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EU acts on platform work: what protection for the self-employed?

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1. **The need for protections beyond the contractual status**

The proposal for a directive "on improving working conditions in platform work"[1] is part of a broad reformist design, aimed at balancing the needs for competitiveness in the digital economy with the protection of fundamental rights. There are many interconnected legislative tracks, including the marketing and use of Artificial Intelligence systems (EU AI Act). In short, these legislative acts attempt to steer digitisation towards the paradigm of sustainability, security, inclusiveness and anthropocentrism, reinforcing the emancipation of European social law from competitive law.

Against this backdrop, regulation of new, highly digitised organisational models of work is grafted on. In particular, it is well known that algorithmic management can contribute to company

decision-making processes, often replacing human decisions, generating a series of risks for working conditions, regardless of the type of contract employed. In fact, in platform work, these problems are common to the whole category, even if internally articulated (e.g. *crowdworkers*, "*offline*"/"*location-based*" *workers*), due to the imbalances of power between the contractual parties: on the side of subordinate work, employer prerogatives are expanded, on the side of autonomous work, organisational autonomy is compressed. This factual reality supports the introduction and strengthening of material protections for all platform workers.

2. The structure of the proposed directive

Notoriously, the algorithmic management of work through platforms generates two macro-consequences, which are interrelated: contractual misclassification and the impoverishment of working conditions. The draft directive intervenes precisely on these two fronts. Chapter II introduces a relative presumption of subordination to facilitate the contractual re-classification of the so-called "false self-employed". Chapter III provides for a series of protections against the risks generated by algorithmic management, graduated according to whether one is an employee ("platform worker") or self-employed ("person performing platform work"). These material protections have an autonomous value, but they are also functional to the presumption of subordination because they facilitate the emergence of abusive control practices and the activation of *enforcement* mechanisms for contractual reclassification. The same applies to Chapter IV on the transparency of information acquired by public authorities, while Chapter V introduces a series of remedial measures, both individual and collective.

During the legislative process, the European Parliament and the Council of EU proposed a number of amendments. Finally, after several unsuccessful attempts, a provisional agreement was reached on 8 March 2024. The directive was finally approved on the following 24 April.

3. The relative presumption of subordination… beyond subordination

The instrument of rebuttable presumption supports the favour that has emerged in infra-European jurisprudence to the recognition of subordination in platform work. In the original proposal, this presumption was anchored to five presumptive indices demonstrating, at the occurrence of at least two out of five, the subordinate nature of the employment relationship. However, the qualifying outcome is not a foregone conclusion because it is in any case conditioned by the interpreter's assessment. In a nutshell, the indices are very general and national courts may continue to apply the jurisprudential criteria of subordination of their own legal system. Moreover, national legal and jurisprudential definitions are still to be respected. Thus, the inhomogeneity of reclassification outcomes in the different Member States is not resolved.

In addition, some of the presumptive indices go beyond subordination because they take into account organisational aspects of the work performance, which in many jurisdictions are also referable to self-employment. For example, in Italy some indices are compatible with the notion of "hetero-organisation" pertaining to the area of self-employment. The reference is mainly to the verification of the quality of results (c) or to the limitation of the freedom to organise working time or to cede work to third parties (d). Even the limitations placed on building one's own clientele or performing work for third parties (e) recall situations of economic dependence of the worker that

go beyond even the criteria of hetero-organisation. However, it must be remembered that this interpretative solution contrasts with the Italian legislator's choice to qualify hetero-organised workers as autonomous.

Certainly, the original relative presumption of subordination reduces the scope for the use of (genuine) self-employment. Indeed, it would be difficult for platforms to refute such "over-inclusive" indices. Admittedly, the proposal adopts a strong legislative choice in contrast to the EU Court of Justice's view that the legal presumption of subordination is an obstacle to the exercise of the freedom to provide services in the Single Market and to the growth of self-employment (*Commission of the European Communities v French Republic*, Case C-255/04, 2006).

4. **The amendments between confirmations and backtracking**

The European Parliament has proposed a number of more flexible amendments to remedy these shortcomings. For instance, in favour of genuine self-employment, Article 5a stipulates that the platform, also in agreement with the worker, may grant additional benefits (such as those of a social security or training nature) without incurring the risk of contractual re-classification. Furthermore, the presumptive indices have been downgraded in recital 25, serving as interpretative guidance for Member States. On the one hand, it can be argued that the removal of the indices from the articles facilitates the adaptability of the presumption in national law. However, without codified parameters, the presumptive instrument risks becoming even more ineffective. In other words, enforcement is totally left to the regulatory discretion of Member States and the interpretative discretion of national courts.

