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The Position of Collective Rights in the "Platform Work" Directive Proposal: Commission v Parliament[1]

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Abstract

This article compares the provisions on collective representation and collective rights of platform workers respectively enshrined in the Proposal for a Directive on improving working conditions in platform work, adopted by the European Commission on 9 December 2021, and in the amendments presented by the European Parliament on 22 December 2022. By systematizing and commenting on the specific provisions, the Authors point out and discuss the different approaches held by the two lawmaking institutions with regard to the rationale, the functioning and the systemic role of collective rights for the protection of platform workers.

Keywords: Platform work, Directive, Collective Bargaining, Employee involvement, Information and consultation, Trade unions

1. Introduction

Collective rights of platform workers have been debated by an extensive legal and industrial relations literature, covering a broad spectrum of issues that could be synthetically referred to as the "collective dimension" of platform work. Those issues encompass the rationale and systemic function of collective

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1 This paper is the result of a joint reflection of the Authors. However, sections 1–4 can be attributed to Iacopo Senatori, sections 5–6 to Ilaria Purificato.

rights, their constitutional foundations, the entitlement of platform workers to collective rights and the legal limitations they face (and how to overcome them), players and forms of collective organization and the strategies of collective action in platform work, to name but a few.[2] On the regulatory side, the matter has been addressed by the well-known initiative of the European Commission, DG Competition, that extended the exemption from antitrust law to collective agreements applied to solo self-employed people.[3] More recently, the case law has pointed out the "collective potential" of the rights to information enshrined in the Transparent and Predictable Working Conditions Directive (hereinafter "TPWCD").[4]

A great attention in the legislative scenario has been catalyzed by the "Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work" (hereinafter: "The Proposal")[5], which is currently under negotiation among the European lawmaking institutions. To date, the "trilogue" has resulted into three main texts: the original version elaborated by the Commission on 9 December 2021 (hereinafter, "P-EC"), the amended version adopted by the Parliament, Committee on Employment and Social Affairs, with its resolution of 21 December 2022 (hereinafter, "P-EP")[6], and finally the compromise text released by the Swedish presidency of the Council on 7 June 2023.[7]

All of the three versions include provisions relevant to the collective dimension of platform work. However, while scholars have already engaged with the provisions contained in the P-EC,[8] no specific analysis so far has been dedicated to the two concurrent versions.

Indeed, the P-EC and the P-EP construe the systemic position of collective representation instruments in the overall legislative framework according to remarkably divergent patterns. The Parliament's version, in particular, appears much more prone to the acknowledgement of an autonomous role for collective rights, and committed to enhancing the establishment of comprehensive and structured industrial relations systems in platform work.

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2 See *ex multis*: Tamàs Gyulavàri: Collective rights of platform workers: The role of EU law. *Maastricht Journal of European and Comparative Law*, vol. 27, n° 4, 2020. 406–424.; Michael Doherty – Valentina Franca: Solving the 'Gig-saw'? Collective Rights and Platform Work. *Industrial Law Journal*, vol. 49, n°3, 2020, 352–376.; José Maria Miranda Boto – Elisabeth Brameshuber (eds.): *Collective Bargaining and the Gig Economy. A Traditional Tool for New Business Models*. London, Bloomsbury, 2022.

3 European Commission: Communication Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons. *OJEU* C 374/10, 2022/C 374/02, 30.9.2022. See Silvia Rainone: Labour Rights Beyond Employment Status: Insights from the Competition Law Guidelines on Collective Bargaining. In: Tindara Addabbo – Edoardo Ales – Ylenia Curzi – Tommaso Fabbri – Olga Rymkevich – Iacopo Senatori (ed.): *Defining and Protecting Autonomous Work. A Multidisciplinary Approach.* Cham, Palgrave Macmillan, 2022. 167–191.

4 The Tribunal of Palermo, Italy, in a judgement issued on 23 March 2023 affirmed that the right to information granted under Legislative Decree n° 104/2022, that implements the TPWCD, can be claimed by works councils directly and jointly to individual workers' claims, and not only in alternative to the latter. See Giuseppe Antonio Recchia: Condizioni di lavoro trasparenti, prevedibili e giustiziabili: quando il diritto di informazione sui sistemi automatizzati diventa uno strumento di tutela collettiva. *Labour & Law Issues*, vol. 9, no. 1, 2023. 32–57.

5 COM(2021) 762 final.

6 A9-0301/2022. https://www.europarl.europa.eu/doceo/document/A-9-2022-0301_EN.html (consulted on 6 July 2023).

7 EMPL 294 SOC 422 CODEC 1011. https://eur-lex.europa.eu/procedure/EN/2021_414 (consulted on 6 July 2023).

8 Valerio De Stefano: The EU Commission's proposal for a Directive on Platform Work: an overview. *Italian Labour Law e-Journal,* vol. 15, no. 1, 2022. 1–11.

This paper compares the texts adopted by the Commission and the Parliament, with a view to systematizing and commenting on the different regulatory options they envisage. Although it is not realistically predictable that the Parliament's approach will withstand the pitfalls of the legislative process, still it remains an important step, and its thorough analysis is timely insofar as it may contribute to the debate while the negotiations on the final text are still ongoing. The Council's compromise version, on the other hand, is not included in the analysis. Its contents on this specific topic recall to a large extent those included in the Commission's text, hence it can be considered less significant for the specific purpose of this study.

