rapporto di lavoro subordinato* (vol. II). Torino: UTET Giuridica, pp. 424-430.

De Mauro, Andrea, Greco, Marco & Grimaldi, Michele (2014, September). What is big data? A consensual definition and a review of key research topics. *AIP Conference Proceedings*, 1644(1), pp. 98-99. doi:https://doi.org/10.1063/1.4907823.

De Siervo, Ugo (2005). La privacy. In Sergio P. Panunzio (Ed.), *I diritti fondamentali e le Corti in Europa*. Napoli: Jovene.

DeCew, Judith Wagner (n.d.). Privacy. In Edward N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2018 ed.). Retrieved from https://plato.stanford.edu/archives/spr2018/entries/privacy/.

Del Federico, Caterina (2017). Il trattamento dei dati personali dei lavoratori e il Regolamento 2016/679/UE. Implicazioni e prospettive. In Patrizia Tullini (Ed.), *Web e lavoro. Profili evolutivi e di tutela*. Torino, Giappichelli Editore, pp. 61-77.

Del Punta, Riccardo (2019). Social media and workers' rights: What is at stake? *International Journal of Comparative Labour Law and Industrial Relations*, 35(1), pp. 79-100.

Dell'Olio, M. (1988), *Licenziamenti illegittimi e provvedimenti giudiziari atti delle giornate di studio di diritto del lavoro*, Torino, 16-17 Maggio 1987. Milano: Giuffrè, p. 510.

Denti, V. (1980). Diritto comparato e scienza del processo. In Giovanni Bognetti & Rodolfo Sacco (Eds.), *L'apporto della comparazione alla scienza giuridica*. Milano, Giuffrè, p. 213;

Determann, Lothar (2013). Soziale Netzwerke in der Arbeitswelt - Ein Leitfaden für die Praxis. Arbeitszeit, Bewerberauswahl, Ermittlungen, Plattform, Richtlinie, Soziale Netzwerke. *Betriebs-Berater*, 4, pp. 181-189.

Dewey, Caitlin (2016). How many hours of your life have you wasted on work emails? Try our depressing calculator. *The Washington Post*. Retrieved from https://www.washingtonpost.com/news/the-intersect/wp/2016/10/03/how-many-hours-of-your-life-have-you-wasted-on-work-email-try-our-depressing-calculator/.

Di Fraia, Guido (2012). Social network e racconti identitari. *Minorigiustizia*, 4, pp. 14-20.

Di Liddo, Marco, Falconi, Andrea, Iacovino, Gabriele & La Bella, Luca (2011). Il Ruolo dei Social Network nelle Rivolte Arabe. *Osservatorio di politica internazionale*, 40, pp. 1-29. Retrieved from http://www.parlamento.it/application/xmanager/projects/parlamento/file/repository/affariinternazionali/osservatorio/approfondimenti/PI0040App.pdf;

Di Majo, Adolfo (1991). "Recensione a Mario Napoli", La stabilità reale del rapporto di lavoro. *Giornale di diritto del lavoro e di relazioni industriali*, p. 700.

Di Stasi, Sibilla (2015). Obbligo di diligenza ed obbedienza del lavoratore nel diritto vivente: una lettura ragionata dell'art. 2104 Cod. Civ. alla luce dei principali orientamenti giurisprudenziali. *ADL Argomenti di diritto del lavoro*, 3(2), pp. 747-764.

Dieterich, Thomas (2007). Unternehmerfreiheit und Arbeitsrecht im Sozialstaat. *Arbeit und Recht*, pp. 65-67.

Dietlein, Johannes (2005). *Die Lehre von den grundrechtlichen Schutzpflichten*. Berlin: Duncker & Humblot.

Digital media and the Arab spring. Reuters. Retrieved from http://blogs.reuters.com/great-debate/2011/02/16/digital-media-and-the-arab-spring.

Dilcher, Hermann (1982). *Schuldrecht. Besonderer Teil: in Programmierter Form*. Berlin: De Gruyter Lehrbuch.

Duke Law School Legal Studies Paper n. 87, p. 4. Retrieved from https://ssrn.com/abstract=839826.

Dwyer, Catherine, Hiltz, Starr R. & Passerini, Katia (2007). Trust and privacy concern within social networking sites: A comparison of Facebook and MySpace. In *Thirteenth American Conference on Information Systems* (Keystone, USA, 2007).

Facebook by the Numbers: Stats, Demographics & Fun Facts (2020) Omnicore Agency. Retrieved from https://www.omnicoreagency.com/facebook-statistics/.

Failla, Luca & Quaranta, Carlo (2002). *Privacy e rapporto di lavoro*. Assago: IPSOA.

Falcone, Giuseppe (2003). *Obligatio est iuris vinculum*. Turin: Giappichelli.

Fameli, Elio (2019). La rilevanza giuslavoristica dei social network, tra diritti dei lavoratori e prerogative datoriali di controllo. *Rivista italiana di informatica e diritto*, 1, pp. 5-22. Retrieved from: http://www.rivistaitalianadiinformaticaediritto.it.

Fava, Pasquale (2008). *Le obbligazioni*, vol. I. Milano: Giuffré.

Fergola, Paolo (1985). *La teoria del recesso e il rapporto di lavoro*. Milano: Giuffrè.

Ferrante, Vincenzo (2020). Potere di controllo e tutela dei lavoratori: riflessioni sparse sulle disposizioni dello "Statuto", alla luce delle più recenti modifiche. JusOnline, 1, pp. 289-306. Retrieved from http://jus.vitaepensiero.it.

Ferri, Gattista B. (1982). Persona e privacy. Rivista di diritto commerciale, 1, p. 75.

Fikentscher, Wolfgang & Heinemann Andreas (2006). *Schuldrecht*. Berlin: De Gruyter.

Finkin, Matthew W. (2010). Some further thoughts on the usefulness of comparativism in the law of employee privacy. *Employee Rights & Employment Policy Journal*, 14, p. 14.

Finkin, Matthew W., Krause, Rüdiger & Okuno, Hisashi Takeuchi (2015). Employee autonomy, privacy, and dignity under technological oversight. In Matthew W. Finkin & Guy Mundlak (Eds.), *Comparative labor law* (pp. 153-194). Cheltenham, Northampton: Edward Elgar Publishing.

Finocchiaro, Giusella (2019). Diritto all'oblio e diritto di cronaca: una nuova luce su un problema antico. In *giustiziacivile.com*, 1, pp. 1-6.

Fischinger, Philipp (2018). § 3 Gegenstand und Leitprinzipien des Arbeitsrechts Rn. 1-47. In K. Heinrich, Lunk Stefan & Oetker Hartmut (Eds.), *Münchener Handbuchzum Arbeitsrecht, Band 1: Individualarbeitsrecht*. München: Verlag C.H. Beck, Rn. 19-20.

Fitting, Karl, Auffarth, Fritz, Kaiser, Heinrich et al (2012). *Betriebsverfassungsgesetz: BetrVG Handkommentar*. München: Verlag Vahlen Franz.

Fitzjames, Stephen J. (1873). *Liberty, equality and fraternity*. New York: Henry Hold and Co.

Forlivesi, Michele (2017). Il controllo della vita del lavoratore attraverso i social network. In Tullini Patrizia (Ed.), *Web e lavoro. Profili evolutivi e di tutela* (pp. 45-46). Torino: Giappichelli.

Forst, Gerrit (2010). Bewerberauswahl über soziale Netzwerke im Internet?. *Neue Zeitschrift für Arbeitsrecht* (NZA), pp. 427-433.

Forti, Simona (2009). Le figure del male. In Hannah Arendt, *Le origini del totalitarismo*. Torino: Einaudi, p. XXXVII-LIV.

Fuhlrott Michael & Oltmanns Sönke (2016). Social Media im Arbeitsverhältnis - Der schmale Grat zwischen Meinungsfreiheit und Pflichtverletzung. *Neue Zeitschrift für Arbeitsrecht*, pp. 785-791.

Gaeta, Lorenzo (2001). Lodovico Barassi, Philipp Lotmar e la cultura giuridica tedesca. *Giornale di diritto del lavoro e di relazioni industriali*, 2001, 90, pp. 165-194.

Gaeta, Lorenzo (2015). L'influenza delle culture giuridiche straniere sul diritto del lavoro italiano. *Rivista italiana per le scienze giuridiche,* 6, pp. 205-232.

Gaeta, Lorenzo (2016). La subordinazione del diritto del lavoro italiano nei confronti della Germania. *Lavoro e diritto*, (4), pp. 695-706.

Gaier, Reinhard (2003). *Münchener Kommentar zum BGB*. München: Verlag C.H. Beck.

Galasso, Alfredo (1974). *La rilevanza della persona nei rapporti privati*. Napoli: Jovene.

Gamba, Cinzia (2016). Il controllo a distanza delle attività dei lavoratori e l'utilizzabilità delle prove. *Labour & Law Issues*, (1), Retrieved from: http://labourlaw.unibo.it.

Gambino, Andrew, Kim, Jinyoung, Sundar, Shyam S., Ge, Jun & Rosson, Mary B. (2016). User disbelief in privacy paradox: Heuristics that determine disclosure. Proceedings of the 2016 CHI Conference Extended Abstracts on Human Factors in Computing Systems, pp. 2837-2842.

Gamillscheg, Franz (1964). *Arbeitsrecht und Rechtsvergleichung, in Göttinger Arbeitskreis (Ed.), Recht im Dienste der Menschenwürde: Festschrift für Herbert Kraus* (pp. 95-110), Würzburg: Holzner Verlag.

Gamillscheg, Franz (1976). Zivilrechtliche Denkformen und die Entwicklung des Individualarbeitsrechts: Zum Verhältnis von Arbeitsrecht und BGB. *Archiv Für Die Civilistische Praxis*, 176(2/3), pp. 197-220. Retrieved from www.jstor.org/stable/40994836.

Gaudio, Giovanni (2017). Condotte extra-lavorative e licenziamento per giusta causa. *ADL Argomenti di diritto del lavoro*, 4-5/2, p. 1324.

Gavison, Ruth E. (1980). Privacy and the limits of law. *The Yale Law Journal*, 89(3), pp. 421-471. Retrieved from https://ssrn.com/abstract=2060957.

Gerety, Tom (1977). Redefining privacy. *Harvard Civil Rights-Civil Liberties Law Review*. 12(2), p. 281.

Geyer, Fabian (2003). Die private Nutzung von Kommunikationsmitteln am Arbeitsplatz. *Fachanwalt Arbeitsrecht*, p. 102.

Ghera, Edoardo (2000). *Diritto del lavoro*. Bari: Cacucci.

Ghera, Edoardo (2001). Lodovico Barassi e Paolo Greco. *Giornale di diritto del lavoro e di relazioni industriali*, 90, pp. 155-164.

Ghezzi, Giorgio & Romagnoli, Umberto (1995). *Il rapporto di lavoro*. Bologna: Zanichelli.

Ghezzi, Giorgio, Mancini, Giuseppe F., Montuschi, Luigi & Romagnoli, Umberto (1979). *Statuto dei diritti dei lavoratori*. Bologna: Zanichelli.

Gierke, Otto von (1917). *Deutsches Privatrecht*, vol. III. Leipzig: Duncker & Humblot.

Giugni, Gino (1063). *Mansioni e qualifica nel rapporto di lavoro*. Napoli: Jovene.

Giugni, Gino (1989). *Lavoro legge contratto*. Bologna: Il Mulino.

Glenn, H. Patrick (2006). The aims of comparative law. In J.M. Smits (Ed.), *Elgar Encyclopedia of Comparative Law, Second Edition*. Cheltenham, UK: Edward Elgar Publishing, pp. 57-58. doi: https://doi.org/10.4337/9781781006108.00009.

