

Global Workplace Law & Policy

The Proposed Directive on Regulating Platform Work: Can it become a double-edged sword for effective collective representation and voice of platform workers?

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Representation and Voice of Platform Workers as an Instrumental Tool for Improvement of their working conditions

“Ways to improve labour conditions of platform workers” are at the top of the EU’s policy agenda. At the end of 2021, the Commission presented a proposal for a Directive on improving working conditions in platform work (COM(2021)762). Moreover, guidelines clarifying the (non-)application of EU competition law to “collective agreements between solo self-employed persons and digital labour platforms” (2022/C(374/02), recital 31) were published.

The current state of research in the field highlights the relevance of effective collective representation and voice, which is regarded as essential for mitigating risks faced by platform workers and improving the terms and conditions governing their work. The literature also identifies the need for further investigation of this matter from a collective and multidisciplinary perspective, going beyond the issue of misclassification. (see e.g. Aloisi, Kilhoffer et al, Prassl). Notably,

Adams-Prassl highlights the importance of collective bargaining, pointing out the need to think about specific standards to address unequal bargaining power in the world of flexible work. The author deems collective action as perhaps the most salient development required to rebalance the scales, suggesting that effective collective representation of worker interests should be at the forefront of policymakers' concerns.²

Even though the importance of effective collective representation and voice has been highlighted by the literature, the proposed directive to regulate this phenomenon has also been criticised for not including provisions aimed at strengthening collective rights. Despite the criticism, some provisions in the proposed directive in fact do aim to address the issue of platform workers' voice. Adams-Prassl and Kelly-Lyth mention some of them; e.g. the proposal envisages a significantly improved role for consultation and bargaining at the collective level. There are also provisions directly addressing collective action: i.e., Art 9 reaffirms collective consultation rights which are present in existing EU law; and Art 15 requires the creation of unmonitored, in-platform communication channels for labour organising. On the same day the proposed Directive was published, the Commission also released the draft '[Guidelines on collective bargaining rights for self-employed workers](#)', for whom competition law is a barrier to collective action. In the words of Adams-Prassl and Kelly-Lyth "*the Directive is alive to the importance of promoting the role of worker representatives in the gig economy context.*"

In addition to these provisions, article 14 may also be deemed to address issues of effective representation and voice. Said provision is contained under Chapter V of "*Remedies and Enforcement*" which enables representatives of persons performing platform work⁴ or other legal entities which have a legitimate interest in defending their rights to engage in any judicial or administrative procedure, to enforce any of the rights or obligations contained in the proposal. Although the provision under review hints in particular at representation in classification procedures, the wording is not strictly limited to these kinds of procedures. Therefore, if adopted, the scope of this article could entail the possibility of these workers being represented in scenarios such as litigation and administrative procedures by other representatives apart from trade unions. *Prima facie*, the adoption of this article seems to have the potential to strengthen the collective representation and voice of platform workers by allowing them to be represented by a broader range of actors in the defence of their rights.

A Spurt in Collective Organisation-Building

When analysing the development of collective representation and voice of platform workers, the literature highlights that new forms of organisation – distinct from traditional trade unions – have emerged. Basualdo et al point out that, while defensive struggles are primarily being fought by trade unions, an increasing variety of collective associations and forms of worker representation can be observed in the digital economy. Bottom-up initiatives and alliances between grassroots networks and established trade unions are playing an important role in advancing workers' power and rights. As Vandaele explains, the platform economy has ignited what he considers a (modest) spurt in collective organisation-building. The author mentions amongst them grassroots, groups of activists, mainstream unions, cooperative models (including union-led cooperatives) and types of mutual aid such as bread funds and labour market intermediaries, which together he terms "organisational creativity". These kinds of organisational experimentation hint at the possible coexistence of several models of unionism and new forms of collective representation. This requires, as held by Atzeni, widening the research lens beyond mainstream unions.