The paper will proceed as follows. The next section will frame the discussion in the context of the protection instruments designed in the Proposal. These instruments will be classified according to a basic distinction between primary and secondary protections.In the following sections we will carry out a systematic comparison between the relevant provisions of the P-EC and the P-EP, with the aim of ascertaining whether the latter actually results in an extended protection of collective rights, that exceeds the ancillary role to individual rights envisaged in the P-EC. We will analyze and comment the legal construction of the different instruments (information and consultation, collective bargaining, other enabling prerogatives) and their systemic impact, particularly as regards players, functions and instruments of industrial relations.

2. Primary and secondary protections in the "Platform Directive" Proposal. Which role for collective rights?

The Proposal, whose well known overall purpose is "to improve the working conditions of persons performing platform work", establishes two levels of protections, which may be referred to as primary and secondary.

Primary protections are those directly aimed at fulfilling the goals set out in Article 1(1) P-EC, i.e. ensuring correct determination of workers' employment status, promoting transparency in algorithmic management and improving transparency in platform work, including in cross-border situations. The criteria that trigger the legal presumption of an employment relationship and the rights to information, explanation and human review of algorithmic decisions are examples of such category.

Secondary protections are those aimed at reinforcing and promoting the effectiveness of the rights and safeguards laid down by provisions of primary protection. This category includes the provisions enshrined in Chapter V on "Remedies and Enforcement". Examples are the right to access an impartial dispute resolution and seek redress, granted to workers who claim an infringement of the prerogatives arising from the Directive.

There is little doubt that the provisions that involve the "collective dimension", or, to put it differently, that envisage a role for representatives of workers and persons performing platform work[9], as defined in Article 2(1.5) of P-EC,[10] have been construed by the legislator essentially as secondary protections. This means that the prerogatives vested in workers' representatives are in most cases only a means to facilitate the fruition of a set of rights primarily tailored on individual workers. This is, for instance, the case of the right to receive information on the existence and functioning of algorithmic management systems used by the platform and of the right of workers' representatives to engage in enforcement procedures on behalf or in support of persons performing platform work.

Only two exceptions to this pattern can be found in the body of the P-EC: Article 9 ("Information and consultation"), which appropriately complements the involvement procedures established by the general EU legislation on I&C with additional rules to be applied in the event of an organizational decision concerning the use of algorithmic management systems; and, first and foremost, Article 15 ("Communication channels for persons performing platform work"), which commits platforms to allow workers and their representatives to use the digital infrastructure to establish a communication channel free from access and monitoring from the platform itself.

Whereas the former represents an important albeit not really innovative provision, as it could have been inferred from an evolutive interpretation of the Framework I&C Directive, Article 15 likely represents the single provision, in the whole body of the Proposal, provided with an enabling potential, insofar as it introduces a key tool to organize workers around a "collective interest". All in all, however, collective rights are certainly not at the center of the Commission's initiative, as is confirmed by the lack of a comprehensive and consistent normative architecture and the vague references to players (with no mention of trade unions) and instruments of collective representation (with a single reference to I&C procedures and no consideration for collective bargaining).

The amendments proposed by the European Parliament express a largely different approach. They address the "collective dimension" in a more detailed and systematic manner, starting from the explicit acknowledgment of collective bargaining and trade unions, along with other forms of collective organization of workers.

Moreover, the P-EP elevates one of the constitutive elements of the collective dimension, collective bargaining, to a primary rank. This is, at least, what can be inferred from the amended Recital 13, which illustrates the basic goals of the proposed legislation. In fact, the three "pillars" of primary protection (employment status, transparency in algorithmic management, transparency in platform work) are integrated in the Parliament's version by other minimum rights, including fair and just

9 The difference between the categories of "workers" and "persons performing platform work" is taken for granted for the purpose of this line of reasoning.

10 "Workers' organisations or representatives provided for by national law or practices, or both".

working conditions, non-discrimination, prevention of health and safety risks and, for what matters here, "the right to bargain collectively in accordance with national law and practice".

3. Collective players: representatives, trade unions and other organisations. The linkage with employment status

While the P-EC uses a broad concept of workers' "representatives", defined as "workers' organisations or representatives provided for by national law or practices, or both" (Article 2(1.5)), the P-EP expresses a specific consideration, or, one may argue, a blatant favour, for trade unions.

This is plastically represented by the amended wording of Article 2(1.5), where "representatives of recognized trade unions" come first in the definition of representatives of workers and of persons performing platform work, whereas "other persons who are freely elected or who are designated" by workers or self-employed people are mentioned in a subordinate period, separated by the disjunctive term "or".

One may ask why the European lawmakers felt the need to specify a notion, contained in the original version, whose loose formulation made it capable of encompassing almost every possible form of collective representation along different scales of "institutionalization", including the "conventional" trade unions. Likely, the new formulation aims to hamper the formation of bogus or "accommodating" organisations, more vulnerable to the influence of the digital platforms. This concern is plainly stated in the new Recital 18a, according to which "the phenomenon of company trade unions, or workers' representatives that are established or controlled by, and in the interests of, the employer rather than those the workers, is particularly serious in platform work", and therefore "Digital labour platforms should ensure, together with the most representative trade unions, that elections for workers' representatives comply with fundamental rights and freedoms".