Goffredo, Massimo T. & Meleca, Vincenzo (2016). Jobs Act e nuovi controlli a distanza. *Diritto & pratica del lavoro*, 3, pp. 1894-1901.

Gola, Peter (2019). Das Internet als Quelle von Bewerberdaten. Vorgaben von DS-GVO, BDSG und UWG. *Neue Zeitschrift für Arbeitsrecht*, pp. 654-658.

Göpfert, Burkard & Wilke, Elena (2011). Facebook-Aktivitäten als Kündigungsgrund. *Arbeitsrecht Aktuell*, 7, pp. 159-161.

Gordley, James (2012). The functional method. In P.G. Monateri (Ed.), *Methods of comparative law.* Research Handbooks in Comparative Law. Cheltenham, U.K., Northampton, MA: Edward Elgar Pub, pp. 107-120.

Gorla, Gino (1948). *Commento a Tocqueville. "L'idea dei diritti".* Milano: Giuffrè.

Gorla, Gino (1950). Le scuole di diritto degli Stati Uniti d'America. *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 48(1), pp. 320-334.

Gorla, Gino (1955). *Il Contratto, vol. II*. Milano: Giuffrè.

Gragnoli, Enrico (2001). "Conversione" del recesso per giusta causa in uno per giustificato motivo. *ADL Argomenti di diritto del lavoro*, 3, pp. 813-832.

Grandi, Mario (1996). Comparazione giuridica e diritto del lavoro. *ADL Argomenti di diritto del lavoro*, 3, pp. 1-33.

Griffiths, John & Adams, Maurice (2012). Against "comparative method": Explaining similarities and differences. In M. Adams & J. Bomhoff (Eds.), *Practice and theory in comparative law*. Cambridge: Cambridge University Press, pp. 279-301.

Grossfeld, Bernhard (1984). *Macht und Ohnmacht des Rechtsvergleichung*. Tübingen: J.C.B. Mohr, p. 193 (transl. Grossfeld, Bernhard (1990). *The strength and weakness of comparative law*. Oxford New York: Clarendon Press Oxford University Press).

Grossi, Paolo (2000). *Scienza giuridica italiana. Un profilo storico 1860-1950*. Milano: Giuffrè.

Grundmann, Stefan (2005). Risarcimento del danno contrattuale. Sistema e prospettive nell'interazione fra gli ordinamenti tedesco e italiano in Europa. *Diritto e giurisprudenza*, 2, pp. 169-203.

Guella, Elena. (2016). Il carattere autonomo degli obblighi di protezione nei sistemi italiano e tedesco. La ricaduta sulla struttura del rapporto obbligatorio e sulla qualificazione della responsabilità. ZERP: Zentrum für Europäische Rechtspolitik, Deutsch-Italienische Studien - Studi Italo-Tedeschi, vol. 9, pp. 1-226.

Gutteridge, Harold C. (1949). *Comparative law. An introduction to the comparative method of legal study and research* (vol. I). Cambridge Studies in International and Comparative Law. London: Cambridge University Press.

Hanau, Peter & Hoeren, Thomas (2003), *Private Internetnutzung durch Arbeitnehmer*. München: Verlag C.H. Beck, pp. 23 ff.

Henssler, Martin (2017). *Münchener Kommentar zum BGB*, § 626 BGB, Rn. 80.

Henssler, Martin (2020). BGB § 627 Fristlose Kündigung bei Vertrauensstellung. In Franz J. Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (Eds.), *Münchener Kommentar zum BGB*, Rn. 1.

Hohfeld, Wesley Newcomb (1919). *Fundamental legal conceptions, as applied in judicial reasoning*. Yale University Press, pp. 710-770.

Homans, George C. (1958). Social behavior as exchange. *American Journal of Sociology*, 63, pp. 597-606.

Hounshell, Blake (2011). The revolution will be Tweeted. Life in the vanguard of the new Twitter proletariat. Foreign Policy. Retrieved from https://foreignpolicy.com/2011/06/20/the-revolution-will-be-tweeted/

Hubmann, Heinrich (1967). *Das Persönlichkeitsrecht*. Köln, Graz: Böhlau.

Hueck, Alfred & Nipperdey, Hans Carl (1957). *Lehrbuch des Arbeitsrechts*. Berlin Frankfurt am Main: Vahlen.

Husa, Jaakko (2009, October 14). Farewell to functionalism or methodological tolerance?. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 67(3), pp. 419-447, July 2003. Retrieved from https://ssrn.com/abstract=1488669.

Iaquinta, Francesca & Ingrao, Alessandra (2014). La “privacy” e i dati sensibili del lavoratore legati all’utilizzo di “social networks”. Quando prevenire è meglio che curare. *Diritto delle relazioni industriali*, 4, pp. 1027-1062.

Ichino, Pietro (1992). Intervista a Gino Giugni. *Rivista italiana di diritto del lavoro*, I, pp. 411-456.

Ingrao, Alessandra (2016). Il “cyberslacking” e i diritti del lavoratore “catturato nella rete informatica”. Note critiche a margine della sentenza della Corte Europea dei diritti dell’uomo, sez. IV, 12 gennaio 2016, n. 61496, “Barbulescu vs. Romania”, in attesa della pronuncia della Grande Camera. *Osservatorio costituzionale*, 3. Retrieved from http://www.osservatorioaic.it.

Iodice, Domenico (2018). Social network e responsabilità disciplinari: le possibili tutele individuali, p. 1-14. Retrieved from http://www.bollettinoadapt.it/social-network-e-responsabilita-disciplinari-le-possibili-tutele-individuali/?pdf=81315.

Jobs, Friedhelm (1972), Die Bedeutung Otto von Gierkes für die Kennzeichnung des Arbeitsverhältnisses als personenrechtliches Gemeinschaftsverhältnis. *Zeitschrift für Arbeitsrecht*, pp. 305-343.

Kania, Thomas (2021). Verhältnis zum Datenschutzrecht. In Müller-Glöge Rudi, Preis, Ulrich & Schmidt Ingrid (2021). *Erfurter Kommentar zum Arbeitsrecht*, § 87 Rn. 61.

Katsabian, Tammy (2018, March 29). Employees’ privacy in the internet age - Towards a new procedural approach. *Hebrew University of Jerusalem Legal Research Paper*, 18-19, pp. 1-50. doi: https://dx.doi.org/10.2139/ssrn.3152404.

Kim Pauline T. (2017, April 19). Data-driven discrimination at work. *William & Mary Law Review*, 58(3), pp. 857-936. Retrieved from https://ssrn.com/abstract=2801251.

Klinkhammer, Patrick & Müllejans, Gabi (2014). Veröffentlichen von Fotos in sozialen Netzwerken – ein Überblick über mögliche Rechtsfolgen. *Arbeitsrecht Aktuell*, pp. 503-506.

Koch, Ulrich (2010). Langjährige Mitarbeiter dürfen das! Headline of the editorial. *Betriebs-Berater*, n. 45, p. 1.

Kolle, Tina & Deinert, Olaf (2006). Liebe ist Privatsache. Grenzen einer arbeitsvertraglichen Regelung zwischenmenschlicher Beziehungen. *Arbeit und Recht*, pp. 177–184.

Kort, Michael (2012). Kündigungsrechtliche Fragen bei Äußerungen des Arbeitnehmers im Internet. *Neue Zeitschrift für Arbeitsrecht*, pp. 1321-1326.

Kramer, Stefan (2000). Gestaltung arbeitsvertraglicher Regelungen zur Telearbeit. *Der Betrieb*, p. 1329.

Kramer, Stefan (2004). Internetnutzung als Kündigungsgrund. *Neue Zeitschrift für Arbeitsrecht*, pp. 457-464.

Kramer, Stefan (2006). Kündigung wegen privater Internetnutzung. *Neue Zeitschrift für Arbeitsrecht*, pp. 194-197.

Krasnova, Hanna, Kolesnikova, Elena & Günther, Oliver (2009). It won’t happen to me!: Self-disclosure in online social networks. *In 15th American Conference on Information Systems* (San Francisco, USA, 2009).

Küchenhoff, Günther (2020). BGB § 626 Fristlose Kündigung auswichtigem Grund. In Beate Gsell, Wolfgang Krüger, Stephan Lorenz & Christoph Reymann (Eds.), *Beck-online. Grosskommentar*. München: Verlag C.H. Beck Rn. 452-455.

Lambo, Luigi (2007). *Obblighi di protezione*. Padova: Cedam.

Lattanzi, Roberto (2011). Dallo Statuto dei Lavoratori alla disciplina di protezione dei dati personali. *Rivista italiana di diritto del lavoro*, (1/1), pp. 151-174.

Lega, Carlo. (1963). *La diligenza del lavoratore*. Milano: Giuffrè.

Lelley, Tibor & Fuchs, Essen (2010). My space is not your space: Einige arbeitsrechtliche Überlegungen zu Social Media Guidelines. *Corporate Compliance Zeitschrift*, pp. 147-150.

Life in the vanguard of the new Twitter proletariat. Foreign Policy. Retrieved from http://www.foreignpolicy.com/articles/2011/06/20/the_revolution_will_be_tweeted; Howard, P.N. (2011, February 16).

Lotmar, Philipp (1902). *Der Arbeitsvertrag nach dem Privatrecht des deutschen Reiches*. Leipzig: Duncker & Humblot.

Lützeler, Martin & Bissels, Alexander (2011). Social Media-Leitfaden für Arbeitgeber: Rechte und Pflichten im Arbeitsverhältnis. *Arbeitsrecht Aktuell*, 20, pp. 499-502.

Maggiolino, Mariateresa (2017). Concorrenza e piattaforme: tra tradizione e novità. In G. Colangelo & V. Falce (Eds.), *Concorrenza e comportamenti escludenti nei mercati dell'innovazione* (pp. 69-70). Bologna, il Mulino.

Maitland, Federic William (1911). Why the history of English law is not written. In Herbert Albert Laurens Fisher (Ed.), *The Collected Papers of Frederic William Maitland* (vol. I, pp. 480-497) Cambridge: University Press.

Mancini Giuseppe Federico (1981), "Commento all'art. 18". In G. Ghezzi, G.F. Mancini, L. Montuschi, U. Romagnoli (Eds.), *Statuto dei lavoratori*. Bologna: Zanichelli.

Mancini, Giuseppe Federico (1957). *La responsabilità contrattuale del prestatore di lavoro*. Milano: Giuffrè.

Mancini, Giuseppe Federico (1965). *Il recesso unilaterale e i rapporti di lavoro*, vol. I. Milano: Giuffrè.

Mantelero, Alessandro & Poletti, Dianora (2018). *Regolare la tecnologia: il Reg. UE 2016/679 e la protezione dei dati personali. Un dialogo fra Italia e Spagna.* Pisa: Pisa University Press.

Mantelero, Alessandro (2015). Rilevanza e tutela della dimensione collettiva della protezione dei dati personali. *Contratto e impresa. Europa*, 1, pp. 137-158.

Mantouvalou, Virginia (2005). Work and rivate Lilfe: Sidabras and Dziautas v Lithuania. *European Law Review*, 30, pp. 573-585.

Marazza, Marco (2004). Lavoro e rendimento. *ADL Argomenti di Diritto del Lavoro*, 9(2), pp. 539-570.

Marcus, Bernd, Machilek, Frany & Schütz, Astrid (2006). Personality in cyberspace: Personal web sites as media for personality expressions and impressions. *Journal of Personality and Social Psychology*, 90(6), pp. 1014-1031.

Mariucci, Luigi (2010). Ridare senso al diritto del lavoro. Lo Statuto oggi. *Lavoro e diritto*, pp. 5-18.

Martinelli, Alberto (2009). Introduzione. In Hannah Arendt, *Le origini del totalitarismo*. Torino: Einaudi, pp. VI-XXV.

