Italian Labour Law e-Journal
Issue 2, Vol. 13 (2020)
ISSN 1561-8048
https://doi.org/10.6092/issn.1561-8048/12045

The European Framework Agreement on Digitalisation: a Whiter Shade of Pale?

Iacopo Senatori*

1. The context of the agreement. 2. The design and the methodological approach. 3. The specific issues addressed in the agreement. 4. Conclusive remarks: the implementing mechanisms and the role of industrial relations in the digital transformation.

Abstract

This article analyses the recent European Social Partners' framework agreement on digitalisation. After contextualising the agreement as an element of European Social Dialogue, it reconstructs its objectives and its main contents. The measures proposed are commented in the light of the broader policy initiatives undertaken by the European institutions on the topic. The procedural approach and the "mainstreaming" of industrial relations practices in all the stages related to the implementation of digital technologies in the workplace are identified as the most promising innovations introduced by the agreement. The general implications for industrial relations practices are finally discussed, with a particular reference to the respective roles and the mutual relationship of employee involvement schemes and collective bargaining.

Keyword: Digitalisation; Social Dialogue; Artificial intelligence; Right to disconnect; Surveillance; Skills.

1. The context of the agreement.

The European Social Dialogue has finally entered into the debate on the digital transformation of work. The Framework Agreement on Digitalisation (hereinafter FAD), signed on 22 June 2020 by BusinessEurope, SMEunited, CEEP, ETUC and the liaison committee EUROCADRES/CEC, represents the paramount joint and comprehensive

* Assistant Professor of Labour Law, University of Modena and Reggio Emilia and Marco Biagi Foundation (Italy). This article has been elaborated in the context of the research project *iRel. Smarter industrial relations to address new technological challenges in the world of work*, co-funded by the European Commission, Directorate General Employment, Social Affairs & Inclusion (VS/2019/0081). Usual disclaimers apply. The article has been submitted to a double-blind peer review process.

initiative launched by the European social partners since the topic was put on top of the policy agenda by the EU institutions.[1]

Indeed, a number of individual actions have been undertaken in the past years, in particular on the trade union side, both at the policy[2] and the research levels[3], to address the challenges posed by the new technologies on workers, companies and employment relations. What has been missing, instead, is the elaboration of a specific EU regulatory framework of a contractual nature to guide social partners at the lower levels and complement (or interact with) the conspicuous action plan enacted by the European policy makers, the Commission in the first place.

The FAD is an autonomous cross-industry agreement concluded under article 155 of the Treaty on the Functioning of the European Union (TFEU). Recalling a well-established taxonomy of social dialogue agreements, it can be classified as a "self-initiated and self-implemented collective agreement" (Sisica).[4] In fact, it does not stem from a legislative initiative by the Commission, nor it requires a statutory implementation by a Council decision through the procedure laid down in article 155 (2) TFEU. As a matter of fact, a statutory implementation is hardly conceivable in this case, as the agreement can't be framed into a purely legal framework of interpretation: its contents are procedural rather than strictly normative, while its purpose is more oriented towards the provision of a "soft" methodological guidance for the national players than on their coordination through a set of common rules of general application.

This is a feature that the FAD shares with other agreements of the same kind, with the only exception of the 2002 Framework Agreement on Telework, which resembles very closely the model of prescriptive and self-executive contractual texts.[5] All the topics dealt with in such agreements embody the idea of adapting the workplace and the labour market in response to the pressure by social or technical changes that impact directly on the organizational and the cultural setting of the enterprise.[6] A characteristic that most of the agreements plainly translate into a list of aims dominated by a cooperative and capacity-building philosophy, expressed by phrases like "Raise awareness and improve understanding of employers, workers and their representatives of the opportunities and challenges in the world of work resulting from the digital transformation", "Provide an action-oriented framework to encourage, guide and assist employers, workers and their representatives", and "Encourage a partnership approach" between the latter.

[1] Although it is difficult to set a specific date, the time span can be circumscribed around two crucial documents released by the European Commission: the pioneering Communication *A Digital Agenda for Europe*, COM(2010)245 final, and the recent Communication *A Strong Social Europe for Just Transitions*, COM(2020)14 final.

[2] *See* Countouris N., De Stefano V., *New Trade Union Strategies for New Forms of Employment*, ETUC, Brussels, 2019.

[3] *See* among the earliest contributions Valenduc G., Vendramin P., *Work in the Digital Economy: Sorting the Old from the New*, ETUI Working paper 2016.03, ETUI, Brussels, 2016.

[4] Smisman S., *The European Social Dialogue in the Shadow of Hierarchy*, in *Journal of Public Policy*, 2008, 28(1), 161 – 180.

[5] In fact, the Agreement has been implemented in some Member States, like Italy, by a simple translation of the European text and only minor adaptations.

[6] Among the most recent autonomous agreements, mention can be made of: *Framework agreement on Active ageing and an inter-generational approach*, signed on 8 March 2017; *Framework agreement on Inclusive labour markets*, signed on 25 March 2010; *Framework agreement on Harassment and violence at work*, signed on 26 April 2007; *Framework agreement on work-related stress*, signed on 8 October 2004.

As it is well known, the effectiveness of the European social dialogue has always been exposed to the enduring tension between the autonomy granted by social partners under article 152 TFEU and the prerogatives enjoyed by the Commission in the EU legislative process.[7] The most recent examples of this struggle are the famous *Hairdresses* and *EPSU* cases[8], both dealing with the refusal opposed by the Commission to start the procedure for a statutory implementation of the signed agreements (the latter is currently awaiting a decision by the CJEU).[9]

Against such background, one may argue whether the FAD may be presented as an alternative strategy for the autonomy of social partners to express its potential at the EU level. A "subsidiary" and "reflexive" strategy, based on triggering and enhancing the regulatory skills of sectoral and local players on matters that are unfit to hard and general solutions.