This last sentence, as it envisages a specific influence of "the most representative trade unions" in the process of electing workers' representatives in the "virtual" platform's workplace, could be maliciously interpreted as the element of a "defensive" strategy orchestrated by the historically established institutions against the threat posed by new and more dynamic players. In fact, the role of grassroot movements and other spontaneous organizations, often untied to trade unions, in putting forward the interests of platform workers has been widely acknowledged in the literature, especially at the early stages of these workers' quest for better working conditions. Hence, as clear as can be the need to establish sound and objective criteria to assess the representativeness of these "informal" players, submitting their acknowledgement to rules devised by a possible competitor could appear as counterintuitive.

However, such malicious interpretation is probably exaggerated. On the one hand, the body of the Directive does not translate the recommendation contained in Recital 18a in specific normative provisions (nor it could, for the risk of colliding with the exclusion of legislative competence on the right to association enshrined in Article 153 TFEU). On the other hand, at a close look the Proposal does not grant any special prerogative to trade unions in respect of other workers' organisations.

In several cases trade unions and other representatives are mentioned together as subjects of the same rules (like in Article 15 on communication and reporting channels and Article 17 on protection against retaliation). The cases where trade unions are mentioned alone (Article 4(1.1a) and Article 14(2a)) refer to unions acting in a collective proceeding to claim the application of the presumption of employment status or the breach of other rights set out in the Directive. These cases are probably motivated by the assumption that "external", rather than workplace representatives are normally engaged in such actions.[11]

Another exception to the equality of arms between trade unions and other representative organization is blatantly asserted in Recital 18, which affirms that "The exclusive prerogatives of trade unions should be preserved, such as their right to participate in collective bargaining and to conclude collective agreements". But again, such reservation of competence to trade unions as exclusive bargaining agents, in apparent opposition with other workers' representatives, apart from being refutable in general legal terms,[12] is contradicted by a systematic reading of the body of the Directive. To name one single example, the central provision on this matter, the new Article 10a introduced by the P-EP, clearly refers to the right to collective bargaining as a competence of workers' representatives, when it envisages the duty of the digital labour platform to provide such representatives with the relevant information necessary to exercise this right.

In the direction of an extensive conceptualization of the "collective dimension" of platform work in the P-EP, from the perspective of the players and the organizational forms, it is also worth mentioning the acknowledgement of the role played by workers' cooperatives. Drawing from interesting experiences monitored in the literature,[13] Recital 39a encourages Member States to promote cooperative undertakings as a means of bottom-up organization of platform work, and an example of "participatory-governed businesses which use digital platforms to facilitate citizen engagement and the selling of locally produced goods and services, aiming to achieve better working conditions for their members".

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11 And, in any case, the P-EP preserves the possibility for any representative body, holding a legitimate interest, to engage in a judicial or administrative proceeding on behalf or in support to workers (Article 14.1), without prejudice to the competences of trade unions as set out in national law or practice (Article 14.2a).

12 Article 28 CFREU grants the fundamental right to collective bargaining to "organisations" of workers, and the CJEU has maintained that the scope of that provision covers also the right to co-decision exerted by a works council (CJEU, C699/17, Allianz, ECLI:EU:C:2019:290).

13 For instance, Julienne Charles – Isabelle Ferreras – Auriane Laimine: A freelancers' cooperative as a case of democratic institutional experimentation for better work: a case study of SMart-Belgium. *Transfer*, vol. 26, no. 2, 2020. 157–174.

Yet, the most remarkable element of the Proposal, with regard to the actors of collective representation in platform work, is its extension, granted on (almost) equal grounds regardless of the employment status of the workers. This element, already present in P-EC, has been made more evident in P-EP, where the unitary definition of "representatives" has been broken down into two parts, separating "workers' representatives" and "representatives of persons performing platform work". In this way, the legislator likely aims at clarifying that also self-employed platform workers, included in the latter definition, enjoy collective representation and the attached rights.

Nonetheless, despite the identical wording of the two definitions, there remain uncertainties with regard to the breadth of their material scope, with representatives of employees apparently enjoying more extensive rights than the self-employed. The broader category of "representatives of persons performing platform work" is expressly vested with the rights related to the provisions on the access to relevant information on platform work, the representation of workers in judicial and administrative proceedings and the use of communication channels provided for by the platform. Furthermore, it can be argued that the same category enjoys the rights to be informed and consulted on decisions based on the use of algorithms and to request a review of such decisions (Articles 6, 7 and 8). In fact, although these provisions mention "workers' representatives", the general clause of Article 10 provides that "Articles 6, 7, 8 shall also apply to persons performing platform work who do not have an employment contract or employment relationship". So that it would appear incongruous, and vehicle of discriminatory effects, to apply such extension to individual self-employed workers alone and exclude their representatives.