Double-edged sword

The upsurge of new forms of organisational creativity has raised the question of whether there is a need to guarantee that all forms of association of platform workers can access the institutional tools to represent this workforce in judicial and administrative procedures. This may have been the teleology behind the inclusion of article 14 in the proposed directive. However, when asking a representative from the Dutch trade union *FNV* about her view on the adoption of a provision such as an article 14 of the proposed directive, she offered another perspective:

“This is one of the aspects that platforms such as Uber and Deliveroo are lobbying very strongly in favour of. Currently, in the Netherlands, only unions can represent workers in judicial and administrative procedures. But this provision can be dangerous. From the outside, it looks like a significant change, and it appears to be positive for the workers, but it has the potential to bear negative effects, as it might be used to the advantage of platforms to exclude unions from the process and in some cases even represent workers through these company endorsed organisations.”⁵

There have been some cases at Member State level where the legitimate interests of some of the non-traditional organisational structures that represent platform workers have been questioned. In Italy, a series of collective associations have emerged and are suspected of being yellow unions, and as a matter of fact, have even been declared as such by the domestic courts. These are the unions ‘Unione Shoppers Italia’ (a newly founded association representing shoppers) and ‘UGL-rider’; the latter absorbed the former ‘Associazione nazionale autonoma dei riders’, which is an independent association whose demands were so close to the interests of the platform that it was the only trade union invited to negotiate the collective agreement.⁶

In turn, in 2022 the French government decided to launch negotiations on the rights of platform workers, and considering that self-employed workers, drivers and couriers did not have any union representing them, elections for the representatives were held. This opened the doors to newcomers supporting self-employment alongside traditional unions. Not only were these elections deemed unsuccessful by some due to the low turnout of drivers but they also raised questions about the legitimacy of the representation in the upcoming negotiations.⁷ Some even claim it raised eyebrows in the European Commission, who has ever since been scrutinising the new organisations that have emerged on the French union scene due to fears the gig economy brings about so-called ‘yellow unions’.⁸

Lastly, in Spain, after the Riders Law was enacted, a series of protests emerged from a group of platform workers, which has been termed the Spanish “Sí Soy Autónomo” -Yes I Am Self-Employed- movement. The Spanish trade Union UGT presented a [report](#) that followed the creation of these organisations which deemed that these were company-endorsed organisations acting in the platform’s interests. This movement was later the object of [sociological research](#) which explored the arguments behind it. The findings suggest that couriers cherish the self-employed status not stemming from an unshakable belief in their *de facto* freedom or autonomy, but rather due to an objection to what the broader labour market continues to offer: temporary contracts, low wages and a lack of flexibility. In a very similar way to the Spanish case, labour unrest also developed against proposals to regulate platform work in [Portugal](#), [Colombia](#) and [Chile](#). This unrest, in itself, is a form of protest against the *status quo* in the terms on offer in the labour market.

Tensions arise with the changing role of conventional and unconventional representation structures in the world of work

Article 14 may precipitate tension between widening the scope of (platform) worker representatives beyond traditional collective actors (i.e. mainstream trade unions) encompassed in the letter of the Commission's proposal, and maintaining trade unions as the main (or sole) representatives of workers in judicial and administrative procedures, as has been the tendency until now.

The inclusion of article 14 in the draft directive raises questions such as, who could represent platform workers in judicial and administrative procedures? What are the rights included under the wording "to enforce any of the rights or obligations under this proposal"? Could this, for instance, together with the guidelines show an expression of intent from the EU's executive power to steer national policy in the direction of legitimising other legal entities apart from traditional trade unions to take part also in other processes such as collective bargaining? This could be construed from a contextual interpretation of the proposal together with the [guidelines](#), namely item 14 which states: "(...) *these Guidelines apply to all forms of collective negotiations conducted in accordance with national law and practice, ranging from bargaining through social partners or other associations to direct negotiations by a group of solo self-employed persons or their representatives with their counterparty/-ies or associations of those counterparties.*" Can a provision such as this create the risk of excluding (established) unions from processes of representation of platform workers?

The aforementioned interpretation issues ignite some fears that the proposed directive might backfire the exclusive rights of trade unions as workers' representatives, possibly endangering the adequate representation of this workforce as the legitimacy and/or independence of some of these associations is questioned. As it is currently not clear whether the proposed article 14 can be interpreted in the manner suggested by the representative of *FNV*, a critical analysis is necessary of the possible effects of such kind of 'open' provisions on effective procedural collective representation and voice within national systems. And thus, close attention must be given to the development of these provisions and of the proposal from a collective perspective.

