Global Workplace Law & Policy

Digital Transition: An Opportunity to Advance Labour Rights

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With the digital transition, the precise definition of the future of work (its social and human dimensions) requires urgent attention. Recent policymaking developments tell us a little more about whether the institutions of the European Union are ready to engage in this crucial endeavour.

A MULTIDIMENSIONAL APPROACH

On 9 December 2021, the European Commission presented a proposal for a legislative initiative on the working conditions of platform workers. On the same day, it also proposed a series of Guidelines that would allow a redefinition of the scope of the application of EU competition law so as to enable collective bargaining among self-employed workers. In the meantime, the AI Act has also been working its way through the legislative pipeline.

These initiatives have arrived following years of intense discussion between experts and policymakers on the disruptive impact that digital platforms and AI are having on the world of work, in terms both of working conditions and the transformation of the labour market.

Now, with these proposals, it is conceivable that the digital transition may also turn out to provide an opportunity to launch a broader constructive reflection on how to ensure the future resilience of labour rights. And, just as significantly, the Commission seems to have realised the importance of approaching this reflection with a multidimensional perspective. The direction being taken is certainly promising. But how far do the winds of change blow?

PLATFORM WORK

The first dimension through which the Commission is approaching digitalisation is the regulation of the platform economy. The draft directive intervenes in the rich debate over the correct classification of platform workers as 'employees' or 'self-employed' and is intended to bring clarity to this issue. The proposed legislation introduces, in the presence of specific criteria, a presumption of employment status that would help to correct the elusive strategies of platforms concerning the application of national employment and social protection systems.

This initiative would undoubtedly grant more dignity to platform workers and, at the same time, make platforms accountable as regards their social responsibility.

However, it could have gone even further. The directive risks covering only those platforms that *organise* the work performed by individuals (Article 2), thus potentially excluding some crowdworkers. In addition, more must be done to decouple workers' access to labour rights from the 'subordination vs autonomy' dichotomy.

It might be the time to recognise that the future of workers' rights lies in the abandonment of this dualism in favour of a more universalist approach. This could be done, for instance, by expanding the recognition of labour rights to all cases of algorithmic management. The proposal already establishes that, in the presence of automated decision-making, a series of rights should be conferred on all platform workers regardless of their status (a right to transparency on the system deployed; a right of information and consultation for worker representatives; a right to oversight of automated mechanisms by humans; measures to prevent health and safety risks; and data protection rights). Nevertheless a paradigm shift has not yet been reached since employment and social protection rights remain linked to the existence of an employment relationship.

REGULATING ARTIFICIAL INTELLIGENCE

This brings us to the Commission's approach to AI and automated decision-making: the second dimension through which the EU is addressing digital transition in the world of work. The Commission seems to have realised the potentially damaging effect of AI applications on workers' rights. According to the proposed AI Act, AI systems used in a work-related context are considered 'high risk' and therefore must be subject to a specific ex-ante conformity assessment. And, as

mentioned, the draft directive on platform workers reinforces those safeguards by attributing a series of rights in the case of algorithmic management.

Yet, both the proposed AI Act and the draft directive do not provide sufficiently strong guarantees. In the one case (the AI Act), the norms are not sufficiently stringent since they rely mostly on self-assessment procedures; and, in the other (the proposed directive), the scope of application is still too narrow since it only concerns platform workers.

It is thus necessary to open an institutional debate so as to address in a more comprehensive manner the risks that AI applications pose for all workers and to do so in a way that better integrates labour rights with data protection law, with existing non-discrimination instruments and with ad hoc and stronger rules on product liability and product standardisation in mind.

MONOPSONIST COMPANIES

The Commission has also demonstrated its awareness of the need to intervene in a third dimension, namely the emergence of companies with extraordinarily strong corporate power.

The digital transition enables labour market monopsonies, created when there are few (or just one) companies 'buying labour'. These monopsonist employers, of which Amazon is a prime example, are therefore in a position to push labour costs down and cause a general deterioration in working conditions across entire industries and sectors of production.

By recognising the right of self-employed persons to bargain their working conditions collectively, the Commission is taking a positive step to limit the excessive negotiating power of these 'supercompanies'.

The scope of the Guidelines is quite wide, since it covers all solo self-employed persons who:

1. Are in a 'situation comparable to workers', meaning those who earn at least 50 per cent of their total annual work-related income from a single entity, those working 'side-by-side' with workers and those working through digital labour platforms.
2. Are in a 'weak bargaining position vis-à-vis their counterparts and [who] therefore may be unable to significantly influence their working conditions'. This covers those providing services for contractors of a certain economic strength that represent a whole sector or industry, or have an annual aggregate turnover above €2 million or a staff of more than 10 workers (individually or jointly). It also covers all solo self-employed workers entitled to bargain collectively pursuant to national or EU legislation.

Still, the scope of this initiative could be significantly broader. It is also noteworthy that the solo self-employed described under b), above, are merely considered as falling outside the enforcement priorities of the Commission, while also as remaining firmly within the scope of Article 101 TFEU (unlike self-employed that are in a 'situation comparable to workers', who are designated as outside its scope). The draft Guidelines thus appear to indulge in a classic, and undesirable, fallacy of (half-hearted) regulation, whereby a broader personal scope tends to correlate to a diminishing return in terms of the substantive rights and protections afforded. Hardly a paradigm shift and a move towards universalism, as also noted by ETUC.

Moreover, recital 16 of the Guidelines is quite problematic, as the Commission de facto considers that the exercise of the right to strike by self-employed persons 'may raise competition concerns' and, therefore, should be subject to a proportionality test. A step reminiscent of the Monti II regulation, which is difficult to reconcile with ILO Convention 87.

POLITICAL WILL

The digital transition has accelerated the crisis of labour law but, at the same time, it does provide the opportunity to open a debate about redirecting, or even advancing, labour rights.

EU rule-makers have approached a crossroads. The Commission's proposals have the very important merit of creating momentum, preceding the initiatives of many national legislators. At the same time, these initiatives could take workers' rights even more into consideration.

The policymaking process has just started: the directive on platform workers will have to be discussed, amended and only then eventually adopted, following discussion in the European Parliament and by national governments within the Council, while the competition law Guidelines are at a consultative stage. The direction that will be taken will reveal the actual political will of the EU institutions and whether this is strong enough to prevent labour rights from being (once again) sacrificed on the altar of market forces and powerful corporate actors.

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