Thus, the only prerogatives really limited to workers' representatives in a strict sense seem to be those related to the information and consultation rights laid down in Article 9 of the Proposal. This special treatment can be easily ascribed to formal reasons, namely the need to align with the original scope of the general I&C Directives of which Article 9 represents a specification.[14]

Nevertheless, from a systemic as well as a functional point of view this difference represents an inconsistency. In fact, the involvement of collective representatives in matters related to algorithmic decisions (Articles 6-8) and transparency on platform work (Chapter IV) tends, especially in P-EP, to align to the procedural model designed by the I&C Directives, particularly for what concerns the effectiveness of the procedures, as will be shown in the next section. So that it would not seem unreasonable to grant representatives of self-employed platform workers a similar power to "interfere" with the strategic and organizational decisions concerning the introduction of algorithmic management technologies in the work processes.

With regard to collective bargaining, on the other hand, the impression that Proposal grants special prerogatives only to workers' representatives (including trade unions), that could descend from a

[14] The P-EP mentions not only Directive 2002/14/EC – Framework I&C Directive – but also Directive 2009/38/EC – European Works Councils Directive – and, only for what concerns information and consultation rights, the Framework H&S Directive 89/391/EEC.

literal reading of Article 10a P-EP, can be easily overturned by a systematic review of the text. One can mention in particular Recital 23, affirming that "Collective bargaining is a key tool by which to improve the working conditions of persons performing platform work, irrespective of the contractual designation of the relationship", and Recital 45, proclaiming that "Persons performing platform work should be free to organise, choose representatives and be taken into account in social dialogue and collective bargaining processes, regardless of their employment status". Let alone the need to ensure the coordination with the Commission's DG Competition initiative on collective bargaining of solo self-employed persons. Which, as it is well-known, expressly stated that collective agreements between solo self-employed persons and digital labour platforms relating to working conditions fall outside the scope of Article 101 TFEU.[15]

4. Provisions enabling collective organization of workers and the exercise of collective rights in platform work

The effort of the European Parliament to strengthen collective rights of platform workers is shown in the first place by the increased quality and extent of the protections surrounding the relationship between workers and their representatives, in comparison with the Commission's version of the Proposal.

These are exemplified by the prohibition imposed on platforms to process certain categories of data, namely those resulting from communication among platform workers and workers' representatives "also in relation to the possibility to organize collectively and to defend their rights" (Article 6(5c)) and those revealing trade union membership (Article 6(5ca)). In the same way operates the restriction of the scope of the confidentiality exception that digital platforms are allowed to raise in the event of a request of information from representatives of persons performing platform work. According to the new Article 6a P-EP, such exception cannot apply to communications between workers' representatives, works councils and recognized trade union organizations, when information may affect the jobs or the working conditions of workers.

Such innovations are consistent with the repeatedly affirmed importance of social dialogue for the achievement of the goals of the Directive and of the need to ensure rights and prerogatives of trade unions and workers' representatives, in line with the ILO Conventions and the European Social Charter (Recital 18b). Thus, they go in the direction of increasing the effectiveness of those rights, by enhancing their "immunity" from any external interference from the platform.

The P-EP enlarges also the prerogatives endowed to the representatives of workers, first of all with regard to the involvement of these representatives in the context of algorithmic management.

[15] European Commission, nt. 2, Guideline 31.

Article 6 considers workers' representatives as primary recipients of the information on the existence and functioning of automated monitoring and decision-making systems, on equal grounds with individual workers, whereas the P-EC grants them only a secondary role, by stipulating that they should receive this information only upon their request.

Furthermore, the P-EP designs a detailed framework for the involvement of workers' representatives in the administration of algorithmic management systems. Firstly, it places an obligation on digital labour platforms to involve such representatives in the discharge of their duties concerning the impact assessment of the data processing, as laid down in art 35 GDPR. In particular, the platform shall seek the views of workers' representatives on the intended processing (Article 6(5a)), involve the representatives in the elaboration of the impact assessment (Article 7(1)) and submit them the final document (Article 7(2a)). Secondly, the representatives can request in first person the human review of decisions significantly affecting working conditions (Article 8(2)).

These additional prerogatives go in the direction of framing a scope of operation for collective representatives that is not merely functional to the satisfaction of individual rights alone. Indeed, one may argue that they set the grounds for the activation of collective action for the defense of the "collective interest" that lays in the background of the decisions affecting one or more individual workers.

The same can be argued with regard to the position of collective representatives in the enforcement proceedings, regulated by Article 14 of the Proposal.

The representatives, like other legal entities vested with a "legitimate interest in defending the rights of persons performing platform work", can engage in judicial or administrative procedures to enforce the rights arising from the Directive. Under the P-EC wording of Article 14, the representatives' initiative "on behalf or in support" of one or several workers is conditional to those persons' approval. The P-EP has limited this condition to the cases where it is "relevant and in accordance with national law or practice" (Article 14(1) and 14(2)). Moreover, a new Article 14(2a) specifies that those provisions are without prejudice to "the competences of trade unions as set out in national law or practice".

These changes, as ambiguous as they can be, open a window on the possible acknowledgement of a direct legitimation of collective representatives and trade unions to act (also) in defense of the collective interest affected by a decision directly hitting the (different and further) interests of one or more individual workers. In this sense, they produce the same systemic effect as the additional prerogatives granted to the representatives by the P-EP in the context of algorithmic decisions.