However, it is not the intention of this contribution to discuss the limits of the principle of social partners' autonomy in EU law or to alleviate the frustration that the acknowledgment of those limits may generate. Especially because it is impossible to separate the FAD from the general EU policy framework on the digitalization of employment relations.

In fact, the involvement of social partners is constantly invoked in the documents released by the European institutions that address the challenges of the technological innovation. For instance, the Commission's *White Paper on Artificial Intelligence – A European approach to excellence and trust*[10] includes social partners among the stakeholders that will be part of the "European governance structure on AI", a body composed of EU-level and national members that "should be consulted on the implementation and the further development" of the cooperation strategy in the field. In a similar vein, the Commission points out in the same document that "The involvement of social partners will be a crucial factor in ensuring a human-centred approach to AI at work". Another example is the *Charter* enclosed to the *Pact for Skills* launched by the Commission in the context of the *European Skills Agenda for Sustainable Competitiveness, Social Fairness and Resilience.*[11] The *Charter* highlights, in its preamble, the "importance of social dialogue in contributing to successful upskilling and reskilling in Europe".

Conversely, the FAD makes reference to several EU instruments that social partners should comply with in the implementation of the agreement, such as the General Data Protection regulation (GDPR) and the rules on working time and telework. Furthermore, it recalls the enabling role that the EU and national governments have to play, "by ensuring that the framework conditions allow and support employees and workers to grasp the

[7] Lo Faro A., *Art. 152 TFEU*, in Ales E., Bell M., Deinert O., Robin-Olivier S. (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos, Baden-Baden, 2018, 150 – 155; Schieck D., *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to Read Article 139 EC*, *Industrial Law Journal*, 2005, 34(1), 23 – 56.

[8] *See* Dorssemont F., Lörcher K., Schmitt M., *On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case*, in *Industrial Law Journal*, 2019, 48(4), 571 – 603.

[9] General Court, T-310/18, *EPSU and Goudriaan v Commission*, ECLI:EU:T:2019:757.

[10] European Commission, *White Paper On Artificial Intelligence - A European approach to excellence and trust,* COM(2020) 65 final, Brussels, 19 February 2020

[11] European Commission, Communication *European Skills Agenda for Sustainable Competitiveness, Social Fairness and Resilience*, Brussels, 1 July 2020.

opportunities"[12] brought about by digitalization, while leaving the private actors enough space to design appropriate solutions for their specific interests and needs.

Thus, in spite of its purely autonomous nature, this new European social dialogue initiative is fully embedded into a broader system of policies and institutions, and must therefore be interpreted and assessed in the light of such broader system. Starting from this assumption, this article will seek to investigate the added value of the agreement, finding whether the social partners have been able to introduce new elements and new tools to achieve a "mutually beneficial"[13] transition for employers and workers and a "human oriented approach to integration of digital technology in the world of work"[14]: the overarching goals stated in the FAD that resonate in the purposes claimed by the European policy makers.[15]

The article will proceed as follows. The next section will illustrate the general structure of the agreement and its guiding principles. From this analysis it will be possible to infer the meaning attached by the social partners to the technological revolution and the methodology that they commit themselves to follow when implementing new technologies in the work processes. The FAD defines the digital transformation as a "multifaceted topic"[16], and focuses its attention on four specific facets: hence the third section will address the measures devised in the agreement to drive the regulation of these four elements towards the general objectives pursued by the signatory parties. Such measures will be read in parallel with a sample of EU policy initiatives, to point out differences and complementarities. The fourth section will provide some conclusive remarks, focusing on the perspectives related to the implementation of the agreement and its possible effects. The main question in this regard concerns the capacity of social partners at the different levels to align with the model proposed by the FAD to "govern" the digitalisation, and is strictly linked with the question of which industrial relations tools and arrangements can ensure the most effective implementation of the principles laid down by the agreement. In this regard the agreement itself provides some indications, behind its apparent neutrality.

2. The design and the methodological approach.

The FAD is inspired by a partnership approach, in line with the assumption that a successful integration of digital technologies at the workplace can (and should) be achieved by a "consensual transition".[17] The landing place of such transition, in the view of the signatory parties, is a "win-win" setting that will allow workers and employers to reap the

[12] *Framework Agreement on Digitalisation*, 13.
[13] *Framework Agreement on Digitalisation*, 3.
[14] *Framework Agreement on Digitalisation*, 4.
[15] In the words of the Communication *A Strong Social Europe for Just Transitions* (European Commission, nt. (2), 9): "Robots as well as digital tools can take over dangerous and monotonous tasks from humans. Still, change can also generate new concerns. New work patterns - constant connectivity, increased online and mobile work, human-machine interfaces, workers' monitoring, recruitment and management by algorithms to mention just a few – can bring increased productivity that is vital to overall improvements in living standards, but should develop in ways that avoid new patterns of discrimination or exclusion or new risks to workers' physical and mental health".
[16] *Framework Agreement on Digitalisation*, 3.
[17] *Framework Agreement on Digitalisation*, 6.

opportunities and minimize the risks attached to the technological change, and "ensure the best possible outcome".

Besides the Voltairean accent, this concept reflects the growing consensus towards a non-deterministic approach to technology. Behind lays the idea that technology is neutral in itself, and that its impact on employment relations (and society at large) is not predetermined but depends on the implementing (hence regulatory) choices made by the institutions and the societal players.

In a similar vein, European policy makers have repeatedly advocated the benefits of regulating the digital transformation. The Commission's *White Paper on Artificial Intelligence* has sketched out the guidelines of a regulatory framework of AI aimed at building an "ecosystem of trust".[18] Similarly, the Council of the European Union, in its Conclusions on *Shaping Europe's Digital Future*[19] invited the Commission to put forward concrete proposals "which follow a risk-based, proportionate and, if necessary, regulatory approach for artificial intelligence".

