

Global Workplace Law & Policy

Collective protection instruments for persons performing platform work: European Parliament raises the stakes.

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1) Introduction

On December 12, 2022, at first reading, the European Parliament adopted 186 amendments to the Proposal for a directive on improving working conditions in platform work presented by the European Commission on December 9, 2021[1]. The proposed directive is part of a package of measures promoted at European level in order to guarantee better working conditions for people who work through digital platforms[2].

The choice of the European lawmaker to regulate platform work is based on the need to set a floor of protections for those workers who use a digital infrastructure to perform their work activities through the adoption of a series of measures aimed, first and foremost, at ensuring the fair classification of the work relationship and improving transparency. Indeed, the functioning of such digital platforms is basically governed by automated management, control, and decision-making systems (algorithmic management) characterised by opacity[3]. This feature prevents anyone other

than the digital platform from knowing how and what information it collects and uses to make unilateral decisions that affect workers' working conditions. Well-known examples are the cases of riders where there is no correspondence between their contractual classification and the factual way the activity is managed and performed[4]. Despite offline workers being at the center of court litigations, media and academic attention, the scope of the proposed directive also extends to crowdworkers, *i.e.*, those who perform their services entirely online by means of a digital labour platform.

The amended draft directive shows a greater emphasis on the role accorded to the collective dimension of employment, both in the forms of collective bargaining and in the forms of involvement of workers and their representatives. Such an approach is consistent with the broader European regulatory framework[5], as well as with the positions expressed by the social partners in the consultation phase[6]. Accordingly, in the new Recital 18 b[7], collective bargaining and social dialogue are defined as two essential elements to achieve the goals of protection set out in the proposed directive.

It is an important step considering the imbalanced bargaining power in favour of the digital platform and the information asymmetry inherent in this form of work. In the following paragraphs, after outlining the main changes introduced by the amendments with respect to these instruments, some thoughts will be advanced regarding their potential.

2) Involvement of persons performing platform work and their representatives

If one considers the provisions of Directive 2001/86/EC[8] (employee involvement in companies), then for the purposes of the present reflection, the definition of involvement of employees is: “*any mechanism, including information, consultation and participation, through which employee representatives can exercise influence on decisions to be taken within the company*“[9]. In the proposed directive at issue, there are various ways in which workers can be involved, not only by means of their representatives, but also directly. Moreover, they may influence automated monitoring and decision-making systems *ex ante* or intervene *ex post*. Specifically, Articles 6, 7, 8, and 9 describe and regulate these forms of involvement. Among these, by express provision of Article 10, the first three find application with respect to “*persons performing platform work*“, while the rest applies only to workers who are classified as employees.

The amendment proposed to Article 6 could be considered significant, for this purpose, basically for reproducing the information and consultation procedure that are part of the data protection impact assessment already provided for in [Articles 35 and 36 of the GDPR](#).

The change to Article 7 can be considered even more relevant. In this case, the oversight and the execution of the periodic impact assessment of decisions made by automated systems that have an impact on working conditions, health and safety, and fundamental rights from a matter to be managed solely by the digital platform becomes a duty shared with employee representatives. Furthermore, although this form of involvement should be made *ex post*, it can be appreciated that its scope is not insignificant in terms of the possible effects it may have on the operation of the digital platform. In other words, it is able to impact the choices of the digital platform.

Article 8 (2) also establishes a right of *ex post* intervention by employee representatives on decisions made by automated systems regarding account access, contractual status, and terms and conditions of the relationship in order to obtain their review.

Article 9, substantially the same as the Commission's proposed version, regulates the right to information and consultation. The European Parliament's amendments intervened by identifying the matters covered by this right, namely "*on decisions likely to lead to the introduction of or substantial changes affecting working conditions and health and safety*". Conversely, the lawmaker leaves its scope of application unchanged, which covers only employees.

3) Collective bargaining

Collective bargaining is presented in the proposal as one of the regulatory instruments through which should be recognized "*a number of minimum rights, the correct determination of their contractual status as well as fair and just working conditions*" to employees and "*where applicable*" also to self-employed workers[10].

This provision is also stressed in Recital 23[11], where it is introduced as a key tool for ensuring better working conditions for genuinely self-employed workers on digital platforms as well. In this regard, the European Parliament identifies the Commission's Communication containing the [Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons](#) as a clear example of how this can be achieved.

In the newly introduced Article 10a, collective bargaining is expressly given the possibility of intervening also in automated monitoring and decision-making systems in order to carry out this essential function. It could be assumed that collective bargaining is one of the places where such automated systems and their functioning could be defined, entitling the parties to that negotiation of the algorithm which has already been proposed in the literature[12].

4) Brief concluding remarks

These brief remarks allow one to appreciate the efforts of the European Parliament to fill some of the legislative gaps in collective protection. At least on the theoretical level, these gaps, highlighted also by scholars[13], are filled also thanks to a greater synchronisation with the European regulations in force and referred to in the text of the proposed directive itself.