The collective rights have been reinforced by the P-EP also with regard to the qualitative conditions of the involvement of the workers' representatives. In particular, the amendments to Article 9 go in the direction of increasing the clarity and timeliness of the information provided by the platform, in line with the "effet utile" principle elaborated by the CJEU. Remarkably, this intervention does not operate only in the context of the I&C procedures referred to in Article 9, but also with regard to the other

forms of involvement of workers' representatives in algorithmic management addressed in Chapter III of the Proposal.[16] One may conclude from the above that the general I&C framework represents, in the P-EP, the pattern followed by all the different modalities of involvement of workers' representatives regulated in the Directive.

One final remarkable result of the amendments introduced by the P-EP concerns the coordination of the different instruments of industrial relations. In a systemic perspective, it is possible to observe a convergence of several provisions to assign collective representation one overarching function that ties together information, consultation and collective bargaining.

Mention can be made in this regard of the new Article 10a (1a), that commits Member States to

> "ensuring that digital labour platforms, taking into account the size and capacity of the undertaking concerned, provide workers' representatives with *relevant information in order to exercise their right to collective bargaining*" (emphasis added). The functional link between involvement and bargaining is echoed in Recital 32, where, with reference to transparency in algorithmic management, it is stated that "As more detailed information is necessary for full transparency, *for effective consultation and negotiation* between the parties and for enforcement, digital labour platforms should also provide a detailed and robust report containing that information for platform workers, their representatives and the competent authorities" (emphasis added),

and in Recital 39, in whose words

> "in accordance with Directive 2002/14/EC, those provisions [laying down i&c procedures] are meant to foster effective social dialogue on these features and, because automated monitoring and decision making systems have a direct impact on working conditions, it should be possible to subject them to collective bargaining".

This matter will be examined into more detail in the following sections.

5. Empowerment of workers: the roles of collective bargaining and workers' involvement

As mentioned in the first paragraph, the P-EP has recognized a first-order role for social dialogue and collective bargaining in order to reach the goals set out in it. As a result, the instruments of industrial relations have received more important functions than those laid out in the P-EC.

[16] See in particular Article 9 (2a): "Digital labour platforms shall provide the information referred to in Article 6(1), (2), (5a) and (5b) and Article 7 to workers' representatives with sufficient time as to allow a thorough examination and effective consultation. For newly deployed automated systems, the consultation shall take place prior to their use and before any changes affecting working conditions, the organisation of work or the monitoring of work performance".

Overall considered, these functions enable persons performing platform work, their representatives, and unions to intervene in decision-making and monitoring processes in which automated systems can play a pivotal or supportive role. Indeed, the cited actors could intervene from the step of defining the features of such systems to the stage that can lead to the revision of decisions made.

Therefore, industrial relations instruments are aimed at synergistically ensuring the protection of working conditions, health and safety as well as fundamental rights of all workers, albeit in different ways and with the involvement of different actors[17].

As mentioned in closing the previous section, P-EP creates such synergy between the functions of collective agreement and information and consultation since the information to be provided to workers and their representatives is the logical and necessary precondition for collective bargaining. At the same time, as expressed in the Recital 39, the provisions on information and consultation should be regulated by collective agreement due to the relevance of the matters on which they intervene for the working condition of platform workers.

The following paragraphs are focused on the functions of collective bargaining, also bringing out the connections with information and consultation rights, as well as on the role of information and consultation in a broad sense.

5.1. The role of collective bargaining

With reference to the first of these instruments, namely collective bargaining, one could argue that European Parliament has consolidated its functions more than the others.

Comparatively speaking, in the P-EC, the collective agreement emerged primarily as a parameter for ascertaining the existence of the conditions for qualifying a worker as an employee and as a source of rights for workers – along with the law and social protection standards – that had to be respected by digital platform. In the P-EP, in addition to being elevated to a primarily protection[18], the collective agreement has received more functions which are complementary to those just mentioned.

Besides being a parameter for assessing the compliance of decisions taken by the digital platform with impacts on workers' health and safety, contractual relationship, situations of account limitation, suspension or termination, and provision of disciplinary measures[19], Member States are required to promote collective bargaining as a means by which to improve working conditions in digital platform work.

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17 *See* section 2 for more details on this topic.

18 *See* section 1.

19 Article 6.

According to the lawmaker, this goal can be achieved starting with the recognition of a power to participate in defining the features of automatic decision-making and monitoring systems to the negotiating parties[20]. In other words, platform workers' representatives are allowed to "negotiate" the algorithm[21].

This provision, fixed in the Article 10a should not be considered in itself as mentioned in section 2, but should be interpreted in the light of the contents of the Recitals. The recital No. 23[22] in particular has a significant influence on the scope of application of Article 10a, in which the European Parliament, on the assumption that better working conditions should be guaranteed to all persons performing platform work, regardless of their employment status, expressly identifies collective bargaining as the main means by which this aim can be achieved. Therefore, it considers that the Commission and the Member States should take steps to promote collective bargaining for both employees and self-employed workers on digital platforms. Recital 23 itself identifies the recent Commission communication containing Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons (henceforth "Guidelines") as a reference that moves in the latter direction, having paved the way for collective bargaining for self-employed workers on digital platforms.