Some changes were made with the final version of the European Parliament resolution of December 2022. Firstly, the resolution introduces a more pronounced reference to domestic law. Recital 25 states that the employment relationship as defined by the applicable law, collective agreements, or practice in the Member State in question is relevant. Moreover, the indices of subordination were again introduced in Article 4(2), but the presumption is triggered in the presence of a majority of the indices. Then, other indices were codified to overcome the presumption (Article 5, para. 3-ter) in order to avoid it becoming irrefutable.

Finally, the provisional agreement definitively eliminates the indices of subordination by referring to employment relationships in accordance with national law, collective agreements, or practice in the Member States, taking into account the case law of the Court of Justice. The only reference is to the "traditional" indices of subordination, i.e. facts indicating a power of control or direction (Article 5(1)). Thus, it was decided not to intervene directly in national labour laws. Thus, the effectiveness of the presumption is left to the implementing choices of each Member State.

5. **The protections between universalism and selectivity**

The most innovative measures of the proposal are contained in Chapter III (6-10). Indeed, certain protections for platform workers are introduced in order to improve the quality and transparency of algorithmic management. In a nutshell, the right of workers to be informed about the functioning of the automated decision-making and monitoring systems and the prohibition to process workers' personal data unrelated to the performance of the contract are enshrined (Article 6). Furthermore,

platforms are obliged to structure periodic human monitoring of automated systems, in respect of which a health and safety risk assessment obligation is established (Article 7). The right to complain against automated decisions and the right to request a review of such decisions is established (Article 8). There is also a right to information and consultation of workers and their representatives on decisions concerning algorithmic management (Article 9).

Most of these provisions also apply to genuine self-employment (Article 10). This is a fundamental floor of protection because it unveils and limits the intensity and manner of control exercised by the platform over workers, regardless of the type of contract. However, self-employed workers are not covered by occupational health and safety protection (Article 7(2)). This choice facilitates the transposition of the provision in national legal systems that do not grant health and safety protection beyond subordination. However, it is “anachronistic” because it runs counter to the universalist vocation of the right to a safe and healthy working environment, which has recently been raised to an international core labour standard. Despite the fact that the initial amendments had overcome this critical issue, the provisional agreement relates the preventive protection exclusively to “platform workers” (Article 12).

Moreover, the prevention obligation will have to be integrated with the proposed regulation on AI. Indeed, this act imposes a risk management system for “high risk” automated systems on users, which includes both employers and clients. This obligation, therefore, disregards the contractual status of workers, referring to management systems that impact on employment, management of workers, and access to self-employment (Annex III, para. 4).

The right to information and consultation (Article 9) is also restricted in scope. This is a controversial issue in EU law. So much so that the European Commission attempted to remedy the problem with the approval of the guidelines on collective bargaining for the self-employed (see below). Finally, the provisional agreement makes specific provisions for representatives of persons performing platform work other than representatives of digital platform workers (Article 15). However, these information rights are only triggered when the representatives of self-employed workers act for the protection of their personal data.

It should also be highlighted that human oversight of decisions being limited to those in an employment relationship, and not extending to the self-employed when they are classified as “business users” pursuant to the Regulation (UE) n. 2019/1150 on Fairness and Transparency of Intermediaries (Article 11, para. 5). In particular, a business user also includes any private individual acting in a commercial or professional capacity who, through online intermediation services, offers goods or services to consumers for purposes relating to its trade, business, craft or profession. This is a definition that could absorb many self-employed workers, leaving them without a crucial protection that guarantees all the others.

There is no space to deal with transparency and enforcement measures. However, it is worth noting that the possibility is established for representatives to initiate judicial and administrative proceedings to enforce the rights of employees and self-employed persons (Article 14). The provision supports the widespread trade union practice of bringing the issue of contractual qualification, and the issue of discrimination, before the courts. This is an important provision because, to date, the courts could reject the legitimacy of representatives to take legal action for the self-employed.