The rules provided for by the FAD are phrased in a very general manner, as it was noted above. Four particular issues are addressed in the agreement: digital skills and securing employment; modalities of connecting and disconnecting; artificial intelligence and guaranteeing the human in control principle; respect of human dignity and surveillance. Each issue is dealt with according to one recurring pattern: first, the signatory parties state their common understanding and the conceptual coordinates (a sort of "state-of-the-art"), the respective interests and the goals that should be achieved; second, the list of measures that could be enacted is designated. Such measures are not exhaustive, as can be inferred from the wording of the text, which introduces the list with the phrase: "Measures to be considered include". Besides their merely optional and illustrative value, the measures are not accompanied by any indication about the order of priority to be followed in their implementation.

This author has maintained elsewhere[20] that regulatory initiatives about work and new technologies should address power issues, and particularly the risk that digitalization may (blatantly or disguisedly) facilitate a shift of power to the detriment of workers. In this sense, the loose normative value of these provisions may be a source of disappointment.

Nevertheless, in the case of the FAD such vagueness comes as the result of a specific methodological option, which places a major emphasis on the procedure used for the integration of digital technologies in the work processes, leaving the substantive arrangements in the background. This choice is not only inspired by the spirit of cooperation that characterizes the FAD. It is also explained by the necessity to adapt the implementing solutions to a manifold range of peculiar and variable conditions, such as the size of the enterprise, the sector and the different jobs.

Therefore, the procedure is the main distinctive character of the agreement, and real element on which the ability of the social partners to coordinate and exert an influence at the

[18] European Commission, nt. (10), 8.
[19] Council of the European Union, *Shaping Europe's Digital Future - Council Conclusions*, Brussels, 9 June 2020, 8098/1/20, 10.
[20] Senatori I., *Regulating the Employment Relationship in the Organization 4.0: Between Social Justice and Economic Efficiency*, in Perulli A., Treu T. (eds.), *The Future of Work*, Kluwer Law International, Alphen aan den Rijn, forthcoming 2021, 187 – 206.

EU level on the transformation of work (in other words, the effectiveness of their action) should be assessed. As the FAD puts it, "the process steps would remain identical", whereas "the process should be tailored to different national, sectoral and/or enterprise situations and industrial relations systems".[21]

The process devised by the FAD has work organization as its main object, and is structured in a circular way. Its five stages identify the different pivotal moments related to the introduction of digital technologies in the organization:

- joint exploration/preparation/underpinning (consisting in exploring opportunities and risks of digitalization and discussing their impact at the workplace);
- joint mapping/regular assessment/analysis (a mapping exercise looking into the topic areas in terms of benefits, opportunities and risks);
- joint overview of situation and adoption of strategies of digital transformation (represents the outcome of the former stages and leads to agreeing on digital strategies and setting goals for the enterprise);
- adoption of appropriate measures/actions (marks the shift to the concrete launch of the strategy, encompassing activities like priority setting, timing, clarification of roles and responsibilities of management, workers and their representatives, allocation of resources);
- regular joint monitoring/follow-up, learning, evaluation (assessment of the effectiveness of the action and identification of further initiatives to be undertaken).

The involvement of the workers' representatives in every stage of the process is reinforced by the express request to provide them with "such facilities and information as necessary to effectively engage in the different stages".[22] Although the agreement makes it clear that the role and responsibilities of different actors shall be respected, such a "mainstreaming" operation indicates, at least theoretically, the intention to improve the balance of power between workers and management in decisions concerning work organization and the management of change. While the effectiveness of this strategy can't be taken for granted, it represents a step forward insofar as it tackles a major critical point about the implementation of digital technologies in the work context. The fact that, as organizational theory has shown, the involvement of workers normally takes place only at the last and lowest level, i.e. the use of technologies once they have been put in place, and doesn't reach out to the previous and more important phases of design and adoption, where the real strategic decisions are made.[23]

[21] *Framework Agreement on Digitalisation*, 3.
[22] *Framework Agreement on Digitalisation*, 7.
[23] *See* Masino G., *Industria 4.0 tra passato e futuro*, in Salento A. (ed.), *Industria 4.0: Oltre il determinismo tecnologico*, TAO Digital Library, Bologna, 2018, 23. Among the labour law contributions that have addressed the issue: De Stefano V., *"Negotiating the algorithm": Automation, artificial intelligence and labour protection*, International Labour Office, Employment Policy Department, Working Paper No. 246, Geneva, 2018; Armaroli I., Dagnino E., *A Seat at the Table: Negotiating Data Processing in the Workplace*, in *Comparative Labour Law and Policy Journal*, 2020, 41(1), 173 – 195.

According to the complex scheme designed by the FAD, the circular process embraces four dimensions (or "topics", as the agreement names them): work content and skills; working conditions related to health, safety and wellbeing; terms and conditions of employment linked to time patterns, work-life balance and evaluation mechanisms; work (i.e. interpersonal) relations, like social interactions between workers and between workers and managers, which can have an impact on the performance and the wellbeing of the workers. These dimensions, in turn, crosscut the four specific issues mentioned above: skills, disconnection, AI and surveillance.

This scheme represents a significant advancement in cultural terms, and provides a relevant operational guidance for the actors engaged in the process. In fact, it acknowledges the inherent bonds between different forms of digitalization and the dynamic character of their implementation, as well as the manifold consequences that the introduction of a technological innovation in the organization may entail for the interests of workers.