Maties, Martin (2020). Außerdienstliches Verhalten. In Beate Gsell, Wolfgang Krüger, Stephan Lorenz & Christoph Reymann (Eds.), *Beck-online.GROSSKOMMENTAR*. München, Verlag C.H. Beck, point 888.

Mattarolo, Maria Giovanna (2000). *Obbligo di fedeltà del prestatore di lavoro. Art. 2105*. Milano: Giuffrè.

Mazzotta, Oronzo (2008). *Diritto del lavoro*. Milano: Giuffrè.

Mengoni Luigi (1954). Obbligazione di risultato e obbligazione di mezzi, in *Rivista del Dritto Commerciale*, pp. 185ff.

Mengoni Luigi, Proto Pisani Andrea, Orsi Battaglini Andrea (1990). L'influenza del diritto del lavoro su diritto civile, diritto processuale civile, diritto amministrativo. *Giornale di diritto del lavoro e di relazioni industriali*, 7(45), pp. 5-23.

Mengoni, Luigi (1965), Il contratto di lavoro nel diritto italiano, in Boldt, Gerhard, Camerlynck, Guillaume, Horion, Paul, Kayser, Armando, Levenbach, Marius G., Mengoni, Luigi (Eds.). *Il contratto di lavoro nel diritto dei paesi membri della CECA*. Milano: Giuffrè.

Mengoni, Luigi (1965). Contratto e rapporto di lavoro nella recente dottrina italiana. *Rivista delle società*, pp. 674-686.

Mengoni, Luigi (1986). Spunti per una teoria delle clausole generali. *Rivista critica del diritto privato*, pp. 13-15.

Messina, Giuseppe (1904), I concordati di tariffa nell'ordinamento giuridico del lavoro. *Rivista di diritto commerciale*, I, pp. 458 ff.

Messineo, Francesco (1948). *Dottrina generale del contratto*. Milano: Giuffrè.

Meyrowitz, Joshua (1999). *Oltre il senso del luogo. L'impatto dei media elettronici sul comportamento sociale*. Bologna: Baskerville.

Michaels, Ralf (2006). The functional method of comparative law. In M. Reimann & R. Zimmerman (Eds.), *The Oxford Handbook of Comparative Law*. Oxford University Press, Forthcoming.

Miglietti, Lucia (2014, December 4). Profili storico-comparativi del diritto alla privacy. *Diritti comprati. Comparare i diritti fondamentali in Europa*. pp. 1-35.

Mills, Max (2017). Sharing privately: The effect publication on social media has on expectations of privacy. *Journal of Media Law*, 9(1), pp. 45-71. doi: 10.1080/17577632.2016.1272235.

Miscione, Michele (2017). I comportamenti privati rilevanti per il lavoro nella Rete senza tempi e spazi. *Il Lavoro nella giurisprudenza*, (6), pp. 521-529.

Moccia, Luigi (1994). La "comparazione" come "pedagogia giuridica" nell'opera di Gino Gorla. *Rivista trimestrale di diritto e procedura civile*, (2), pp. 587-611.

Moccia, Luigi (2016). *Comparazione giuridica e prospective di studio del diritto*. Padova: CEDAM.

Mohnke, Lars (2020). Kündigung, verhaltensbedingte. In Isabella Grobys & Andrea Panzer-Heemeier (Eds.), *StichwortKommentar Arbeitsrecht*. Baden-Baden: Nomos, point 1-91.

Montuschi, Luigi (1973). *Potere disciplinare e rapporto di lavoro*. Milano: Giuffrè.

Mostacci, Edmondo (2017). Schemi di classificazione e comparazione giuridica: un regno immenso e anonimo. *Diritto pubblico comparato ed europeo*, 4, pp. 1149-1177.

Nadkarni, Ashwini & Hofmann, Stefan G. (2012). Why do people use Facebook?. Personality and Individual Differences, 52(3), pp. 243-249. doi:10.1016/j.paid.2011.11.007.

Nannipieri, Luigi (1996). Licenziamento per scarso rendimento, minimi di produzione e onere della prova (Nota a Trib. Torino 3 maggio 1995). *Rivista italiana di diritto del lavoro*, 1996, 1(2), pp. 172-175.

Napoli, Mario (1980). *La stabilità reale del posto di lavoro*. Milano: Franco Angeli.

Natoli, Ugo (1984). L'attuazione del rapporto obbligatorio, vol. II, Il comportamento del debitore. In Antonio Cicu & Francesco Messineo (Eds.), *Trattato del diritto civile e commerciale*, XVI. Milano: Giuffrè;

Naughton, Keith (1999, November 28). Cyberslacking. *Newsweek*. Retrieved from https://www.newsweek.com/cyberslacking-164428.

Niger, Sergio (2006). *Le nuove dimensioni della privacy: dal diritto alla riservatezza alla protezione dei dati personali*. Padova: CEDAM, p. 27.

Nikisch, Arthur (1955). *Arbeitsrecht*. Tübingen: Mohr.

Nogler, Luca. (2013). (Ri)scoprire le radici giuslavoristiche del «diritto civile». *Europa e diritto privato*, 4, pp. 959-1013.

Nuzzo, Valeria (2012). *La norma oltre la legge. Causali e forma del licenziamento nell'interpretazione del giudice*. Napoli: Satura.

Oberwetter, Christian (2008). Bewerberprofilerstellung durch das Internet - Verstoß gegen das Datenschutzrecht?. *Betriebs-Berater* (BB), 29, pp. 1562-1566.

Oberwetter, Christian (2011). Soziale Netzwerke im Fadenkreuz des Arbeitsrechts. *Neue Juristische Wochenschrift*, pp. 417-421.

Ogriseg, Claudia (2016). Il Regolamento UE n. 2016/679 e la protezione dei dati personali nelle dinamiche giuslavoristiche: la tutela riservata al dipendente. *Labour & Law Issues*, 2, pp. 1-38. Retrieved from https://labourlaw.unibo.it/article/view/6498.

Ogriseg, Claudia (2017). GDPR and personal data protection in the employment context. *Labour & Law Issues*, (2), p. 1-24. Retrieved from https://labourlaw.unibo.it/article/view/7573.

Oppo, Giorgio (1944). I contratti di durata. *Rivista di Diritto Commerciale*, I, p. 143-180.

Örücü, E. (2007). Developing Comparative Law. In E. Örücü & D. Nelken (Eds.), *Comparative Law: A Handbook*. Oxford: Hart Publishing, p. 62.

Otto von Gierke, Friedrich (1889). *Der Entwurf eines bürgerlichen Gesetzbuchs und das deutsche Recht*, Leipzig: Dunker & Humblot.

Paissan, Mauro (2010). E-mails e navigazione in internet: le linee del Garante, in P. Tullini (Ed.), *Tecnologie della comunicazione e riservatezza nel rapporto di lavoro. Uso dei mezzi elettronici, potere di controllo e trattamento dei dati personali*, in *Trattato di diritto commerciale e di diritto pubblico dell'economia*. Padova: Cedam.

Patti, Salvatore (2015). L'influenza del diritto civile italiana sul diritto tedesco. In V. Di Cataldo, V. Meli & R. Pennisi (Eds.). *Impresa e mercato. Studi dedicati a Mario Libertini: Impresa e società-Concorrenza e mercato-Crisi dell'impresa. Scritti vari, (vol. III).* Milano: Giuffrè.

Pedrazzoli, Marcello (2011). Sul licenziamento per scarso rendimento e per il sopravvenire di incompatibilità personali. In M. Pedrazzoli (Ed.). *Licenziamento e sanzioni nei rapporti di lavoro*. Padova: CEDAM.

Pedrazzoli, Marcello (2014). Philipp Lotmar e il diritto del lavoro italiano. In I. Fargnoli (Ed.), *Philipp Lotmar - letzter Pandektist oder erster Arbeitsrechtler?* (pp. 145-160). Frankfurt am Main: Vittorio Klostermann.

Pera, Giuseppe (1980). *La cessazione del rapporto di lavoro*. Padova: CEDAM.

Perlingieri, Carolina (2017). *Social networks and private law*. Napoli: Edizioni Scientifiche Italiane.

Persiani, Mattia (1971). La tutela dell'interesse del lavoratore alla conservazione del posto. In Luisa Riva Sanseverino & Giuliano Mazzoni (Eds.), *Nuovo trattato di diritto del lavoro* (vol. 2). Padova, Cedam.

Persiani, Mattia (2009). Diritto privato e diritto del lavoro. *ADL Argomenti di diritto del lavoro*, 4-5/1, pp. 947-960.

Petrini, D. (1985). L'articolo 4 dello Statuto dei lavoratori e il controllo dell'attività lavorativa attuato con mezzi informatici. *Rivista Giuridica del Lavoro e della Previdenza Sociale*, IV, p. 375.

Petrucco, Fabrizio (2019). The right to privacy and new technologies: Between evolution and decay. *Rivista di diritto dei media*, 1, pp. 148-182. Retrieved from http://www.medialaws.eu.

Phlips, Louis (1988). *The economics of imperfect information*. Cambridge; New York: Cambridge University Press.

Picker Eduard (1983). Positive Forderungsverletzung und culpa in contrahendo - Zur Problematik der Haftungen "zwischen" Vertrag und Delikt. *Archiv für die civilistische Praxis*, 183, pp. 369-520.

Pisani, Carlo (2004). *Licenziamento e fiducia*. Milano: Giuffrè.

Pizzetti, Francesco (2018). La protezione dei dati personali dalla direttiva al nuovo regolamento: una sfida per le Autorità di controllo e una difesa per la libertà dei moderni. *La rivista di diritto dei media*, 1, pp. 103-123. Retrieved from: http://www.medialaws.eu.

Poletti, Dianora (2017). Il c.d. diritto alla disconnessione nel contesto del «diritti digitali». *Responsabilità civile e previdenza*, 1, p. 16.

Popoli, Anna Rita (2014). Social network e concreta protezione dei dati sensibili: luci ed ombre di una difficile convivenza. *Diritto dell'informazione e dell'informatica*, 6, pp. 981-1017.

Portale, Giuseppe B. (2018). Diritto societario tedesco e diritto societario italiano in dialogo. *Banca borsa e titoli di credito*, (5/1), pp. 597-612.

Posner, Richard A. (1978). The right of privacy. *Georgia Law Review*, 12(3), pp. 393-422.

Pound, Roscoe (1910). Law in books and law in action. *American Law Review*, 44, pp. 12-36.

Pound, Roscoe (1936). What may we expect from comparative law? *American Bar Association Journal*, 22, pp. 56-60.

Preis, Ulrich (2013). BGB § 611 Vertragstypische Pflichten beim Dienstvertrag. In Thoma Dieterich, Peter Hanau & Günter Schaub (2013). *Erfurter Kommentar zum Arbeitsrecht*, BGB, § 611 Rn. 710.

Preis, Ulrich, Greiner, Stefan, Rolfs, Christian, Stoffels, Markus & Wagner, Klaus (2015). *Der Arbeitsvertrag.* Köln: Verlag Dr. Otto Schmidt.

Pugliese, Giovanni (1989). Appunti per una storia della protezione dei diritti dell'uomo. *Rivista trimestrale di diritto e procedura civile*. 43(3), pp. 619-659.

Ramm, Thilo (1966). *Arbeitsrecht und Politik*. Berlin-Spandau: Luchterhand.

Rebhahn, Robert (2002). Ziele und Probleme der Arbeitsrechtsvergleichung in Europa. *Zeitschrift für europäisches Privatrecht*, pp. 436-465.

Recchia, Giuseppe Antonio (2017). Controlli datoriali difensivi: note su una categoria in via di estinzione. *Il Lavoro nella giurisprudenza*, 4, pp. 348-354.