6. **Collective bargaining and self-employment: EU guidelines**

As pointed out, the draft directive does not extend the right to information and consultation of representatives (Article 9) to self-employed workers. Indeed, a strong tension persists in European law between the collective rights of self-employed workers on the one hand, and competition law on the other. This tension is exacerbated with respect to the role of trade unions and collective bargaining in the context of self-employment in a situation of economic weakness or dependence. Indeed, solo self-employed workers are still considered undertakings within the meaning of Article 101 TFEU, because they offer services for remuneration in a given market[2]. Therefore, collective agreements of self-employed workers are considered "agreements between undertakings" that have as their object or effect the prevention, restriction or distortion of competition in the internal market.

In the *FNV Kunsten* case, the Court of Justice legitimised the collective bargaining of so-called "false self-employed persons", i.e. those who are in a situation comparable to that of employees because they are dependent on the principal. Reference is made to a concept of 'organisational dependency' that occurs when a worker acts as an auxiliary integrated into the enterprise and does not share any economic and financial risk with the client.

This position contrasts with the international recognition of the right to collective bargaining for all workers, regardless of contractual status. Moreover, this closure also contrasts with reality. In today's labour market, self-employed workers often find themselves in a situation of economic and organisational dependence on their clients, which results from their weak position in the labour market and in the employment relationship. Therefore, in all Member States, trade unions have long been organising the representation and collective bargaining of self-employed workers. This is what is happening, above all, with the self-employed via platform.

The European Commission preferred not to address this issue in the proposed directive. Instead, the EU legislator intervened with a soft law act. The "Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons" represent a first opening of European law to collective bargaining for the self-employed. In particular, the European Commission granted immunity from competition law to collective agreements signed by certain categories of solo self-employed workers[3].

The immunity classes include self-employed platform workers. Such workers are per se considered to be in a position of dependence on the platform, comparable to that of employees. Therefore, the relevant collective agreements fall outside the scope of Article 101 TFEU. This "exception" appears as a remedial option to the contractual reclassification solution identified by the draft directive. In short, the collective regulation of protections for self-employed workers, for whom the contractual requalification operation will fail, is promoted. However, it must be emphasised that, for the first time, the EU Commission legitimises collective bargaining on the assessment of the worker's status in the employment relationship. In this way, collective intervention can govern and correct the monopsonistic and oligopsonistic labour market generated by the big companies of the digital economy.

7. **Regulatory techniques: concluding remarks**

The proposal for a directive and the guidelines don't go beyond the distinction between employees and self-employed workers. The unequal regulatory treatment built on contractual status is therefore renewed. Above all, the limits of protection techniques that force the extension of subordination emerge, especially for this "moving target" in the subordination-autonomy dialectic. Equally critical is the identification of protections only for certain self-employed workers, in an obsessively selective manner.

In short, the classic method of imputation of protection based on contractual categories is entering a crisis, as demonstrated by the numerous legal disputes brought throughout Europe. The need therefore arises to codify new protection regimes beyond subordination, in adoption of a universalist approach "calibrated" by a reasonable selectivity. In this way, it is possible to prepare a floor of protection according to a-categorical logic in order to pursue protective effectiveness in social reality.

This is a task particularly suited to the European legislator. Indeed, the European Union supports the integration process by regulating minimum standards of protection based on the values of the European social model, while safeguarding the autonomy of national legal systems. It is precisely this that appears to be the most effective regulatory technique for undertaking an effective process of "upward" harmonisation between national legal systems. On the other hand, direct intervention in the subordination-autonomy dialectic seems unusual and ineffective, as it could fuel interpretative and implementation tensions in national legal systems.

References

[1] For a more in-depth analysis, please refer to M. Giovannone, *La proposta di direttiva UE sui platform workers: tecniche regolative ed effettività delle tutele per i lavoratori autonomi,* in *Federalismi.it,* n. 25, 2022, pp. 129-160; M. Giovannone, *Proposal for a directive on platform workers: enforcement mechanisms and the potential of the (Italian) certification procedure for self-employment*, in *Italian Labour Law e-Journal*, Issue 1, Vol. 15, 2022, pp. 65-83.

[2] *Española de Empresarios de Estaciones de Servicio* (case C-217/05, 14 December 2006); *Ordem dos Técnicos Oficiais de Contas v. Competition Authority* (case C-1/12, 28 February 2013).

[3] Giovannone M., *La contrattazione collettiva dei lavoratori autonomi nell'orizzonte UE: tra tutela della concorrenza e autotutela collettiva*, in *Federalismi.it*, n. 34, 2022, pp. 209-230.

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