For instance, fast-speed digital communications may enable new remote work arrangements that can improve work-life balance and the wellbeing of workers, but at the same time can increase the risks related to an enhanced surveillance and pave the way for more intrusive and opaque methods to assess the work performance. Similarly, keeping professional skills at pace with technology is relevant not only to preserve employability, but also to allow workers to govern digitalization and protect themselves from its downsides: for instance, to avoid (or recognize) the danger of a technological discrimination or to exert the right to disconnect.

Against such background, any static and fragmented approach would be short-sighted and would bear a high risk of ineffectiveness. For this reason, the FAD points out that all the dimensions and issues have to be discussed and taken into account in the different stages of the process.

In the same line of thinking, the European Parliament in its recent resolution on a *Framework of ethical aspects of artificial intelligence, robotics and related technologies*[24] highlighted "the need for competence development through training and education for workers and their representatives with regard to AI in the workplace to better understand the implications of AI solutions".

The FAD refers for its implementation to the procedures and practices specific to each Member State, in line with the tradition of the EU regulatory instruments in the field of industrial relations. Consistently, it stipulates that the provisions referring to workers' representatives in the agreement shall recognize the prerogatives of trade union representatives in accordance with national laws and practices. However, this apparent neutrality can't completely hide the circumstance that certain practices and instruments seem better aligned than others to the methodological principles stated in the agreement. This issue will be specifically addressed in Section 4 of this article.

Another reference to national definitions is made as far as the subjective scope of the agreement is concerned. In fact, the FAD covers all workers and employers, in the private and public sectors alike, including the activities using online platform, but only in the framework of an employment relationship as defined nationally.

[24] European Parliament, *Resolution with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies*, (2020/2012(INL)) P9_TA(2020)0275, 20 October 2020.

This provision is at odds with an emerging strand of EU legislation that incorporates in its scope the notion of employee elaborated in the case-law of the CJEU, as one of the elements that must be taken into consideration, together with the national definitions, in the interpretation of legislative texts. The most recent examples are article 1(2) of the Directive on transparent and predictable working conditions in the European Union[25] and article 2 of the Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union.[26]

It is difficult to figure out the reasons why the signatory parties decided not to open the agreement to the (although limited) flexibility embodied in the European concept of employee.[27] The adoption of a more flexible concept of flexibility not only would be capable to attract certain forms of platform workers, but conversely could prevent the risk that jobs performed with an increased degree of autonomy by virtue of new technologies (such as some remote work arrangements) will in the long run undergo a problem of reclassification, which may result in the loss of labour law protections.

3. The specific issues addressed in the agreement.

In the "substantive" part of the FAD the social partners address the four issues raised by digitalization that in their opinion deserve the maximum attention, and indicate the measures that could be considered to tackle them. The opening topic is "Digital skills and securing employment".

The general principles stated in the text are consistent with the narrative recurring in the many EU policy documents that deal with the same issue.[28] Access to training and skills development are presented as a shared interest as well as a mutual responsibility of employers and workers, albeit acknowledging the different roles of the two parties. The agreement recalls "employers' commitment to use digital technology positively, seeking to improve innovation and productivity (…) and for the employment security of the workforce and for better working conditions". At the same time, it mentions "workers' commitment to support the growth and success of the enterprises".[29] The responsibility of the employer is reinforced by affirming his commitment to pursue an "high road" pathway to innovation, i.e. "to introduce technology in a way that benefits at the same time employment, productivity and the work content and improved working conditions".[30]

The detailed coordinates of the strategy on skills development are also familiar with the general discourse on this matter. The fast-changing technological environment requires a continuous and multidirectional process of adaptation in the form of "upskilling" and "reskilling", which the agreement presents as a commitment of both parties. Employability is framed into the context of labour market transitions, so that training strategies should aim

[25] Directive EU 2019/1152.
[26] European Commission, *Proposal for a Directive of the European Parliament and of the Council on Adequate Minimum Wages in the European Union*, COM(2020) 682 final.
[27] *See* Menegatti E., *The Evolving Concept of "worker" in EU law*, in *Italian Labour Law e-Journal*, 2019, 12(1), 71-83.
[28] *See* European Commission, nt. (11).
[29] *Framework Agreement on Digitalisation*, 8.
[30] *Framework Agreement on Digitalisation*, 8.

at fostering the workers' mobility within the company as well as towards the external market.[31] This does not rule out, however, the effort required by the FAD to adopt specific measures to retain workers within the enterprise, such as the redesign of jobs and work organization and tailored training initiatives to accompany the workers to the new positions.

The involvement of the social partners in all the stages of the organizational processes related to skill development is reaffirmed in the agreement. It should take place at all the appropriate levels and encompass every strategic activity, such as the identification and regular assessment of training needs, the competence development initiatives, the promotion of the aptitude to change.

The list of measures envisaged (in a not exhaustive nor binding manner, as it was noted above) to translate the general objectives into concrete actions broadly refers to the instruments (also of a legislative nature) and practices already in force. For instance, the use of arrangements such as training/sectoral funds and learning accounts is encouraged, and the employer's duty to provide paid training during working hours in all the cases he/she requires workers to participate in training activities linked to the digital transformation of the enterprise is recalled, in line with the provision of article 13 of the Transparent and Predictable Working Conditions Directive on Mandatory Training.

Besides recalling already existing provisions and schemes, the agreement fails to indicate precise options and more ambitious perspectives to substantiate and enforce the right (and duty) to training. The impression is that the social partners might have lagged behind the remarkable body of policy documents produced by the EU institutions on this issue, that have set a higher target by devising more detailed and advanced solutions. Nevertheless, given the open character of the measures set out in the agreement, it is possible that those solutions may be serve as an inspiration for the social partners in the further implementation of the agreement. Two examples can be made in this respect.