Reichold, Hermann (2018). § 53 Interessenwahrungspflichten des Arbeitnehmers - Grundlagen und Überblick. In Heinrich Kiel, Stefan Lunk & Hartmut Oetker (Eds.), *Handbuchzum Arbeitsrecht*. München: Verlag C.H. Beck, Rn. 1-16.

Reimann, Mathias W. (2001). Beyond national systems: A comparative law for the international age. *Tulane Law Rewiew*, 75(4), pp. 1103-1119.

Reinfeld, Moll (2021). § 33 Loyalitäts- und Rücksichtnahmepflichten, Nebentätigkeitsbeschränkungen. In W. Moll (Ed.), *Münchener Anwaltshandbuch Arbeitsrecht*. München: C.H. Beck, Rn. 49.

Rendina, Luigi (2019, October 30). Privacy vs protezione dati personali: attenti alla differenza, ne va della nostra identità. *Agenda digitale*. Retrieved from https://www.agendadigitale.eu/sicurezza/privacy/privacy-e-protezione-dati-personali-cosa-sono-quali-differenze-cosa-e-cambiato-col-gdpr/.

Ricci, Francesco (1886). *Corso teorico-pratico di diritto civile*, vol. VIII, II ed. Torino: Unione Tipografico-Editrice.

Richardi, Reinhard & Thüsing, Gregor (2016). *Betriebsverfassungsgesetz mit Wahlordnung*, § 98 Rn. 71.

Richters, Swantje & Wodtke, Carolina (2003). Schutz von Betriebsgeheimnissen aus Unternehmenssicht "Verhinderung von Know-how Abfluss durch eigene Mitarbeiter". In *Neue Zeitschrift für Arbeitsrecht*, pp. 281-287.

Riesenhuber, Karl (2011). Die Einwilligung des Arbeitnehmers im Datenschutzrecht. In *Recht der Arbeit*, pp. 257-265.

Riva Sanseverino, Luisa (1960). *Il lavoro nell'impresa*. Torino: Utet.

Riva Sanseverino, Luisa (1978). *Diritto del lavoro*. Padova: CEDAM.

Riva Sanseverino, Luisa (1982). *Diritto del lavoro*. Padova: CEDAM.

Rodotà, Stefano (1974). La "privacy" tra individuo e collettività. *Politica del diritto*, pp. 545-563.

Rodotà, Stefano (1997). Persona, riservatezza, identità. Prime note sistematiche sulla protezione dei dati personali. *Rivista critica del diritto privato*, 4, p. 588.

Rodotà, Stefano (2003). Foreword. In D. Lyon, *La società sorvegliata. Tecnologie di controllo della vita quotidiana*. Milano: Feltrinelli.

Rodotà, Stefano (2004). *Le fonti di integrazione del contratto*. Milano: Giuffré.

Rodotà, Stefano (2004, October 25). *Nuovi diritti. L'età dei diritti. Lezioni Norberto Bobbio*. Retrieved from http://www.cgil.it/cgil_attachments/75092_0_bioetica_00013.pdf.

Rodotà, Stefano (2006). Una Costituzione per Internet. In *Notizie di POLITEIA*, XXII, 82, p. 177.

Rodotà, Stefano (2012). *Il diritto di avere diritti*. Bari: Gius. Laterza & Figli.

Romei, Roberto (1992). Brevi spunti di riflessione sui rapporti tra diritto del lavoro e diritto civile. In Giuseppe Santoro-Passarelli (Ed.), *Diritto del lavoro e categorie civilistiche*. Torino: Giappichelli.

Romei, Roberto (1994). Diritto alla riservatezza del lavoratore e innovazione tecnologica. *Giornale di diritto del lavoro e di relazioni industriali*, pp. 67-80.

Rossi, Filippo (2015). L'emersione del licenziamento in età liberale (1865-1914) fra codice, dottrina e giurisprudenza. *Giornale di diritto del lavoro e di relazioni industriali*, 146, pp. 231-272.

Rota, Anna (2017). Rapporto di lavoro e "big data analytics": Profili critici e risposte possibili. *Labour & Law Issues*, 3(1), p. 32-52. doi:10.6092/issn.2421-2695/6861.

Ruge, Jan, Krömer, Martin, Pawlak, Klaus & Rabe von Pappenheim, Henning (2020). Lexikon Arbeitsrecht im öffentlichen Dienst. Rehm Verlag: Heidelberg, Rn. 5.3 Bewerberscreening mittels sozialer Netzwerke.

Ruggiero, L. (2004). Scarso rendimento ed inidoneità attitudinale sopravvenuta per modernizzazione tecnologica dell'impresa. *Massimario di Giurisprudenza del lavoro*, 1(2), p. 66.

Ruotolo, Gianpaolo Maria (2018). I dati non personali: l'emersione dei big data nel diritto dell'Unione europea. *Studi sull'integrazione europea*, 1 (XIII), pp. 97-116. Retrieved from https://www.studisullintegrazioneeuropea.eu/Scarico/Rivista%20Studi%200118.pdf.

Sacco, Rodolfo (1980). Comparazione giuridica e conoscenza del dato giuridico positivo. In Giovanni Bognetti & Rodolfo Sacco (Eds.), *L'apporto della comparazione alla scienza giuridica. Studi di diritto comparato*, 20, Milano: Giuffrè.

Sacco, Rodolfo (1991). Legal formants: A dynamic approach to comparative law (Installment I of II). *American Journal of Comparative Law*, 39(1), pp. 1-34. doi:10.2307/840669.

Salazar, Paola & Failla, Luca (2017). Controlli difensivi: quali i limiti nel nuovo contesto dell'art. 4, L. n. 300/1970. *Il Lavoro nella giurisprudenza*, 2, pp. 164-168.

Salazar, Paola (2015). "Facebook" e rapporto di lavoro: quale confine per l'obbligo di fedeltà. *Il Lavoro nella giurisprudenza*, (3), pp. 291-296.

Salazar, Paola (2016). Facebook e rapporto di lavoro: a che punto siamo. *Il Lavoro nella giurisprudenza*, 2, pp. 201-208.

Samuel, Geoffrey (2014). *An introduction to comparative law theory and method*. Oxford and Portland, Oregon: Hart Publishing.

Sangermano, Francesco (2007). *L'interpretazione del contratto, profili dottrinali e giurisprudenziali*. Milano: Giuffré.

Sanseverino, Riva Luisa (1978). *Diritto del lavoro*. Padova: CEDAM.

Santagata, Raffaello (2013). I licenziamenti in Germania: i presupposti di legittimità. *Diritto delle relazioni industriali*, 3, pp. 887-897.

Santagata, Raffaello (2013). Il recente dibattito dottrinale e giurisprudenziale sui licenziamenti nel diritto tedesco (parte II). *Diritti lavori mercati*, 1, pp. 101-142.

Santoro Passarelli, Francesco (1961). Spirito del diritto del lavoro. In F. Santoro Passarelli (Ed.), *Saggi di diritto civile*. Napoli: Jovene.

Santoro Passarelli, Francesco (1969). *Nozioni di diritto del lavoro*. Napoli: Jovene.

Santoro Passarelli, Giuseppe (2008). *Diritto dei lavori*. Giappichelli: Torino.

Sauro, Maria E. (2017). I controlli difensivi tra tutela del patrimonio aziendale e tutela della riservatezza. *Rivista giuridica del lavoro e della previdenza sociale*.

Scarciglia, Roberto (2016). *Metodi e comparazione giuridica*. Padova: CEDAM.

Scheid, Anja & Klinkhammer Patrick (2013). Kündigung wegen beleidigender Äußerungen des Arbeitnehmers in sozialen Netzwerken. *Arbeitsrecht Aktuell*, pp. 6-9.

Schenk, Andreas (2007). *Die Pflichtverletzung (Leistungsstörung): Arten und jeweilige Rechtsfolgen nach dem neuen Leistungsstorungsrecht*. München: Grin Verlag.

Schoeman, Ferdinand (1984). *Philosophical Dimensions of Privacy: An Anthology*. Cambridge: Cambridge University Press.

Schön, Wolfgang (1997). *Gedächtnisschrift für Brigitte Knobbe-Keuk*. Köln: Verlag Dr. Otto Schmidt.

Schröder, Georg (2019). Social Communities und deren datenschutzrechtliche Auswirkungen auf die Unternehmenspraxis. In Nikolaus Forgó, Marcus Helfrich & Jochen Schneider (Eds.), *Betrieblicher Datenschutz*. München: Verlag C.H. Beck.

Schuler, Karin & Weichert, Thilo (2016 April 08). Die EU-DSGVO und die Zukunft des Beschäftigtendatenschutzes. Retrieved in https://www.netzwerk-datenschutzexpertise.de/sites/default/files/gut_2016_dsgvo_beschds.pdf.

Schulze, Marc Oliver (2015). Datenschutz: Grundlagen und Rechte des GBR/ BR. In *Arbeitsrecht für Arbeitsnehmer*, pp. 1-44.

Schwartz, Robert G. (1992). Privacy in German Employment Law. *Hastings International and Comparative Law Review*, 15(2), pp. 135-167.

Scognamiglio, Renato (1992). Conclusioni. In G. Santoro-Passarelli (Ed.), *Diritto del lavoro e categorie civilistiche*. Torino: Giappichelli.

Selmi, Michael (2006). Privacy for the working class: Public work and private lives. *Louisiana Law Review*, 66(124), pp. 1-22.

Simi, Valente (1948). *L'estinzione del rapporto di lavoro*. Milano: Giuffrè.

Simitis, Spiros (1977). Datenschutz und Arbeitsrecht. *Arbeit Und Recht*, 25(4), pp. 97-108. Retrieved from www.jstor.org/stable/24017884.

Simitis, Spiros (1999). Reconsidering the premises of labour law: Prolegomena to an EU Regulation on the Protection of Employees' Personal Data. *European Law Journal*, 5, pp. 45-62.

Sinzheimer, Hugo. (1976). *Arbeitsrecht und Rechtssoziologie. Gesammelte Aufsätze und Reden*. Frankfurt-Köln: Otto Kahn Freund, Thilo Ramm.

Sitzia, Andrea (2013). *Il diritto alla "privatezza" nel rapporto di lavoro tra fonti comunitarie e nazionali*. Padova: CEDAM.

Smorto, Guido (2010). L'uso giurisprudenziale della comparazione. *Europa e diritto privato*, 1, pp. 223-241.

Smuraglia, Carlo (1967). *La persona del prestatore nel rapporto di lavoro*. Milano, Giuffrè.

Soffientini, Marco (2013). Le origini della privacy, la normativa odierna e la prospettiva futura con il regolamento europeo. In Nicola Bernardi, Momica Perego, Marcello Polacchini, Marco Soffientini (Eds.), *Privacy officer. La figura chiave della data protection europea* (pp. 19-81). Assago: Wolters Kluwer.

Somma, Alessandro (2001). *L'uso giurisprudenziale della comparazione nel diritto interno e comunitario*. Milano: Giuffrè.

Spagnuolo Vigorita, Luciano (1992). Interventi. In Giuseppe Santoro-Passarelli (Ed.), *Diritto del lavoro e categorie civilistiche*. Torino: Giappichelli.

Spence, Michael A. (1974). *Market Signaling: Informational transfer in hiring and related screening process*. Cambridge, Massachusetts: Harvard University Press.

Spiekermann, Sarah, Krasnova, Hanna, Koroleva, Ksenia & Hildebrand, Thomas (2010). Online social networks: Why we disclose. *Journal of Information Technology*, 25(2), pp. 109-125. doi:10.1057/JIT.2010.6.

Sprague, Robert (2011, Febraury 28). Invasion of the social networks: Blurring the line between personal life and the employment relationship. *University of Louisville Law Review*, 50, pp. 1-42. Retrieved from https://ssrn.com/abstract=1773049.