Therefore, the provisions contained in Art. 10a should take into account the contents of the Guidelines, as there is no sign of incompatibility.

Indeed, in the first place, the collective agreements referred to in Art. 10a have the function of guaranteeing better working conditions for platform workers, and are not meant to regulate different matters that could come into conflict with competition law, just as provided for in point 18 of the Guidelines[23].

Secondly, the vague wording of Article 10a allows its subjective scope of application not to be restricted to subordinate workers, since the provision refers generically to "promotion of collective bargaining in platform work", the latter to be understood, according to the definition provided by Article 2 of the same proposal for a directive, as "any work organized through a digital labour platform and performed in the Union by an individual, […]".

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20 Article 10a states that "in accordance with national law and practice, Member States, with the involvement of the social partners, shall promote collective bargaining in platform work, including on the features of automated monitoring and decision-making systems, in order to improve working conditions […]."

21 Among the first in the literature to advance this need is Valerio De Stefano – Simon Taes: Algorithmic management and collective bargaining. *Transfer*, 2022. https://journals.sagepub.com/doi/10.1177/10242589221141055

22 Recital 23: "[…] Collective bargaining is a key tool by which to improve the working conditions of persons performing platform work, irrespective of the contractual designation of the relationship and should be encouraged by the Commission and Member States. […]."

23 Point 18 of the mentioned Guidelines: "These Guidelines do not cover decisions by associations or agreements between solo self-employed persons outside the context of negotiations (or preparations for negotiations) with a counterparty to improve the self-employed persons' working conditions."

As a consequence, collective bargaining is a useful instrument to achieve better working conditions for persons performing platform work, who, by express provision of Recital 19, are either employed or genuinely self-employed.

Within the category of persons performing platform work are the "solo self-employed persons working through digital labour platforms", identified within the Guidelines as one of the categories of solo self-employed persons[24] who should be recognised as having the right to collective bargaining, since they are in a situation comparable to employees and this regardless of whether they are to be classified within the criteria of false self-employment or whether a judge has decided to legally requalify their employment relationship.

Therefore, the proposal for a Directive as amended by the European Parliament seems to extend the right to collective bargaining to the self-employed on digital platforms, including who would be considered genuine self-employed workers, on the basis of the automatic recognition of the right to collective bargaining set out in the Guidelines.

However, in order for workers' representatives, who are expressly recognized by Article 10a (1) (lett. a) as having the right to collective bargaining, to effectively exercise this right, it is firstly necessary that they receive all "relevant information".

This part of the provision contains the first link between collective bargaining and the information that the digital platform is required to provide. However seemingly obvious, this provision is in truth of great importance on a practical level.

As is well known, one of the inherent features of the functioning of digital platforms is their opacity that makes them "black boxes"[25], of which it is not possible to know the data that are collected to supply their operation, the ways in which such data are processed and used, but only to observe the final effects on the management and organization of platform workers.

The EU lawmaker is well aware of this, consequently, it identifies transparency and clarity in the functioning mechanisms of digital platforms and greater accountability on the part of the latter (as well as greater transparency at the cross-border level) as the way to ensure the fair classification of workers.

As said[26], this transparency is pursued through a more widespread, consistent information system that is aimed at greater effectiveness by establishing the form the information should take and the timelines for its delivery[27].

One can perceive that the information and workers involvement issues could potentially play a functional role in collective bargaining.

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24 In the Guidelines they are described as persons who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labour for the provision of the services concerned."

25 Frank Pasquale: *The Black Box Society: The Secret Algorithms That Control Money and Information.* Harvard University Press, 2015.

26 Section 3.

27 *See* Articles 6 and 8, for example.

Recognizing that workers' representatives are allowed to participate by means of collective bargaining in defining the features of automated decision-making and monitoring systems, powering them to mitigate and manage their impact on working conditions, could make collective bargaining the place where the outcomes achieved in the information and consultation procedure regulated by the proposed directive, also to be understood in a broad sense, find their expression.

5.2. The role of the workers' involvement

As mentioned, a common thread that guides the entire directive is the need to react to the opacity of algorithmic management mechanisms with the promotion of transparency and clarity, which basically means that digital platforms need to provide more information to workers and their representatives.

This aim is pursued by preparing an articulated system in which persons performing platform work and their representatives are guaranteed greater involvement with respect to situations that directly affect them, at least in terms of their effects.

Preserving the approach of the P-EC, such system distinguishes between procedures addressing all workers, without distinction based on their legal classification, and their representatives, and rights granted only to employees, which may undermine the internal coherence of the system itself.

According to Article 10, Articles 6, 7 and 8 apply to which persons performing platform work, while Article 9 addresses only employees.

Article 6 identifies the type of information that should be provided, their procedure and form as well as the recipients.

With regard to the first aspect, the European Parliament makes additions both in terms of the functions that can be performed by automated decision-making and monitoring systems and the information that digital platforms are required to provide[28].

These are supplements that can be considered in part to fill legislative gaps that have emerged in the experiences of platform workers enforced before the courts or disclosed in the various forms of protest and claims. In this sense, the additions to paragraph 1 (b) seem to place themselves where now among the aspects on which automatic decision systems can affect there is express reference to "[…] recruitment, […] access to and organization of work assignments, […] earnings including the pricing of individual assignments."