The first one concerns the portability of individual learning accounts, that the Commission has expressly envisaged in its recent initiative *European Skills Agenda for Sustainable Competitiveness, Social Fairness and Resilience*.[32] This mechanism should make it possible for the worker to withhold his monetary entitlements to training in the transition from job to job (or from job to unemployment). While the Commission has announced a specific initiative on this matter, it seems possible for the social partners to autonomously put in place a similar machinery by contractual means, at least within one single sector.

The second example is about the perspective, devised by the Commission within the initiative for a *Pact for Skills* (part of the broader *European Skills Agenda*), to set up large scale partnerships for the establishment of "strategic industrial ecosystems". Such instrument would put together all the stakeholders, including social partners, in a given economic environment (like specific value chains), and enable the participants to pool resources for projects of common interest like the establishment of inter-company training centres. In this way it should be possible to enlarge the scope and increase the effectiveness of training investments, especially in smaller companies and in less advanced districts and territories. Strategies of this kind may well be accompanied by a mobilization of industrial relations practices at the correspondent level. This would be consistent with the provisions of the

[31] "In enterprises and more broadly between enterprises and sectors": *Framework Agreement on Digitalisation*, 9.
[32] European Commission, nt. (11).

FAD, that expressly call upon the involvement of social partners at the appropriate levels in supporting digital transformation strategies through skill development initiatives.

The second specific issue addressed by the FAD is "Modalities of connecting and disconnecting". The issue is correctly framed into the context of the protection of health and safety of workers, whereby all the players are called to actively participate in securing the protection of the working environment "through a system of defined rights, responsibilities and duties"[33], and in this regard the social partners put a particular focus on the prevention of risks.

The measures proposed by the social partners to reach these goals encompass a mix of cultural and normative indications. The latter are indeed very limited, as they merely refer to the obligation to respect of the existing rules on working time, telework and mobile work and to the principle that appropriate compensation should be provided for any extra time worked. Hence the cultural and the organizational concerns tend to prevail, resulting in several warnings addressed to the management to "create a culture that avoids out of hours contact", design organizational objectives in such a way that their achievement "should not require out of hours connection", and prevent workers from being blamed for not being contactable outside working hours.

The soft approach followed by the FAD seems too weak and ill-equipped to reinforce the position of the workers against the risk of a collapse of the boundaries between working time and personal life that the digital transformation has exacerbated.[34] Again, the comparison with concomitant policy initiatives at the EU level may shed a negative light on the activity of the social partners, but can also point to a possible pathway to enhance the implementation of the agreement.

The reference is to the initiative of the European Parliament for a Directive on the right to disconnect, set to be discussed in the plenary session on 18 January 2021.[35] Two elements are worth mentioning in this regard. First, the definition of the right to disconnect provided by the Directive proposal is much more precise, and seems capable of granting a broader coverage of workers' positions, than the correspondent notion assumed by the FAD. The former defines disconnection as the right "not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working time" (article 2(1)), whereas the latter is especially concerned with the fact that the worker should not be obliged to be contactable outside working hours. Thus, the agreement seems only interested in protecting workers from outside interferences, whereas the Directive proposal is more comprehensive as it covers every "off-duty" work activity, included those performed off-line.

Second, the European Parliament's initiative requires the employer to go beyond the simple cultural effort to set up a "time-friendly" organization. In fact, it stipulates that

[33] *Framework Agreement on Digitalisation*, 10.

[34] On the concept of "time porosity" and its implications for labour law *see*: Genin E., *Proposal for a Theoretical Framework for the Analysis of Time Porosity*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2016, 32(3), 280 – 300; Krause R., *"Always-on": The Collapse of the Work–Life Separation in Recent Developments, Deficits and Counter-Strategies*, in Ales E., Curzi Y., Fabbri T., Rymkevich O., Senatori I., Solinas G. (eds.), *Working in Digital and Smart Organizations. Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, Palgrave Macmillan, Cham, 2018, 223- 248.

[35] European Parliament, Committee on Employment and Social Affairs, *Draft Report with recommendations to the Commission on the Right to Disconnect*, 2019/2181(INL), 28 July 2020.

companies must have in place a system of terms and conditions that shall include *inter alia*: "practical arrangements for switching off digital tools for work purposes, including any work-related monitoring or surveillance tools", that can be derogated only under a rigid and predetermined set of conditions; "the manner in which employers record working time"; "psychosocial risk assessments, with regard to the right to disconnect" (article 4 (1) lett. a, b, c), whereas the employers should inform workers in writing about the applicable arrangements (art. 7).

The third issue is "Artificial Intelligence and guaranteeing the human in control principle". The "human in control" principle, unanimously advocated by labour law scholars when referring to the implications of artificial intelligence on employment[36], echoes the "human approach" that underpins the broader European strategy on the economic and social effects AI, as illustrated in the Commission's *White Paper on Artificial Intelligence – A European approach to excellence and trust*, already mentioned above. The basic idea is that AI systems and solutions should not jeopardize but "augment human involvement and capacities at work"[37], as well as ensure "the control of humans over machines".

The agreement also mirrors the main coordinates of the Commission's strategy for a human-centred AI: trust and risk-based approach.

The *White Paper* acknowledges that AI entails the risk of "opaque decision-making, gender-based or other kinds of discrimination"[38]; a risk that has been extensively investigated by labour lawyers[39], and that could undermine the trust of citizens and workers towards the new technologies. The FAD points out three components of a trustworthy AI relevant to employment relations: it should comply with all applicable laws and regulations, fundamental rights and non-discrimination rules; it should follow agreed ethical standards that ensure adherence to EU fundamental and human rights; it should be robust and sustainable from a technical and societal perspective.