On a practical level, it will be interesting to observe, regarding collective bargaining, the impact of the enforcement mechanisms envisaged, particularly Articles 17(1a) and 15 [14], on the promotion of associationism and collective bargaining. Indeed, mainly due to the absence of time-space conditions for developing a concept of a collective and synthesising the interests of the workers themselves, it has been shown to have an impact on the unionisation of workers and the conclusion of collective agreements. In addition, under these conditions there is a risk, also taken into account by the European Parliament[15], that 'yellow unions' may be created.

Nevertheless, concerning the involvement of workers some critical points may emerge with reference to the scope of Article 9. As mentioned above, this finds limited application with respect to employees. However, the different *ratio* behind Article 9 on the one hand, and Articles 7 and 8 on the other could be discussed. Indeed, the former prevents genuinely self-employed persons and the associations representing them from intervening *ex ante*, while the second ones allow them to intervene on the same matters *ex post*, even with more incisive functions affecting the decisions made by the digital platform.

As well as it could be evaluated as partially conflicting with the provision according to which collective bargaining, potentially extending to all workers, could be a tool for defining the features

of automated decision-making systems. This would occur where collective bargaining is considered not as an alternative tool to worker involvement, but as a form of such involvement.

The Directive on adequate minimum wages adopted in October 2022[16] also points in the direction of strengthening the role of collective bargaining and worker involvement. If one goes beyond the reference to the scope of the minimum wage, the implementation of this directive could lay the basis for ensuring collective bargaining in Member States, especially in those where the percentage of collective bargaining coverage is under a certain threshold. This goal is pursued by increasing the involvement of the social partners, as well as by fostering access to adequate information on wage determination.

At the same time, the directive identifies a form of involvement of the social partners at levels other than those provided for in the draft directive analyzed in this article.

Indeed, in addition to promoting the participation of the social partners in the negotiation of sectoral or inter-sectoral collective agreements, it introduces forms of consultation of the social partners at the State level which are functional for the establishment of action plans aimed at increasing the percentage of collective bargaining coverage.

Likewise, it provides for the social partners to join consultative bodies which advise the competent authorities on wage issues.

If the proposed directive on platform work were to be implemented as amended by the European Parliament, the minimum wage directive would provide a basis for the setting up of a more comprehensive framework on the points under consideration. Indeed, the latter also applies to platform workers, where they are employed or in a false self-employed status. Moreover, it would strengthen the effectiveness of collective bargaining because of its enforcement provisions. However, as expressly laid down, the scope of the directive does not include genuinely self-employed workers, leading to the consolidation of a different regime of worker involvement depending on their employment status.

The analysis carried out would lead one to conclude the remarks with a question. Could the proposed directive, as amended, be a missed opportunity for the regulation of different models of preventive worker involvement in digitised work contexts and, therefore, subject to rapid changes that can significantly affect working conditions, health and safety, and workers' fundamental rights? After all, Article 7 would seem to open the door to the possibility of interference in company choices.

References

[1] https://eur-lex.europa.eu/procedure/EN/2021_414.

[2] Commission Communication on Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:761:FIN>; Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_COM%3AC%282021%298838.

[3] Pasquale F., *The Black Box Society: The Secret Algorithms That Control Money and Information*, Harvard University Press, 2015.

[4] For example, in Italy, *see* Cass. 24/01/2020, no. 1663. For Uber cases around Europe, *see*, among others Mangan D., *Delivering on the Binary Divide*, in *ELLJ*, 2021, 12, 2.

[5] Among others, European Pillar of Social Rights (https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en), but also the recent European Social Partners Framework Agreement on Digitalization (<https://www.etuc.org/en/document/eu-social-partners-agreement-digitalisation>).

[6] *See* “Choice of the instrument” section at [https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2021/0762/COM_COM\(2021\)0762_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2021/0762/COM_COM(2021)0762_EN.pdf)

[7] https://www.europarl.europa.eu/doceo/document/A-9-2022-0301_EN.html

[8] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0086>

[9] Art. 2, lett. h)(https://www.europarl.europa.eu/doceo/document/A-9-2022-0301_EN.html

[10] Recital 13(https://www.europarl.europa.eu/doceo/document/A-9-2022-0301_EN.html

[11] https://www.europarl.europa.eu/doceo/document/A-9-2022-0301_EN.html

[12] De Stefano V., Taes S., *Algorithmic management and collective bargaining*, in *Transfer*, 2022, <https://journals.sagepub.com/doi/10.1177/10242589221141055>.

[13] Recchia G. A., *Alone in the crowd? La rappresentanza e l'azione collettiva ai tempi della sharing economy*, in Alessi C., Barbera M., Guaglianone L. (a cura di), *Impresa, lavoro e non lavoro nell'economia digitale*, Cacucci, Bari, 2019.

[14] (https://www.europarl.europa.eu/doceo/document/A-9-2022-0301_EN.html)

[15] Recital 18 a https://www.europarl.europa.eu/doceo/document/A-9-2022-0301_EN.html

[16] Directive EU 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022L2041>)

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