Sronce, Cara S. (2011). The references of the twenty-first century: Regulating employers' use of social networking sites as an applicant screening tool. *Southern Illinois University Law Journal*, 35, pp. 499-516.

Stanzione, Pasquale (2012). *Trattato della responsabilità civile*. Padova: Cedam.

State Council sec. III, 21 February 2014, n. 848, in Database Leggiditalia.

Staub, Hermann (2001). *Le violazioni positive del contratto*. Napoli: Edizioni scientifiche italiane.

Stenico, Eleonora (2000). Il trattamento dei dati personali del lavoratore subordinato: dalla segretezza al controllo. *Quaderni di diritto del lavoro e delle relazioni industriali*, (24), pp. 125-150.

Stoffels, Markus (2011). Die "Emmely"-Entscheidung des BAG – bloß eine Klarstellung von Missverständnissen? *Neue Juristische Wochenschrift*, pp. 118-123.

Stoll, Heinrich (1932). Abschied von der Lehre von der positiven Vertragsverletzungen. In *Archiv für die zivilistische Praxis*.

Stoll, Heinrich (1936). Die Lehre von den Leistungsstörungen. In *Archiv für die zivilistische Praxis*.

Stone, Ferdinand F. (1951). The End to Be Served by Comparative Law. *25 Tulane Law Review*, pp. 325-335.

Supiot, A. (2006). Homo juridicus. *Saggio sulla funzione antropologica del diritto*. Milano: Mondadori.

Tamir, Diana I. & Mitchell, Jason P. (2012, May 22). Disclosing information about the self is intrinsically rewarding. *PNAS Proceedings of the National Academy of Sciences of the United States of America*, 109(21), pp. 8038-8043. doi: 10.1073/pnas.1202129109.

Tardivo, Davide (2017). Libertà di espressione nel rapporto di lavoro: diritto di critica e di replica del lavoratore. *La Nuova giurisprudenza civile commentata*, 9(1), pp. 1146-1152.

Tebano, Laura (2017). Employees' Privacy and employers' control between the Italian legal system and European sources. *Labour & Law Issues*, 2. Retrieved from: http://labourlaw.unibo.it.

Thüsing, Gregor & Wurth, Gilbert (2020). § 10 Sanktionenunzulässiger SocialMedia-Nutzung. In G. Thüsing & G. Wurth (Eds.), *Social Media im Betrieb. Arbeitsrecht und Compliance*. München: C.H. Beck, Rn. 1-79.

Tosi, Paolo & Puccetti, Elisa (2018). Post denigratorio su "Facebook", la leggerezza che per pubblicità diventa giusta causa (note to judgment Corte Suprema di Cassazione, ruling of 27 April 2018, n. 10280). *Giurisprudenza italiana*, 8-9, pp. 1958-1962.

Tosi, Paolo (1974). *Il dirigente d'azienda. Tipologia e disciplina del diritto del lavoro*. Milano: Franco Angeli.

Trial Court (Pretura) of Bari 4 December 1989, in *Rivista italiana di diritto del lavoro*, 1990, 3(2), pp. 688-695, with comment of E. Vullo (1990). *Hashish e licenziamento per giusta causa: una sentenza criticabile*.

Tripiccione, Alberto (1961). *La comparazione giuridica*. Padova: CEDAM.

Trojsi, Anna (2000). Sfera privata del lavoratore e contratto di lavoro (artt. 5, 8 e 26 St. lav.). *Quaderni di diritto del lavoro e delle relazioni industriali*, (24), p. 195.

Trojsi, Anna (2013). *Il diritto del lavoratore alla protezione dei dati personali.* Torino: Giappichelli.

Trojsi, Anna (2016). Controllo a distanza (su impianti e strumenti di lavoro) e protezione dei dati del lavoratore. *Variazioni su temi di diritto del lavoro,* p. 667 ff.

Trojsi, Anna (2020). Potere informatico del datore di lavoro e controllo sui lavoratori, cinquant'anni dopo. *dirittifondamentali.it*, (2), Retrieved from: http://dirittifondamentali.it.

Tullini, Patrizia (1999). Il licenziamento in tronco, la fiducia e i c.d. fatti extra-lavorativi. *Rivista italiana di diritto del lavoro*, 1, pp. 147-155.

Tullini, Patrizia (2009). Comunicazione elettronica, potere di controllo e tutela del lavoratore. *Rivista italiana di diritto del lavoro*, 3(1), p. 323-352.

Tullini, Patrizia (2016). Economia digitale e lavoro non-standard. *Labour & Law Issues*, 2, p. 1-15. doi: 10.6092/issn.2421-2695/6489.

Twining, William (2000). *Globalization and legal theory*. London: Butterworth.

Twitter Privacy Policy. Retrieved from https://twitter.com/en/privacy?lang.

Ubertazzi, Tommaso M. (2004). *Diritto alla privacy, natura e funzioni giuridiche*. Padova: Cedam.

Ulrici, Bernhard (2021). *Geschäftsgeheimnisschutzgesetz. Handkommentar*. Baden-Baden: Nomos Verlag.

Van Hoecke, Mark (2015). Methodology of comparative legal research. Law and Method, pp. 1-35.

Vásquez, Miño V., Suhren, Peter Liability for injuries according to GDPR. *Datenschutz Datensich* 42, pp. 151-155 (2018). Retrieved from https://doi.org/10.1007/s11623-018-0926-0.

Vehslage, Thorsten (2001). Privates Surfen am Arbeitsplatz. *Anwaltsblatt*, pp. 145-146.

Veneziani, Bruno (1987). Nuove tecnologie e controllo di lavoro: profili di diritto comparato. *Giornale di diritto del lavoro e di relazioni industriali*, 1, p. 28.

Venosta, Francesco (2011). Profili della disciplina dei doveri di protezione. *Rivista di diritto civile*, 6(1), pp. 839-885.

Viglione, Filippo (2011). I "confini" nel diritto privato comparato. *La Nuova giurisprudenza civile commentata*, 3(2), pp. 162-193.

Visconti, Roberto M. (2016). Valutazione dei *Big data* e impatto su innovazione e *digital branding*. *Il Diritto industriale*, 1, pp. 46-53.

Visintini, Giovanna (2009). *Trattato della responsabilità contrattuale*. Padova: Cedam.

Voigt, Paul & von dem Bussche, Axel (2017). *The EU General Data Protection Regulation (GDPR) A Practical Guide*. 1st ed. Cham: Springer International Publishing, p. 3.

Von Bülow, Oskar (1885). *Gesetz und Richteramt*. Leipzig: Duncker & Humblot.

Von Staudinger, Julius (2016). *Kommentar zum Bürgerlichen Gesetzbuch*. Sellier: de Gruyter Rn. 5.

Von Staudinger, Julius, Looschelders, Dirk & Olzen, Dirk (2014). BGB - §§ 241-243. In Julius Von Staudinger, Dirk Looschelders & Gregor Schiemann (Eds.), Berlin: Sellier - De Gruyter, § 242 Rn. 797.

Vossen, Kathrin (2020). § 10 Sanktionenunzulässiger SocialMedia-Nutzung. In Gregor Thüsing & Gilbert Wurth (Eds.), *Social Media im Betrieb. Arbeitsrecht und Compliance*. München: C.H. Beck, Rn. 49-50.

Walton, Charles (2009). *Policing public opinion in the French Revolution. The culture of calumny and the problem of free speech*. Oxford: Oxford University Press.

Warren, Samuel & Brandeis, Louis (1890, December 15). The right to privacy. *Harvard Law Review*, 4(5), p. 193-220.

Weichert, Thilo (2020). Datenschutz-Grundverordnung – arbeitsrechtlich spezifiziert. *Neue Zeitschrift für Arbeitsrecht*, p. 1602.

Westin, Alan (1970). *Privacy and freedom*. Atheneum: New York.

Westin, Alan (2003, April 29). Social and political dimensions of privacy. *Journal of Social Issues*, 59(2), pp. 431-453.

Wetzlar, Roman F.A. (1998). Sanktion, Prognoseprinzip und Vertragsstörung bei der verhaltensbedingten Kündigung im Arbeitsrecht. *Neue Zeitschrift für Arbeitsrecht*, pp. 284-287.

Wheeless, Lawrence R. & Grotz, Jams (1976). Conceptualization and measurement of reported self-disclosure, *Human Communication Research*, 2(4), pp. 338-346.

Whitman, James (2004). The two Western cultures of privacy: Dignity v. liberty. *Yale Law Journal*, 113, pp. 1151-1221.

Wiese, Günther (1971). Der Persönlichkeitsschutz des Arbeitnehmers gegenüber dem Arbeitgeber. In *Fundheft für Arbeits- und Sozialrecht*, 17(112), pp. 273-317.

Wiese, Günther (1996). Der personale Gehalt des Arbeitsverhältnisses. *Zeitschrift für Arbeitsrecht*, pp. 7-16.

Wiese, Günther (2012). Internet und Meinungsfreiheit des Arbeitgebers, Arbeitnehmers und Betriebsrats. *Neue Zeitschrift für Arbeitsrecht*, pp. 1-8.

Wignore, John H. (1928). *A panorama of the world's legal systems* (vol. III). Saint Paul: West Publishing Company.

Wilcox, Keith & Stephen, Andrew T. (2013). Are close friends the enemy? Online social networks, self-esteem, and self-control. *Journal of Consumer Research*, 40(1), pp. 90-103. Retrieved from https://doi.org/10.1086/668794.

Willemsen Heinz J. (2017). Verhaltensbedingte Kündigung: Fünf Thesen und fünf Fragezeichen. *Recht der Arbeit*, pp. 115-127.

Zagrebelsky, Gustavo (1992). *Il diritto mite*. Torino: Einaudi.

Zanelli, Pietro (1985). Nuove tecnologie, riservatezza, diritto d'informazione. *Rivista italiana di diritto del lavoro*, I, pp. 89-125.

Zanelli, Pietro (1988). Innovazione tecnologica, controlli, riservatezza nel diritto del lavoro. *Diritto dell'informazione e dell'informatica*, 3, pp. 749-763.

Zatti, Paolo & Colussi, Vittorio (2001). *Lineamenti di diritto privato*. Padova: CEDAM.

Zimmer, Michael (2010, December). But the data is already public: On the ethics of research in Facebook. *Ethics and Information Technology*, 12(4), pp. 313-325. doi: https://doi.org/10.1007/s10676-010-9227-5.

Zoli, Carlo (2009). Il controllo a distanza del datore di lavoro: l'art. 4, l. n. 300/1970 tra attualità ed esigenze di riforma. *Rivista italiana di diritto del lavoro*, 2009, 4/1, pp. 485-503.

Zoppini, Andrea (2006). Fonti del diritto privato, concorrenza tra ordinamenti giuridici e riforma del diritto delle obbligazioni (note minime). *Rivista di diritto civile*, 6, pp. 123-129.

Zweigert, Konrad & Kötz, Hein (1971). *Einführung in die Rechtsvergleichung*. Tübingen: J.C.B. Mohr (Paul Siebeck).

CASE LAW CONTRIBUTIONS

Angiello, Luigi (1983). Brevi note su un caso di licenziamento per scarso rendimento (note to ruling of Corte Suprema di Cassazione, ruling of 23 April 1983, n. 2797). *Rivista italiana di diritto del lavoro*, 3(00), pp. 648-652.

Arbeitsgericht Bochum, ruling of 09 Febraury 2012 - 3 Ca 1203/11, in *Beck-Rechtsprechung*, 2012, p. 68181.

Arbeitsgericht Bochum, ruling of 29 March 2012 - 3 Ca 1283/11, in *Beck-Rechtsprechung*, 2012, p. 70844.