The risk-based approach is the method identified by the Commission to assess the proportionality of regulatory interventions on AI. Starting from the assumption that any regulation should be effective without creating a disproportionate burden, it comes as a result that the higher the risk, especially from the perspective of safety, consumer rights or fundamental rights, the more urgent the need for protection of the affected groups or sectors, the more justified will be the imposed regulation. Against such background, the *White Paper* affirms that "the use of AI applications for recruitment processes as well as in situations impacting workers' rights would always be considered 'high-risk'", given "its significance for individuals and of the EU acquis addressing employment equality".[40]

---

[36] *See* De Stefano V., nt. (23).
[37] *Framework Agreement on Digitalisation*, 10.
[38] European Commission, nt. (10), 1.
[39] *See* Eisenstadt L. F., *Employer or Big Brother? Data Analytics and Incursions into Workers' Personal Lives*, in Addabbo T., Ales E., Curzi Y., Fabbri T., Rymkevich O., Senatori I. (eds.), *Performance Appraisal in Modern Employment Relations. An Interdisciplinary Approach*, Palgrave Macmillan, Cham, 2020, 165 - 190; Kullmann M., *Artificial intelligence and Gender Biases in Recruitment and Selection Processes*, Discussion paper, The EU Mutual Learning Programme in Gender Equality, 12-13 November 2020, https://ec.europa.eu/info/publications/artificial-intelligence-and-gender-biases-recruitment-and-selection-processes-online-seminar-12-13-november-2020_en (last consulted on 12 December 2020).
[40] European Commission, nt. (10), 18.

The FAD translates this general risk-based approach into a number of specific implementing measures that include: a comprehensive risk assessment focused on the improvement of safety and the prevention of harm for human physical integrity, psychological safety, confirmation bias and cognitive fatigue; the transparency and explicability of AI output, with effective oversight; the protection of workers from bias and discrimination.

It has been repeatedly pointed out that the conformity of AI systems to the regulations enacted for management and control purposes can't always be made once and for all, since "certain AI systems evolve and learn from experience, which may require repeated assessments over the life-time of the AI systems in question".[41] This remark is consistent with the "circular process" laid down by the FAD, and grants a further argument in favour of the continuous involvement of social partners in AI-related decisions at the workplace. In support of this standing, the Committee on Employment and Social Affairs of the European Parliament, in its *Opinion on a framework of ethical aspects of artificial intelligence, robotics and related technologies*[42], has recommended that social dialogue should not be bypassed in decisions concerning the implementation of AI, and workers and their representatives should be consulted and receive sufficient information right from the start of the decision-making process.

If the background of the FAD provisions on AI, in terms of principles and procedural guidelines, is well coordinated with the broader policy context, when it comes to the contents of a more normative nature the impression is, once again, that the social partners may have missed an opportunity to address in depth the problems at stake. Two examples may help explain this point.

The first one concerns the measures envisaged for the use of AI in the context of human resource procedures. The reference is to the mechanisms based on data analytics models and algorithms that produce automated decisions, which, as the agreement recalls, may be applied to every employment situation, like recruitment, evaluation, promotion, dismissal and performance analysis. While the FAD recommends that in those cases the worker should always be allowed to request for human intervention and/or contest the decision, it does not take a clear stance on the crucial question whether the right to contest may embody the claim for a reversal of a decision caused by a wrongful application of AI. This places the agreement a few steps behind the straightforward position taken by the abovementioned *Opinion* of the Committee on Employment and Social Affairs of the European Parliament that "workers should be duly informed in writing when AI is used in the course of recruitment procedures and other human resource decisions and how in this case a human review can be requested in order to have an automated decision reversed".[43]

The second example is about the recommendation that the design of AI systems should guarantee privacy and dignity of workers and comply with existing law, including the GDPR. Redundant in itself, as any plain reference to the contractual commitment to abide by the law, this measure also fails to address the loopholes that the GDPR contains, which may result in a limitation of workers' rights in the context of automated decision-making. The

[41] European Commission, nt. (10), 23.
[42] European Parliament, nt. (24).
[43] European Parliament, nt. (24), point 110.

reference is to article 22 of the GDPR, which affirms the right not to be subject to decisions based solely on automated processing when such decisions produce legal effects on the data subject or similarly affect him or her. In fact, an exception to this general rule is provided when the automated decision in necessary in relation to the performance of a contract. Whether this exception shall apply in the context of an employment relationship depends on how the "necessity" requirement is interpreted, and although labour lawyers have convincingly advocated a strict interpretation, implying that the automated decision should be prohibited whenever a less intrusive means to achieve the same goal is available[44], yet the situation is not completely exempt from risks and the same authors have emphasized "the need for complementary employment specific regulation".[45]

The fourth and last issue, "Respect of human dignity and surveillance", is closely linked with the former. Probably this is the reason why it is treated very rapidly, recalling the need of clear and transparent rules on the processing on data aimed at limiting the risk of intrusive monitoring and linking the data collection to concrete and personal purposes. The specific prerogatives of collective players are taken into account by suggesting that workers' representatives should be enabled to address issues related to privacy protection and provided with facilities and digital tools, such as digital notice boards, to fulfil their duties in the digital era (the positioning of the latter provision in this section appears indeed rather extemporaneous).

Most importantly, the FAD emphasizes (although without addressing any specific request to the Member States) the potential of article 88 of the GDPR, that permits to lay down by law or by collective agreements employment-specific rules to enhance the rights and freedoms of workers in the context of data processing.

4. Conclusive remarks: the implementing mechanisms and the role of industrial relations in the digital transformation.

Like the vast majority of the Social Dialogue initiatives of the same kind, operating under a "double degree of autonomy" (in the genesis as well as in the implementation), the FAD is characterized by mild substantive and normative contents. However, if one does not wish to surrender to classifying the initiative as a mere academic or political exercise by social partners, the agreement offers an alternative: emphasizing and taking seriously the procedural approach theorized in the opening pages of the text.