On the other hand, the integrations may be considered useful for the future advancements or different architectures chosen by digital platforms. One considers the part where, similarly to automated

[28] Article 6 (1).

decision-making systems, the mere support function in monitoring, supervising and evaluating workers' performance gains relevance for monitoring systems[29].

The same *ratio legis* seems to be found in paragraph 2 where the list of information to be provided by the digital platform has been supplemented.

Furthermore, these supplement parts intervene on the way in which the information should be communicated, as well as the form of the information itself, give the procedure a greater degree of effectiveness, especially with a view to the acquisition of the relevant information that employees' representatives need in order to participate in collective bargaining[30].

Moreover, the revised version of Article 6 introduces a further function which involves persons performing platform work and their representatives, namely the data protection impact assessment procedure. In truth this procedure is already provided for in the GDPR[31], but which is expressly taken up in the article, giving greater systematic effect to the protections recognised for platform workers.

In this case, the procedure establishes that prior to the introduction of such processing operations on the protection of personal data and prior to any changes in working conditions, work organisation or monitoring of work performance, such an impact assessment is to be carried out by the digital platform. It contains a series of information which should be communicated in a transparent, clear and comprehensible manner to workers and their representatives so that they can prepare for eventual consultation. It is clear that this is a true information and consultation procedure.

Articles 7 and 8 lay down measures that are triggered once the automated systems take decisions that affect working conditions. Specifically, they are measures ensuring that such decisions can be subject to human control, supervision and rectification because of the effects they may have on workers.

If the P-EP is compared with the P-EC, one integration lends itself to central importance. Reference is to the part of the Article 7 stating that the digital platform shares with workers' representatives the role of supervising and carrying out an impact assessment of individual decisions taken or supported by automated systems that have an impact on working conditions, health and safety as well as fundamental rights[32].

Thus, in an effort to promote dialogue and cooperation between counterparts, the European Parliament is paving the way for workers' representatives to participate in the impact assessment process.

Their role in this process is not marginal considering that an evaluation about the existence of an unmitigated risk to the fundamental rights and health and safety of platform workers carried out by

29 Article 6 (1) (lett. a).

30 Art. 6(3).

31 *See* Art. 35 (Data protection impact assessment) and Art. 36 (Prior consultation) of the Regulation (EU) 2016/679.

32 Article 7 (1).

them – and by national labor and data protection authorities – has the effect for digital to mandatorily cease using the automated system[33].

Likewise, this article is relevant since it paves the way for persons generically designated by the digital platform to carry out the impact assessment, monitor or review the decision-making process adopted by the automated systems, and to withdraw them if necessary.

As in the P-EC, there is also a generic mention of "persons charged by the platform". However, from the protections accorded to them because of their role, it is clear that these are people who belong to the digital platform's workforce. Given the skills required, one might think that these are workers within the platform who hold positions for which skills, at least IT skills, are already required high enough to understand the functioning of the automated systems.

At the same time, since there are no binding provisions, it might be possible that this position could also be given to worker representatives, subject to appropriate training, where national practices provide that such representatives are allowed to be constituted in workplaces.

It is evident how the provision introduced incisive kind of influence that platform workers and their representatives can exert on decisions taken by the digital platform by means of or with the support of automated systems. An influence that, although exercised *ex post*, can lead to participation in the decisions of the digital platform with *ex ante* relevance.

Then Article 8 introduces a procedure that can be activated by workers and their representatives aimed at having decisions supported by automated decision-making systems that do not comply with national law and applicable collective agreements and, therefore, violate workers' rights rectified (or if this is not possible, they obtain a compensation). The procedure basically consists of providing the worker with the information underlying the decision made and a review requiring the digital platform to provide an adequately reasoned and sufficiently precise response.

Finally, there are the rights of information and consultation, regulated in Article 9, and granted only to employees. In this case, the intervention of the European Parliament has gone in the direction of making the provision more systematic with the provisions of the relevant directives and to make explicit the matters covered by information. For example, in paragraph 1, it is reaffirmed that the digital platform and the employees' representatives should establish the arrangements for information and consultation and implement them in a spirit of cooperation, while respecting each other's rights and obligations[34].

As mentioned in paragraphs 3 and 4, it is precisely with reference to information and consultation rights that, a further connection with collective bargaining is to be found. Indeed, recital 39 provides that information and consultation procedures should be able to be regulated by collective bargaining. Thus, the P-EP would seem to suggest a more restrictive solution than that proposed in Directive

33 Article 7 (2b).

34 The same principle is stated in article 1 (3) of the Directive 2002/14/EC.

2002/14/EC on information and consultation, which, instead, refers the definition of information and consultation procedures to the provisions contained in "national law and industrial relations practices in individual Member States"[35].

This choice is justified by the European Parliament on the basis of the implications that the use of automatic decision-making and monitoring systems may have on working conditions. As clarified, the definition of such automatic systems may fall within the scope of collective agreements, therefore, a detailed regulation of information and consultation rights by collective bargaining would achieve a more coherent and thus more effective system.