Arbeitsgericht Cottbus, ruling of 5 June 2008 - 8 Ca 325/08.

Arbeitsgericht Dessau-Roßlau, ruling of 21 March 2012 - 1 Ca 148/11, in *Beck-Rechtsprechung*, 2012, p. 69099.

Arbeitsgericht Duisburg, ruling of 26 September 2012 - 5 Ca 949/12, in *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report*, 2013, p. 18.

Arbeitsgericht Duisburg, ruling of 26 September 2012 - 5 Ca 949/12, in *Beck-Rechtsprechung*, 2012, p. 74872.

Arbeitsgericht Hagen (Westfalen), ruling of 16 May 2012 - 3 Ca 2597/11, in Database Juris.

Arbeitsgericht Hamburg, ruling of 18 September 2013 - 27 Ca 207/13, in Database Juris.

Arbeitsgericht Leipzig, ruling 17 December 1998 - 16 Ca 14177/97, in Database Juris.

BGH, ruling of 12 Janury 2016 - 3 StR 482/15 (LG Rostock).

Bundesarbeitsgerich Unterrichtungsanspruch des Betriebsrats - Einblicksrecht in Bruttolohn- und -gehaltslisten. In *Neue Zeitschrift für Arbeitsrecht*, 2007, pp. 99-103.

Bundesarbeitsgerich, ruling of 19 April 2012 - 2 AZR 186/11, in *Neue Zeitschrift für Arbeitsecht* 2013, pp. 27-31, Rn. 22.

Bundesarbeitsgerich, ruling of 19 November 2015 - 2 AZR 217/15, in *Neue Zeitschrift für Arbeitsecht* 2016, pp. 540-547.

Bundesarbeitsgerich, ruling of 20 November 2014 - 2 AZR 651/13, in *Neue Zeitschrift für Arbeitsecht* 2015, pp. 294-297.

Bundesarbeitsgerich, ruling of 25 October 2012 - 2 AZR 495/11, in *Neue Zeitschrift für Arbeitsecht* 2013, pp. 319-322.

Bundesarbeitsgerich, ruling of 31 July 2014 - 2 AZR 434/13, in *Neue Zeitschrift für Arbeitsecht* 2015, pp. 358-362.

Bundesarbeitsgericht 12 January 2006, in lexetius.com/2006, p. 1331.

Bundesarbeitsgericht 26 March 2009, n. 2 AZR 953/07, in *Beck-Rechtsprechung* 2009, p. 66020.

Bundesarbeitsgericht, resolution of 14. September 1984 - 1 ABR 23/82, Entscheidungen des Bundesarbeitsgerichts, 46, pp. 367-385.

Bundesarbeitsgericht, resolution of 29 June 2004, n. 1ABR21/03. In *Beck-Rechtsprechung* 2004, p. 41773.

Bundesarbeitsgericht, resolution of 29.06.2004, n. 1ABR21/03. In *Neue Zeitschrift für Arbeitsrecht*, 2004, pp. 1278-1284.

Bundesarbeitsgericht, ruling 04 March 2004 - 2 AZR 147/03, in *Sammlung der Entscheidungen des Bundesarbeitsgerichts*, 110, pp. 1-7.

Bundesarbeitsgericht, ruling 07 July 2005 - 2 AZR 581/04, in *Sammlung der Entscheidungen des Bundesarbeitsgerichts*, 115, pp. 195-205.

Bundesarbeitsgericht, ruling 13 December 2007 - 2 AZR 818/06, in *Neue Zeitschrift für Arbeitsrecht*, 2008, pp. 589-592.

Bundesarbeitsgericht, ruling of 09 December 1982 - 2 AZR 620/80, in *Neue Juristische Wochenschrift*, 1984, pp. 1142-1143.

Bundesarbeitsgericht, ruling of 09 September 1975. In *Sammlung der Entscheidungen des Bundesarbeitsgerichts*, 27, 256, pp. 260-61.

Bundesarbeitsgericht, ruling of 10 December 2009 - 2 AZR 534/08. In *Neue Zeitschrift für Arbeitsrecht*, 2010, pp. 698-701.

Bundesarbeitsgericht, ruling of 10 June 2010 - 2 AZR 541/09, in *Neue Zeitschrift für Arbeitsrecht* 2010, pp. 1227-1234.

Bundesarbeitsgericht, ruling of 10 November 1955 – 2 AZR 591/54, in *Neue Juristische Wochenschrift*, 1965, pp. 359-360.

Bundesarbeitsgericht, ruling of 10 November 1955 - 2AZR591/54. In *Neue Juristische Wochenschrift*, 1956, pp. 359-360.

Bundesarbeitsgericht, ruling of 10 October 2002 - 2 AZR 418/01, in *Neue Zeitschrift für Arbeitsrecht* 2003, p. 1295.

Bundesarbeitsgericht, ruling of 12 January 2006 - 2 AZR 21/05, in *Neue Zeitschrift für Arbeitsrecht* 2006, pp. 917-923.

Bundesarbeitsgericht, ruling of 14 September 1984 - 1 ABR 23/82, Bundesarbeitsgericht, ruling of 08 November 1994 - 1 ABR 20/94.

Bundesarbeitsgericht, ruling of 16 February 2012 - 6 AZR 553/10, in *Sammlung arbeitsrechtlicher Entscheidungen*, 4, pp. 85-89, with comment of C. Rolfs & H. M. Feldhaus (2012). *Die Frage nach der Schwerbehinderung im bestehenden Arbeitsverhältnis.*

Bundesarbeitsgericht, ruling of 18 October 2011 - 9 AZR 303/10. In *Neue Zeitschrift für Arbeitsrecht*, 2012, p. 143, n. 28.

Bundesarbeitsgericht, ruling of 19 April 2021 - 2 AZR 186/11, in *Neue Zeitschrift für Arbeitsrecht* 2013, pp. 27-31.

Bundesarbeitsgericht, ruling of 20 October 2016 - 6 AZR 471/15, in *Arbeitsrechtliche Praxis* BGB § 626 n. 258.

Bundesarbeitsgericht, ruling of 20 September 1984 - 2 AZR 633/82, in *Neue Juristische Wochenschrift*, 1985, p. 1854.

Bundesarbeitsgericht, ruling of 22 October 1986 - 5AZR660/85. In *Neue Zeitschrift für Arbeitsrecht*, 1987, p. 415.

Bundesarbeitsgericht, ruling of 23 June 1994 - 2 AZR617/93. In *Beck-Rechtsprechung* pp. 9998-150312.

Bundesarbeitsgericht, ruling of 23 October 2006 - 1 BvR2027/02. In *Recht und schaden*, 2007, p. 29.

Bundesarbeitsgericht, ruling of 24 June 2004 - 2 AZR 63/03, in *Neue Zeitschrift für Arbeitsrecht*, 2015, pp. 159-161.

Bundesarbeitsgericht, ruling of 24 November 2005 - 2 AZR 584/04, in *Neue Zeitschrift für Arbeitsrecht*, 2006, pp. 650-655.

Bundesarbeitsgericht, ruling of 25 August 1966 - 5 AZR 525/65. In *Neue Juristische Wochenschrift*, 1976, pp. 125-126.

Bundesarbeitsgericht, ruling of 25 October 2012 - AZR 495/11, in *Neue Zeitschrift für Arbeitsrecht*, 2013, pp. 319-322.

Bundesarbeitsgericht, ruling of 26 August 1993 - 2 AZR 154/93, in *Neue Zeitschrift für Arbeitsrecht* 1994, pp. 63-67.

Bundesarbeitsgericht, ruling of 27 April 2006 - 2 AZR 386/05, in *Neue Zeitschrift für Arbeitsrecht*, 2006, pp. 977-980, Außerordentliche Kündigung wegen privater Internetnutzung pornografischer Seiten.

Bundesarbeitsgericht, ruling of 27 September 2012 - 2 AZR 646/11, in *Neue Juristische Online-Zeitschrift* 2013, pp. 1064-1069.

Bundesarbeitsgericht, ruling of 3 November 2011 - 2 AZR 748/10, in *Neue Zeitschrift für Arbeitsrecht* 2012, pp. 607-610.

Bundesarbeitsgericht, ruling of 31 July 2014 - 2 AZR 434/13, in *Neue Zeitschrift für Arbeitsrecht* 2015, pp. 358-362.

Bundesarbeitsgericht, ruling of 7 July 2005 - 2 AZR 581/04. In *Neue Zeitschrift für Arbeitsrecht*, 2006, pp. 98-101.

Bundesarbeitsgericht, ruling of 8 September 2011 - 2 AZR 388/10, in *Neue Zeitschrift für Arbeitsrecht*, 2012, pp. 400-404.

Bundesarbeitsgericht, ruling of 9 June 2011 - 2 AZR 323/10, in *Neue Zeitschrift für Arbeitsrecht*, 2011, pp. 1342-1346.

Bundesfinanzhof, ruling of 20 January 1961 - III 129/59 U, in *Neue Juristische Wochenschrift* 1961, p. 848.

Bundesgerichtshof, ruling of 25 May 1954 - IZR211/53. In *Die Entscheidungssammlung des Bundesgerichtshofes in Zivilsachen*, 13, pp. 334-341.

Bundesverfassungsgericht 15 December 1983, in *Neue Juristische Wochenschrift*, 1984, p. 419 ff. (translation in Rivista giuridica del lavoro 1987, I, p. 532 ff.

Bundesverfassungsgericht, decision of 15 December 1983 on the Census Act, in *Neue Juristische Wochenschrift* 1984, p. 419.

Bundesverfassungsgericht, resolution of 10.10.1995, n. 1 BvR 1476/91, in *Neue Juristische Wochenschrift*, 1995, pp. 3304-3310.

Bundesverfassungsgericht, resolution of 14 March 2006 - 1 BvR 2087/03, in *Neue Zeitschrift für Verwaltungsrecht*, 2006, pp. 1041-1049.

Bundesverfassungsgericht, resolution of 14.3.1972 - 2 BvR 41/71, in *Neue Juristische Wochenschrift*, 1972, pp. 811-814.

Bundesverfassungsgericht, resolution of 22.06.1982 - 1 BvR 1376/79, in *Neue Juristische Wochenschrift* 1983, pp. 1415-1417.

Bundesverfassungsgericht, resolution of 23.3.1971 - 1 BvL 25/61, 3/62, in *Neue Juristische Wochenschrift*, pp. 1555-1559.

Bundesverfassungsgericht, ruling of 1 March 1979 - 1 BvR 533/77, in *Entscheidungen des Bundesverfassungsgerichts*.

Bundesverfassungsgericht, ruling of 11 June 1991 - 1 BvR239/90. In *Entscheidungen des Bundesverfassungsgerichts*, 84, p. 192.

Bundesverfassungsgericht, ruling of 15 December 1983 - 1BvR209/83. In *Entscheidungen des Bundesverfassungsgerichts*, 65, p. 1.

Bundesverfassungsgericht, ruling of 24 April 1991.

Bundesverfassungsgericht, ruling of 27 January 1998, in BvL 15/87.

Bundesverfassungsgerichts, ruling of 03 June 1980 - 1 BvR 185/77. In *Entscheidungen des Bundesverfassungsgerichts*, 54, pp. 148-158.

Bundesverfassungsgerichts, ruling of 14 February 1973 - 1BvR 112/65. In *Entscheidungen des Bundesverfassungsgerichts*, 34, pp. 269-293.

Bundesverwaltungsgericht resolution of 23 January 2013, n. 2 B 63.12, in *Beck-online.RECHTSPRECHUNG* 2013, p. 46742.

Consiglio di Stato, sec. III, ruling of 21 February 2014, n. 848, in *Foro Italiano*, 2014, III, p. 501.