The approach advocated by the FAD, which incorporates the principle of "mainstreaming" of industrial relations in decision-making processes related to digitalization, offers a noteworthy opportunity for social partners at every appropriate level to lift the regulatory floor while implementing the agreement. The open formulation of the measures and options laid down in the text permits this outcome, and the initiatives undertaken at the

[44] *See* Otto M., *"Workforce Analytics" v Fundamental Rights Protection in the EU in the Age of Big Data*, *Comparative Labour Law and Policy Journal*, 2019, 40(3), 389 – 403; Todolì-Signes A., *Algorithms, artificial intelligence and automated decisions concerning workers and the risks of discrimination: the necessary collective governance of data protection*, in *Transfer*, 2019, 25(4), 465 – 481.
[45] Otto M., nt. (44), 403.

different institutional levels of the EU (Commission, Council, Parliament) can provide useful policy examples, which could in turn be integrated by national experiences.

A critical question concerns the identification of the industrial relations practices which can operate most effectively under this dynamic and procedural framework. As it has been noted above, the FAD does not take a clear stance in this regard, as it simply refers to country-specific procedures and tools. Nonetheless, recalling the common binary distinction between collective bargaining and the involvement of employee representatives, the latter seems better aligned with the spirit and the general setting of the agreement.

This conclusion does not come simply as a consequence of the cooperative approach advocated by the parties of the FAD, nor from the circumstance that collective bargaining as a regulatory instrument is seldom and marginally mentioned in the text (for instance as a way to achieve clarity on the use of digital devices and right to disconnect, or to implement specific rules on privacy pursuant to article 88 GDPR). It also leaves unchallenged the sensitive issue of the identification of the actors, since the agreement itself expressly acknowledges that its references to "workers' representatives" do not rule out the prerogatives of trade union representatives as stated in national law and practice.

The main reason why employee involvement seems a more suitable strategy to accompany the digitalization of work is that, as it was noted above, digitalization is a complex organizational process involving recurrent decisions that impact on several aspects of the working conditions in a comprehensive manner. This emphasizes the attitude of involvement schemes to operate as a flexible and dynamic means to control and influence the managerial decision-making process "in real time", and not only by means of a previous set of rules and limits as collective bargaining is typically apt to do.[46]

Against such background, the EU legislative instruments on information and consultation may represent a solid ground for the design of involvement arrangements capable of translating the circular process designed by the FAD into concrete practices.

Firstly, the EU instruments are directly applicable, for the companies that fall into their subjective scope, in the stages of the circular process that correspond to the matters on which employees' representatives have a right to be informed and consulted. In fact, digitalization certainly represents a case of "decisions likely to lead to substantial changes in work organization or in contractual relations" (article 4(2)b, Directive n. 2002/14 establishing a general framework for informing and consulting employees in the European Community)", or "substantial changes concerning organization, introduction of new working methods or production processes" (Annex I, Directive n. 2009/38 on European Works Councils).

Secondly, they can serve as a pattern for the construction of other mechanisms of employee involvement, with a peculiar object, operating in specific stages of the work processes or with regard to specific organizational decisions.[47] In those cases, the principles enshrined in the information and consultation instruments may represent a benchmark to ensure the effectiveness of the mechanisms, with a particular regard for the time and content

[46] The centrality of collective agreements as sources of regulation is this context is advocated by De Stefano V., *'Masters and Servers': Collective Labour Rights and Private Government in the Contemporary World of Work*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2020, 36(4), 425 – 444.

[47] See the proposal elaborated by Todolì-Signes A., nt. (44) for a joint data protection committee, established on the model of the joint health and safety committees regulated by Directive 89/391.

appropriateness and the existence of adequate sanctions in case of breach of the employer's obligations.[48]

On the other hand, the emphasis placed on employee involvement does not necessarily exclude a possible role for collective bargaining. Quite on the contrary, updating the relationship between the two dimensions of collective action, with a view to exploring new synergies and interdependencies, represents a necessary means to deal with the contemporary challenges on the world of work, such as those posed by digitalization.[49] In this regard, the circumstance that information and consultation can lead to contractual relations is expressly foreseen in the European legislation (the reference is to article 4(2)e, Directive n. 2002/14, which demands that consultation shall take place "with a view to reaching an agreement"). This linkage can now be reinforced after the acknowledgement by the Court of Justice that codetermination rights are protected under article 28 of the Charter of Fundamental Rights of the EU as an expression of the right to collective bargaining.[50] But the cooperation between employee involvement and collective bargaining may also operate in the opposite direction, with collective bargaining directly committed to the construction of new involvement machineries.

The question whether the social partners will have the strength and the capacity to engage with the challenges of digitalization remains, however, open. Some authors have maintained that a "smart mix" between legal intervention and industrial relations practices would be the most viable option to combine the flexibility granted by private regulation and the empowerment function played by the law.[51] The signatory parties of the FAD have not openly required a reinforcement of the legal framework to support their action, but they have recalled the role that EU and national governments have to play by setting up the framework conditions for workers and employers to lay down appropriate solutions, in line with a subsidiary approach.

If the bet launched by the social partners with the soft and procedural strategy brought about in the agreement will prove capable of triggering an advancement in working conditions, autonomous social dialogue will score an unexpected point in a period dense of instability and negative expectations.

[48] *See* Lorber P., *Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community*, in Ales E., Bell M., Deinert O., Robin-Olivier S. (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos, Baden-Baden, 2018, 1551 – 1567.

[49] *See* Ales E., *Libertà sindacale vs partecipazione? Assenze, presenze e possibilità nello Statuto dei lavoratori*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2020, (LXX)1, 129 – 147.