To a certain degree, it could be pondered that said fears are shared by the European Parliament and the Council of the European Union. The former, as set out in the [report](#) presented by rapporteur Elisabetta Gualmini, proposed some important amendments seeking to ensure that the exclusive prerogatives of trade unions are preserved. To highlight some of these see e.g. amendments 25, 170, 171, 172, 173. For instance, amendment 25 explicitly includes that "*the exclusive prerogatives of trade unions should be preserved*", and amendments 170, 171, 172 and 173 stress that paragraphs 1 and 2 of Article 14 shall apply without prejudice to the competences of trade unions as set up in national law or practice.

Likewise, the latter refers to the most recent [amendments](#) to the proposal for a Directive presented by the European Parliament and the Council, which introduced modifications in the same vein, such as those made to Article 1 paragraph 4th and Article 14. For instance, Article 1 paragraph 4th expressly states that "*with respect to representatives of persons performing platform work other than those representing platform workers, this Directive shall apply only to the extent that a representation of persons performing platform work is provided for by national law and practices.*" In turn, article 14 modified the expression "*or other legal entities(...)*" included in the initial proposal presented by the Commission, to the expression "*and legal entities(...)*".

This modification could be relevant from a literal or grammatical interpretation, as the use of the word “*other*” according to its [literal definition](#), is an adjective that denotes people or things that are additional or different to people or things that have been mentioned or are known about. In this case, that would imply an organisation or legal person different from that encompassed within the expression “*representatives of persons performing platform work*” included in article 14. Thus, opening up the possibility for other legal entities who generally have not been entitled to represent platform workers to enforce their rights, as long as they meet the criteria laid down in national law or practice. The inclusion of the expression “*other legal entities*” could point to the Commission’s intention to expand the notion of who can exert the function of representing this workforce in judicial or administrative procedures, which in traditional work relationships has been closely associated with trade unions.

In sum, the Parliament and the Council seem to adopt a conservative approach *vis-à-vis* the Commission, with regard to the expansion of the *locus standi* of unconventional representation structures, opting for a more contained and moderate role for other organisations and representatives who differ from traditional social partners. Thus, the current legislative process allows us to perceive the changing role of conventional and unconventional representation structures in the world of work and the tensions that arise with it for existing legal frameworks and systems.

References

1 Jeremias Prassl, *Humans as a Service*, vol 1 (Oxford University Press 2018) 108.

2 Prassl (n 5) 108.

3 See e.g. -Jelena Starcevic, ‘DISPATCH NO. 40 – EUROPEAN UNION’ 7, 7.; Antonio Aloisi and Valerio De Stefano, ‘European Commission Takes the Lead in Regulating Platform Work’ (*Social Europe*, 9 December 2021). However, such exclusion is likely ascribable to the lack of competence of the EU regarding the right of association and the right to strike (Art. (153 (5) TFEU) and the parallel introduction of the (non-binding) guidelines clarifying the application of competition law to collective agreements, which are complementary to the proposed directive and aim to create a legal framework for the negotiation of self-employed workers in general. New developments also include the Directive on minimum adequate wages that aims for 80 % of collective agreements coverage in each Member State and the draft recommendation adopted by the EU Commission to further strengthen and promote social dialogue ([press release 25 January 2023](#)).

4 According to article 2 of the proposed directive presented by the Commission, “persons performing platform work” are understood to be any individual performing platform work, irrespective of the contractual designation of the relationship between that individual and the digital labour platform by the parties involved. Therefore in accordance with the Directive the term “platform workers” refers to those who are under an employment contract, and the term “persons performing platform work” refers to a broader group which also includes those who are currently classified as self-employed”.

5 Interview with FNV representatives, 18 of October 2022.

6 Mariagrazia Lamannis, 'Collective Bargaining in the Platform Economy A Mapping Exercise of Existing Initiatives' 20-21.

7 ETUC, 'France: Country Report 2022' 'French Digital Platform Workers Vote for Representatives for First Time' Platform Reps (16 May 2023)

8 Francine Aizicovici, 'French Digital Platform Workers Vote for Representatives for First Time' *Le Monde* (8 May 2022) ; Peggy Corlin, 'How France Subverts Collective Bargaining to Favour Big Tech Platforms' *EUobserver* (9 March 2023) .

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