Corte Suprema di Cassazione, resolution of 28 May 2018, n. 13266, in *Foro italiano*, 2018, 7-8/1, pp. 2359-2360, with comment of A.M. Perrino (2018), *(In tema di uso del computer aziendale da parte del lavoratore per finalità extralavorative, verifica informatica successiva del datore di lavoro e licenziamento per giusta causa*).

Corte Suprema di Cassazione, ruling of 1 July 2009, n. 16196, in Database Leggiditalia.

Corte Suprema di Cassazione, ruling of 1 June 1988, n. 3719, in *Rivista Italiana di Diritto del Lavoro*, 1988, II, p. 978.

Corte Suprema di Cassazione, ruling of 1 October 2012, n. 16622, in *Rivista giuridica del lavoro e della previdenza sociale*, (1/2), pp. 32-36 with comment of A. Mattei (2013). *Controlli difensivi e tutela della riservatezza del lavoratore*.

Corte Suprema di Cassazione, ruling of 1 October 2012, n. 16622, in *Il Lavoro nella giurisprudenza*, 2012, 4, p. 383.

Corte Suprema di Cassazione, ruling of 1° October 2012, n. 16622, in *Giustizia civile-massimario annotato dalla Cassazione*, 2012, 10, p. 1168.

Corte Suprema di Cassazione, ruling of 10 February 2015, n. 2550, in Database Italgiure.

Corte Suprema di Cassazione, ruling of 11 July 2014, n. 16009, in Database Leggiditalia.

Corte Suprema di Cassazione, ruling of 12 October 2015, n. 20440, in *il giuslavorista.it* 2016, 18 January.

Corte Suprema di Cassazione, ruling of 14 February 2011, n. 3590, in Database Leggiditalia.

Corte Suprema di Cassazione, ruling of 16 August 2016, n. 17108, in *Diritto delle relazioni industriali*, 2016, 4, pp. 1135-1140, with comment of E. Dagnino, (2016). *Sul riparto probatorio rispetto alla sussistenza della giusta causa di licenziamento: l'inapplicabilità del criterio della vicinanza alla prova*.

Corte Suprema di Cassazione, ruling of 17 April 2001, n. 5633, in Database Leggiditalia.

Corte Suprema di Cassazione, ruling of 17 December 2019 n. 50919, in *Il Lavoro nella giurisprudenza*, 2020, 8-9, pp. 855-862, with annotation comment of G. Taiani, Gianluca (2020). Violazione dell'art. 4 Stat. Lav. e consenso del lavoratore. *Il Lavoro nella giurisprudenza*.

Corte Suprema di Cassazione, ruling of 17 February 1987, n. 1711, in Database Leggiditalia.

Corte Suprema di Cassazione, ruling of 17 July 2007, n. 15892, in *Massimario di giurisprudenza italiana*, 2007.

Corte Suprema di Cassazione, ruling of 18 June 2009 - 14176, in *Il lavoro nella giurisprudenza*, 2009, 11, p. 1166.

Corte Suprema di Cassazione, ruling of 18 June 2009, n. 14176, in *Il lavoro nella giurisprudenza* (2009), p. 1166.

Corte Suprema di Cassazione, ruling of 18 September 2014, n. 19684, in Database Leggiditalia.

Corte Suprema di Cassazione, ruling of 19 September 2016, n. 18302, in *Il Lavoro nella giurisprudenza*, 2017, (2), pp. 164-168 with comment of P. Salazar & L. Failla (2017). *Controlli difensivi: quali i limiti nel nuovo contesto dell'art. 4, L. n. 300/1970*.

Corte Suprema di Cassazione, ruling of 2 February 2016, n. 1978, in *Giurisprudenza italiana*, 2016, 3, pp. 655-659, with comment of G. Castellani (2016). *Diligenza e fedeltà del lavoratore*.

Corte Suprema di Cassazione, ruling of 21 July 2004, n. 13526, in *ADL Argomenti di diritto del lavoro*, 10(1), pp. 277-303, with comment of C. Pisani (2004). *Licenziamento e sanzioni ai dipendenti per fatti privati: profili procedurali e sostanziali*.

Corte Suprema di Cassazione, ruling of 22 October 1998, n. 10511.

Corte Suprema di Cassazione, ruling of 23 Febraury 2012, n. 2722, in *Pratica Lavoro*, 2012, 16, p. 706.

Corte Suprema di Cassazione, ruling of 24 January 2013, n. 1698, in Database Leggi d'Italia.

Corte Suprema di Cassazione, ruling of 24 March 2015, n. 5878, in *Rivista giuridica del lavoro e della previdenza sociale*, 2015, 3(2), pp. 420-424, with comment of G. Pistone (2015). *Turpiloquio sul luogo di lavoro e lesione del vincolo fiduciario*.

Corte Suprema di Cassazione, ruling of 24 November 2016, n. 24023, in Database Dejure.

Corte Suprema di Cassazione, ruling of 25 February 1986, n. 1173.

Corte Suprema di Cassazione, ruling of 25 November 1997, n. 11806, in Database Leggiditalia.

Corte Suprema di Cassazione, ruling of 26 May 2001, n. 7185, in *Notiziario di giurisprudenza del lavoro*, 2001.

Corte Suprema di Cassazione, ruling of 29 July 1986, n. 4868, in *Massimario di giurisprudenza del lavoro*, 1986, p. 505.

Corte Suprema di Cassazione, ruling of 31 January 2017, n. 2499, in *ADL Argomenti di diritto del lavoro*, 2017, 3, pp. 3 ff., with comment of M. Matarese (2017). *Diritto di critica sui social network e licenziamento ritorsivo*.

Corte Suprema di Cassazione, ruling of 4 December 2013, n. 27129, in *Diritto e Giustizia*, 4 December 2013.

Corte Suprema di Cassazione, ruling of 4 March 2014, n. 4984, in *Giurisprudenza italiana*.

Corte Suprema di Cassazione, ruling of 4 October 2017, n. 23178.

Corte Suprema di Cassazione, ruling of 5 October 2016, n. 19922.

Corte Suprema di Cassazione, ruling of 7 April 1999, n. 3386, in *Rivista Italiana di Diritto del Lavoro*, 1999, 3(2), p. 649, with comment of G. Pera (1999). *Il licenziamento per abuso del telefono aziendale*.

Corte Suprema di Cassazione, ruling of 8 February 1993, n. 1519, *in Rivista italiana di diritto del lavoro*, 1994, 3(2), pp. 536-541, with comment of L. Angelini (1994). *Ancora in materia di giusta causa di licenziamento per fatti e comportamenti estranei al rapporto di lavoro*.

Corte Suprema di Cassazione, ruling of 8 March 1998, n. 2626, in *Rivista italiana di diritto del lavoro*, 1999, 1(2), pp. 147-155, with comment of P. Tullini (1999). *Il licenziamento in tronco, la fiducia e i c.d. fatti extra-lavorativi*.

Corte suprema di Cassazione, ruling of 8 May 2017, n. 22148, in giustiziacivile.com, 2018, 2, p. 10, with annotation comment of T. Frigerio (2018). Consenso dei lavoratori e strumenti di controllo a distanza. Anche la Cassazione penale conferma l'orientamento garantista.

Corte Suprema di Cassazione, ruling of 8 November 2016, n. 22662 and resolution of 19 September 2016, n. 18302, in Rivista giuridica del lavoro e della previdenza sociale, 2017, 2, pp. 276-280, with comment of M.E.

Corte Suprema di Cassazione, ruling of 8 November 2016, n. 22662, in *Il Lavoro nella giurisprudenza*, (4), pp. 348-354 with comment of G.A. Recchia (2017). *Controlli datoriali difensivi: note su una categoria in via di estinzione*.

Corte Suprema di Cassazione, ruling of 9 February 2016, n. 2531.

Corte Suprema di Cassazione, ruling of 9 March 2016, n. 4633, in *Rivista italiana di diritto del lavoro*, 2016, 4/2, pp. 800-805, with comment of P. Frigo (2016). *Sulla rilevanza disciplinare di condotte extralavorative illecite e... reticenti*.

Court of Appeal of Catania 20.6.1904, MT, 45, p. 735.

Court of Appeal of L'Aquila 31 October 2013.

Court of Appeal of Lucca 20.12.1903, MT, 45, pp. 190-191.

Court of Appeal of Milano 13.9.1892, MT, 43, p. 535.

Court of Appeal of Turin 15 May 2014, in *Rivista giuridica del lavoro e della previdenza sociale*, 2015, 3/2, pp. 465-469, with comment of B. Catania (2015). *Responsabilità disciplinare per dichiarazioni su "social network".*

Court of Ascoli Piceno 19 November 2013 and Court of Milano resolution 1 August 2014, in *Rivista italiana di diritto del lavoro*, (1/2), pp. 82-89 with comment of F. Iaquinta & A. Ingrao (2015). *Il datore di lavoro e l'inganno di "facebook"*.

Court of Bergamo 24 December 2015, resolution R.G. 2137/2015.

Court of Bergamo, resolution ruling of 24 December 2015, in *Il Lavoro nella giurisprudenza*, (5), pp. 476-482 with comment of L.A. Cosattini (2016). *I comportamenti extralavorativi al tempo dei "social media": "postare" foto costa caro*.

Court of Florence 13 March 2013.

Court of Florence of 14 February 2013, in *Rivista italiana di diritto del lavoro*, 2013, 3(2), pp. 616-620, with comment of M. Lughezzani (2013). *Sulla rilevanza dei fatti extra-lavorativi: lo sfruttamento della prostituzione della moglie giustifica il licenziamento*.

Court of Ivrea 28 January 2015, resolution n. 1008, in *Il Lavoro nella giurisprudenza*, 2015, 8-9, pp. 838-843, with comment of P.Salazar (2015). *"Facebook" e licenziamento per giusta causa: quando si travalicano i limiti del privato influendo sul rapporto di lavoro*.

Court of Milan 17 December 2004 in *Il lavoro nella giurisprudenza*, 2005, 12, pp. 1176-1182, with comment of A. Zilli (2005). *Licenziamento in tronco per abuso del telefono aziendale*.

Court of Padova, ruling of 22 January 2018, in *Rivista giuridica del lavoro e della previdenza sociale*, 2018, 4, pp. 593-604, with comment of A. Ambrosino (2018). *Sulla legittimità dei controlli "difensivi" del datore di lavoro*.

Court of Rome 28 January 2009, in *Massimario di giurisprudenza del lavoro*, 5/09, p. 324, with comment of C. Pisani (2009). *La hostess "allegra": licenziamento per inidoneità morale*.

Court of Rome, sec. lav. 16 February 2005, in *Rivista italiana di diritto del lavoro*, 2005, 3(2), pp. 652-654, with comment of A. Occhino (2005). *L'abuso del telefono aziendale tra inadempimento contrattuale e illecito aquiliano*.

Court of Rome, section labour, 28 January 2009, in *Rivista italiana di diritto del lavoro*, 2010, 1/2, pp. 40-48, with comment of A. Gabriele (2009). Giusta causa oggettiva di licenziamento e inidoneità morale sopravvenuta: brevi riflessioni.

Court of Torino, ruling of 18 September 2018, n. 1664, in *Rivista Giuridica del Lavoro e della Previdenza Sociale;*

Crisp v. Apple Retail (UK) Limited (unreported ET/1500258/2011).

European Court of Human Rights, 12.2.2008, application n. 14277/04, Guja v. Moldova.

European Court of Human Rights, 13.1.2015, application n. 62716/09, Łozowksa v. Polen.

European Court of Human Rights, 16.7.2009, application n. 20436/02, Wojtas-Kaleta v. Poland.

European Court of Human Rights, 20.5.1999, application n. 21980/93, Bladet Tromsø e Stensaas v. Norway.

European Court of Human Rights, 21.9.2017, application n. 51405/12, Axel Springer SE v. RTL Television GmbH/Deutschland.