[50] CJEU C-699/17, *Allianz Vorsorgekasse AG*, ECLI:EU:C:2019:290.

[51] *See* Potocka-Sionek N., Aloisi A., *'Festina Lente': The ILO and EU Agendas on the Digital Transformation of Work*, in *International Journal of Comparative Labour Law and Industrial Relations*, 37(1), forthcoming. Available at SSRN: https://ssrn.com/abstract=3694754 or http://dx.doi.org/10.2139/ssrn.3694754.

Bibliography

Ales E., *Libertà sindacale vs partecipazione? Assenze, presenze e possibilità nello Statuto dei lavoratori*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2020, (LXX)1, 129;

Armaroli I., Dagnino E., *A Seat at the Table: Negotiating Data Processing in the Workplace*, in *Comparative Labour Law and Policy Journal*, 2020, 41(1), 173;

Council of the European Union, *Shaping Europes Digital Future - Council Conclusions*, Brussels, 9 June 2020, 8098/1/20, 10;

Countouris N., De Stefano V., *New Trade Union Strategies for New Forms of Employment*, ETUC, Brussels, 2019;

De Stefano V., *'Masters and Servers': Collective Labour Rights and Private Government in the Contemporary World of Work*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2020, 36(4), 425;

De Stefano V., *"Negotiating the algorithm": Automation, artificial intelligence and labour protection*, International Labour Office, Employment Policy Department, Working Paper No. 246, Geneva, 2018;

Dorssemont F., Lörcher K., Schmitt M., *On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case*, in *Industrial Law Journal*, 2019, 48(4), 571;

Eisenstadt L. F., *Employer or Big Brother? Data Analytics and Incursions into Workers' Personal Lives*, in Addabbo T., Ales E., Curzi Y., Fabbri T., Rymkevich O., Senatori I. (eds.), *Performance Appraisal in Modern Employment Relations. An Interdisciplinary Approach*, Palgrave Macmillan, Cham, 2020, 165;

European Commission, Communication *European Skills Agenda for Sustainable Competitiveness, Social Fairness and Resilience*, Brussels, 1 July 2020;

European Commission, *White Paper On Artificial Intelligence - A European approach to excellence and trust,* COM(2020) 65 final, Brussels, 19 February 2020;

European Commission, *A Strong Social Europe for Just Transitions*, Brussels, 14 January 2020, COM(2020) 14 final;

European Commission, *A Digital Agenda for Europe*, Brussels, 19 May 2010, COM(2010)245 final;

European Parliament, Committee on Employment and Social Affairs, *Draft Report with recommendations to the Commission on the Right to Disconnect*, 2019/2181(INL), 28 July 2020.

European Parliament, *Resolution with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies*, (2020/2012(INL)) P9_TA(2020)0275, 20 October 2020;

Genin E., *Proposal for a Theoretical Framework for the Analysis of Time Porosity*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2016, 32(3), 280;

Krause R., *"Always-on": The Collapse of the Work–Life Separation in Recent Developments, Deficits and Counter-Strategies*, in Ales E., Curzi Y., Fabbri T., Rymkevich O., Senatori I., Solinas G. (eds.), *Working in Digital and Smart Organizations. Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, Palgrave Macmillan, Cham, 2018, 223;

Kullmann M., *Artificial intelligence and Gender Biases in Recruitment and Selection Processes*, Discussion paper, The EU Mutual Learning Programme in Gender Equality, 12-13

November 2020, https://ec.europa.eu/info/publications/artificial-intelligence-and-gender-biases-recruitment-and-selection-processes-online-seminar-12-13-november-2020_en (last consulted on 12 December 2020);
Lo Faro A., *Art. 152 TFEU*, in Ales E., Bell M., Deinert O., Robin-Olivier S. (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos, Baden-Baden, 2018, 150;
Lorber P., *Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community*, in Ales E., Bell M., Deinert O., Robin-Olivier S. (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos, Baden-Baden, 2018, 1551 – 1567;
Masino G., *Industria 4.0 tra passato e futuro*, in Salento A. (ed.), *Industria 4.0: Oltre il determinismo tecnologico*, TAO Digital Library, Bologna, 2018, 23;
Menegatti E., *The Evolving Concept of "worker" in EU law*, in *Italian Labour Law e-Journal*, 2019, 12(1), 7;
Otto M., *"Workforce Analytics" v Fundamental Rights Protection in the EU in the Age of Big Data*, in *Comparative Labour Law and Policy Journal*, 2019, 40(3), 389;
Potocka-Sionek N., Aloisi A., *'Festina Lente': The ILO and EU Agendas on the Digital Transformation of Work*, in *International Journal of Comparative Labour Law and Industrial Relations*, 37(1), forthcoming. Available at SSRN: https://ssrn.com/abstract=3694754 or http://dx.doi.org/10.2139/ssrn.3694754;
Schieck D., *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to Read Article 139 EC*, in *Industrial Law Journal*, 2005, 34(1), 23;
Senatori I., *Regulating the Employment Relationship in the Organization 4.0: Between Social Justice and Economic Efficiency*, in Perulli A., Treu T. (eds.), *The Future of Work*, Kluwer Law International, Alphen aan den Rijn, forthcoming 2021, 187;
Smisman S., *The European Social Dialogue in the Shadow of Hierarchy*, *in Journal of Public Policy*, 2008, 28(1), 161;
Todolì-Signes A., *Algorithms, artificial intelligence and automated decisions concerning workers and the risks of discrimination: the necessary collective governance of data protection*, in *Transfer*, 2019, 25(4), 465;
Valenduc G, Vendramin P., *Work in the Digital Economy: Sorting the Old from the New*, ETUI Working paper 2016.03, ETUI, Brussels, 2016.