Probably, from the perspective of an examination of the changes made to the provision, the removal of the reference to Article 6 of Directive 2002/14/EC on confidential information may be relevant since it has been replaced in practice by Article 6a of the same draft directive. Indeed, the latter, while protecting the right to confidentiality, seems to considerably restrict its scope if one considers that Article 6a(1)(b) excludes confidentiality from being recognised for those actions which may affect the rights protected by the directive.

In addition to protecting workers and their representatives from possible interference by digital platforms[36], they are also better protected in those cases where the right to confidentiality is exercised by digital platforms. Indeed, unlike Article 6 of the directive on information and consultation rights, the digital platform is obliged to reveal the criteria used to attribute confidentiality to the information. Criteria on which there is prior public intervention since Member States are responsible for identifying the list of criteria to which the digital platform may refer[37]. It is clear that this provision has considerable potential to reinforce the effectiveness of the rights of workers and their representatives to receive information.

5.3. Criticism in matter of information and consultation rights

As designed, the system of information and consultation rights, to be understood as not solely concerning Article 9, could lend itself to criticism.

If one takes into consideration the matters covered by the information rights and, at the same time, takes note of the changes introduced in Articles 6, 7 and 8 aimed at giving to the modalities of information, consultation and review of decisions a procedural scheme, one cannot understand the reason behind the exclusion of self-employed workers from the scope of application of Article 9.

35 Article 1 (2) Directive 2002/14/EC.

36 See section 3.

37 Article 6a (2).

Probably the choice of the European lawmaker is based on the desire not to undermine consistency with the other directives on the matter.

However, on a practical level, there is a total overlap of the matters dealt with and, moreover, Articles 7 and 8 pave the way for workers and their representatives to intervene on the same issues, albeit ex post facto, even with more incisive powers on the decisions taken by the digital platform.

Furthermore, in the field of information and consultation, with a view to making the system of protection more systematic and to increasing transparency also through the promotion of social dialogue, a critical point could be found in the absence of a specific reference to European Works Councils. These are mentioned in only one article of the draft directive, but with generic and never punctual reference[38].

Considering the tendency of digital platforms to have a transnational nature, their explicit recognition by means of an article could have strengthened collective rights and better pursued the above-mentioned aims.

6. Final remarks

This article has opened with a question, namely whether in the P-EP, collective rights are elevated from instruments of secondary protection to instruments of primary protection.

The analysis conducted leads to an ambivalent answer, since in some cases these instruments actually fall within the category of primary protection, while in other cases they are intended to strengthen and promote the effectiveness of the rights and guarantees established by primary protection provisions.

The first category of instruments, as we have seen, includes the entitlement of workers' representatives to information and consultation rights, collective bargaining, and the explanation and human review of algorithmic decisions, among others.

On the other hand, those provisions in which platform workers' representatives are given certain prerogatives to ensure that workers as individuals can enjoy a series of rights play a secondary role, with the exception of Articles 9 and 15.

Overall, these provisions seem to address the main critical issues and obstacles that have arisen so far, both in court cases and as a result of explicit claims by platform workers. Issues that range from the creation of a collective identity, to the possibility for trade unions to intercept platform workers, as well as to the risk for workers to face "punishments" by digital platforms that may be related, even indirectly, to their affiliation to a trade union or a grassroots movement, as well as to their participation in collective actions. To conclude, it appears clearly that the P-EP is moving in the direction of conferring on the collective dimension a primary role within the system of protections for platform

[38] Article 10a.

workers, and that it paves the way for the establishment of a genuine industrial relations system in this area. However, one may argue to what extent does the law substitute for the "self-empowerment" of workers' representatives, for instance in all those contexts where collective structures are lacking or, in any case, their formation is hindered.

Specifically, the European Parliament promotes collective bargaining by building an institutional framework based on the connection and circularity of different institutes of collective representation. However, the Proposal does not go as far as to recognise an obligation of the parties to negotiate collectively the terms and conditions of employment in platform work.

In a similar vein, among the mentioned institutions an essential role is played by the right to information of workers and their representatives. This right is to be understood in a broad sense, which, as seen, is not only the prerequisite for negotiation, but more generally the means to overcome the opacity of the functioning of the mechanisms of digital platforms. And again, the European Parliament does not go as far as to make the establishment of collective representation mandatory,[39] nor does it introduce an obligation to collective bargaining.

Thus, basically, the provisions on the collective dimension can be considered as a "machinery"[40] for promoting and encouraging collective bargaining and the establishment of an "autonomous" collective counterpower. However, they do not exempt the actors involved from the burden of activating to create the necessary preconditions for collective mobilization and representation.

The draft Directive, for the part analysed here, seems to have its greatest potential in accelerating or providing collective action in those contexts where there is a bottom-up willingness and sufficient power to organise to protect workers'interests and needs.

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39 Edoardo Ales: Article 27 CFREU Workers' right to information and consultation within the undertaking. In: Edoardo Ales – Mark Bell – Olaf Deinert –Sophie Robin-Olivier (ed.): *International and European Labour Law: Article-by-Article Commentary.* London, Beck–Hart–Nomos, 2018. 214–218.

40 ILO Convention no. 98/1949, Right to Organise and Collective Bargaining Convention.