European Court of Human Rights, 24.5.1988, application n. 10737/84, Müller v. Switzerland.

European Court of Human Rights, 25.3.1985, application n. 8734/79, Barthold v. Germany, § 58, infra, sec. III.

European Court of Human Rights, 26.11.1991, application n. 13166/87, Sunday Times v. United Kingdom.

European Court of Human Rights, 3.5.1988, application n. 11389/85, Morissens v. Belgium.

European Court of Human Rights, fourth section, Bărbulescu v. Romania, 5 September 2017, application n. 61496/08. Retrieved from http://hudoc.echr.coe.int/eng?i=001-177082.

European Court of Human Rights, ruling of 03 April 2007, Copland v. United Kingdom, application n. 62617/00.

European Court of Human Rights, ruling of 12 January 2016, Judgment N. 61496/08.

European Court of Human Rights, ruling of 16 December 1992, Niemietz v. Germany, application n. 13710/88, vol. 251- B of Series A, § 29.

European Court of Human Rights, ruling of 22 February 1994, Burghartz v. Switzerland, application n. 16213/90, vol. 280-B of Series A, § 24.

European Court of Human Rights, ruling of 23 June 2015, Sidabras and Others v. Lithuania, application n. 50421/08 and 56213/08.

European Court of Human Rights, ruling of 23 September 2010, Obst v. Germany, application n. 425/03.

European Court of Human Rights, ruling of 23 September 2010, Schüth v. Germany, application n. 1620/03.

European Court of Human Rights, ruling of 26 March 1985, X and Y v. Netherland, application n. 8978/80.

European Court of Human Rights, ruling of 3 October 1983, G. and E. v. Norway, application n. 9278/81 & 9415/81 (joined).

European Court of Human Rights, ruling of 5 September 2017 - 61496/08, in *Beck-Rechtsprechung* 2017, p. 123332.

European Court of Human Rights, ruling of 9 December 1994, López Ostra v. Spain, application n. 16798/90, vol. 303-C of Series A, p. 55, § 51.

Landesarbeitsgericht Baden-Württemberg 14 March 2019 – 17 Sa 52/18, in *Betriebs-Berater*, 40, pp. 2364-2368, with comment of B. Weller (2019). *LAG Baden-Württemberg: Außerordentliche Kündigung wegen übler Nachrede per Whatsapp*.

Landesarbeitsgericht Berlin-Brandenburg, resolution 02.10.2014 – 10 TaBV 1134/14, in Database Juris.

Landesarbeitsgericht Berlin-Brandenburg, ruling 18 November 2009 - 15 Sa 1588/09, in Database Juris.

Landesarbeitsgericht Berlin-Brandenburg, ruling of 11 April 2014 - 17 Sa 2200/13, in *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report*, 2014, p. 468.

Landesarbeitsgericht Berlin-Brandenburg, ruling of 11 April 2014 - 17 Sa 2200/13, in Database Juris.

Landesarbeitsgericht Berlin-Brandenburg, ruling of 14 January 2016 - 5 Sa 657/15, in *Beck-Rechtsprechung*, 2016, p. 67048.

Landesarbeitsgericht Berlin-Brandenburg, ruling of 16 September 2010 - 2 Sa 509/10, in *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report* 2010, p. 633.

Landesarbeitsgericht Düsseldorf, resolution of 14.11.2005 - 10TaBV46/05. In *Neue Zeitschrift für Arbeits- und Sozialrecht -Rechtsprechungs-Report*, 2006, pp. 81-88.

Landesarbeitsgericht Düsseldorf, ruling of 7 December 2015 - 7 Sa 1078/14, in *Beck-Rechtsprechung* 2016, p. 65271, Rn. 78.

Landesarbeitsgericht Hamm (Westfalen), ruling of 10 October 2012 - 3 Sa 644/12, in Database Juris.

Landesarbeitsgericht Hamm, ruling of 10 October 2012 - 3 Sa 644/12, in *Beck-Rechtsprechung* 2012, p. 74357.

Landesarbeitsgericht Hessen, ruling of 28 January 2013 - 21 Sa 715/12, in Database Juris.

Landesarbeitsgericht Iserlohn, ruling of 09 March 2010 - 5 Ca 2640/09, in Database Juris.

Landesarbeitsgericht Niedersachsen, ruling 31 May 2010 - 12 Sa 875/09, in Database Juris;

Landesarbeitsgericht Rheinland-Pfalz, ruling of 25 November 2014 - 8 Sa 363/14, in Beck-Rechtsprechung, 2015, p. 68577.

Landesarbeitsgericht Schleswig-Holstein, ruling of 08 April 2010 - 4 Sa 474/09, in Database Juris.

Landesarbeitsgericht Schleswig-Holstein, ruling of 29 September 2010 - 3 Sa 233/10, in *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report* 2011, pp. 126-128.

Palomo Sánchez and Others v. Spain of 12 September 2011, in *Global Freedom of Expression*.

Reichsgericht, ruling of 17 December 1901, in *Deutsche Juristen Zeitung*, 1901, p. 118 ff

Repealing Council Framework Decision 2008/977/JHA.

Resolution Court of Perugia 20 February 2006 in *Il Diritto dell'informazione e dell'informatica*, 2007, 1, pp. 200-213, with comment of G.B. Gallus (2007). *Verifiche sull'accesso ad Internet dei dipendenti e controlli difensivi*.

Resolution Court of Trento 10 June 2014, in *Rivista italiana di diritto del lavoro*, 2014, 4(2), pp. 790-798, with comment of E. Dagnino (2014). *La rilevanza delle condotte extralavorative tra giusta causa di licenziamento nel settore autoferrotranviario e insussistenza del fatto contestato*.

Resolution n. 32533/2018 of the Corte Suprema di Cassazione, First Civil Section.

Resolution Regional Administrative Court Milan sec. III 3 March 2016, n. 246, in *Il Lavoro nella giurisprudenza*, 2017, 4, pp. 382-387 with comment of M. Cottone (2017). *"Social Network": limiti alla libertà d'espressione e riflessi sul rapporto di lavoro (il "Like")*.

Supreme Court of Cassation of Venice, ruling of 11 June 1878, in *Giurisprudenza Italiana*, 30, pp. 802-805.

Verwaltungsgericht Ansbach, resolution of 16 January 2012 - AN 14 K 11.02132, in *Beck-Rechtsprechung*, 2012, p. 46753.

Verwaltungsgerichtshof München, resolution of 29 February 2012 − 12 C 12.264, in *Neue Zeitschrift für Arbeits- und Sozialrecht-Rechtsprechungs-Report*, 2012, pp. 302-304.

Volkszählungsurteil BVerfGE 65, 1 of 15. December 1983.

LEGISLATIVE PROVISIONS

Article 2, paragraph 1 of the Basic Law for the Federal Republic of Germany, Act n. 3 of 23 May 1949, Bundesgesetzblatt, n. 1, 23 May 1949.

Bundesdatenschutzgesetz in der Fassung des Regierungsentwurfs des Gesetzes zur Regelung des Beschäftigtendatenschutzes vom 15.12.2010, BT-Drucks. 17/4230, article 1, paragraph 7, number 6, p. 6.

Das Bundesgesetz über die obligatorische Arbeitslosenversicherung und die Insolvenzentschädigung (Arbeitslosenversicherungsgesetz, AVIG) vom 25. Juni 1982.

Das Reichs-haftpflichtgesetz vom 7. Juni 1871.

Directive (EU) 680/2016 on the on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281 23/11/1995, pp. 31-50.

European Parliament Resolution on the First Report on the Implementation of the Data Protection Directive 95/46/EC, COM(2003) 265 – C5-0375/2003 – 2003/2153(INI), in GUCE, C 102E of 28.4.2004, number 33.

Grundgesetz für die Bundesrepublik Deutschland, Act n. 3 of 23 May 1949, Bundesgesetzblatt, n. 1, 23 May 1949.

Commission of the European Communities, COM(97) 390 final on "The social and labour market dimension of the information society. People First - The Next Steps", Brussels, 23.07.1997. Number 29.

Commissione Europea (10 gennaio 2017). Comunicazione della Commissione al Parlamento Europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni, Costruire un'economia dei dati europea. Retrieved in COM(2017)9/F1 - IT (europa.eu).

Communication Research, 2(4), pp. 338-346.

Consideration n. 9 of Regulation (EU) 2016/679.

Il Garante per la protezione dei dati personali, deliberazione 1° marzo 2007, Linee guida del Garante per posta elettronica e internet. Retrieved in https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/1387522.

Il Garante per la protezione dei dati personali*, Lavoro: le linee guida del Garante per posta elettronica e internet*, in Gazzetta Ufficiale n. 58 of 10 March 2007.

Il Garante per la protezione dei dati personali, *Sistemi di localizzazione dei veicoli nell´ambito del rapporto di lavoro*, in Registro dei provvedimenti n. 370 del 4 ottobre 2011.

Il Garante per la protezione dei dati personali, *Vietato il trattamento di dati personali del dipendente ricavati da file e documenti acquisiti nell'ambito di operazioni di backup effettuate sul server aziendale*, Registro di provvedimenti n. 139 del 7 aprile 2011.

ILO (1997). Code of Practice on Protection of Workers' personal data, Geneva: International Labour Office.

Lavoro: Le Linee Guida del Garante per Posta Elettronica e Internet (resolution n. 13 of 1 March 2007 Guarantor Authority for the protection of personal data), in Official Journal n. 58 of 10 March 2007.

OECD (2013), The OECD privacy framework, p. 39. Retrieved from http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.

Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM/2012/011 final - 2012/0011 (COD).

Recommendation CM / Rec (2015) 5 of the Committee of Ministers to member States on the processing of personal data in the context of employment. Retrieved from https://wcd.coe.int/ViewDoc.jsp?id=2306625&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

Bundesdatenschutzgesetz of 27.1.1977, in Bundesgesetzblatt, part I, n. 7 of 1.2.1977, as amended by Act of 30.06.2017, in Bundesgesetzblatt, part I, n. 44 of 05.07.2017.

Bundesdatenschutzgesetz of 27.1.1977, in Bundesgesetzblatt, part I, n. 7 of 1.2.1977, as amended by Act of 20.12.1990, in Bundesgesetzblatt, part I, n. 73 of 29.12.1990.

Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data Adopted (01248/07/EN WP 136) (adopted on June 20, 2007). Retrieved from https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf.

OECD (2008, June 18), The Seoul Declaration for the Future of the Internet Economy, OECD Digital Economy Papers, n. 147, Paris, OECD Publishing, p. 10. Retrieved from https://www.oecd-ilibrary.org/docserver/230445718605.pdf?expires=1596631942&id=id&accname=guest&checksum=DAB6DA714B9F64DD7EE359217784A2B2.

Bundesministerium für Ernährung und Landwirtschaft (2009, August 20). *Umfrage zu Haltung und Ausmaß der Internetnutzung von Unternehmen zur Vorauswahl bei Personalentscheidungen*, pp. 1, 5. Retrieved from https://www.bmel.de/SharedDocs/Downloads/Verbraucherschutz/InternetnutzungVorauswahlPersonalentscheidungen.html;nn=310768.

The Italian Ministry of Justice, circular of 20 February 2015 on the use of social networks in the prison administration. Retrieved from https://www.giustizia.it/giustizia/it/mg_1_8_1.wp?contentId=SDC1122254.

Ispettorato nazionale del lavoro, circolare 7 November 2016, n. 2 («Indicazioni operative sull'utilizzazione di impianti GPS in accordance with article 4, section 1 and 2, law n. 300/1970»).

Article 29 Data Protection Working Party, Opinion 2/2017 on data processing at work (17/EN WP 249) (adopted on June 8, 2017). Retrieved from https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=610169.