
The European Framework Agreement on Digitalisation: a tough coexistence within the EU mosaic of actions

Leonardo Battista*

1. Preliminary remarks. 2. The autonomous nature of the agreement. 3. Reading the four challenges in terms of disruptiveness. 4. 4. The EFAD and the EU mosaic of action. 4.1. The EFAD and the European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect: an own goal? 4.2. 4.2 The EFAD and the Artificial Intelligence Act: no space for social dialogue? 5. Final remarks.

Abstract

Digital transformation of work is an unstoppable phenomenon, and a “multifaceted topic”. Platform and remote work and data manipulation are only aspects of the whole picture, creating new challenges for public stakeholders. The more the world of work changes, the more industrial relations are stimulated to cope with it. With this aim, European social partners have responded to the impact of Digitalisation on the labour market, with the adoption of the “European framework agreement on Digitalisation” (EFAD). Although the EFAD is fully in line with the European involvement in granting rights to workers involved in the digital transformation of the labour market, many questions are still on the table. There are many concerns about the integration of the EFAD within the mosaic of actions at EU level with regards to the digitalisation and automation at the workplace. A difficult integration that raises doubts about the effective implementation of the EFAD at national level and even about the role and the maneuvering space granted to European Social Partners in this field.

Keywords: European Social Partners; Social Dialogue; Digitalisation; Artificial Intelligence; Right to Disconnect; Skills; Artificial Intelligence Act.

1. Preliminary remarks.

The technological evolution is an unstoppable phenomenon capable of generating irreversible changes on several aspects of people’s life. While new technologies and devices influence our routine and daily behaviors, this digitalisation has an increasing impact in the

* Post-doc researcher at the University of Bologna. This article has been submitted to a double-blind peer review process. This essay has been written in the context of PRIN 2017 EC9CPX «Dis/Connection: Lavoro e Diritti nella Rivoluzione di Internet».

world of work. The development of mobile communications, the possibility of performing work anywhere and anytime and the expansion of the gig economy brought some benefits for employers, workers and jobseekers in terms of job opportunities; being crucial in softening the impact of Covid-19 pandemic.

At the same time, this “digital transition” also comes with risks and challenges for workers, enterprises, and stakeholders. Pitfalls such as the obsolescence of specific jobs, the implications on worker’s dignity and privacy related to the use of technology in the employment relationship, the data manipulation, and the impact on work-life balance for remote workers are some of the worrying facets related to the digitalisation.

The more the world of work changes, the more industrial relations are stimulated to cope with it. The intervention of social partners in this mutable context could be beneficial for workers and employers to positively support this digital transition, enhancing the successful integration of digital technologies and softening its consequences.

With this aim, the European social partners have responded to the challenges deriving from this ongoing transformation of work through the adoption of the “*European Framework agreement on Digitalisation*” (hereinafter referred as EFAD), addressing an issue that have been on their agenda for decades, both on employers and employees’ sides. According to them, the EFAD should become the basis for joint activities to adapt to the fast-paced evolution brought by digitalisation and automatisisation of work.

The EFAD is an autonomous cross-industry agreement concluded under art. 155 of the Treaty on the Functioning of the European Union (TFEU), not stemming from a legislative initiative by the European Commission nor requiring any implementation by the Council. It has the purpose of being an agenda to guide national social partners in the field of digital transformation of work.

Alongside this aim, it has the merit of highlighting two urgent needs. Firstly, the EFAD stated the need to intercept the challenges arose from the digital transformation of work and, secondly, to “lift the regulatory floor” thanks to the involvement of worker’s representatives directly in the phases of design and before the implementation of digital technologies in the work context.

The essay will briefly contextualize the adoption of the EFAD, looking at its legal nature and its guiding principles. Then, the relationship between industrial relations and digitalisation will be analyzed from the challenges’ side, evaluating the issues brought by this digital evolution in the world of work and the measures proposed in the EFAD by the European social partners to intercept this evolution. The analysis will then focus on the integration of the EFAD within the recent mosaic of actions at EU level in the field of digitalisation and automation at the workplace, evaluating the contrasts among the Framework Agreement and the recent initiatives in the field of right to disconnect and Artificial Intelligence, trying to assess whether the EFAD is on the pace of the institutional debate on the digital transition.

2. The autonomous nature of the agreement: context and purposes.

Digitalisation has become one of the most important catchwords in the debate about the evolution and modernization of the world of work. For enterprises and workers this “megatrend”¹ can be both an opportunity and a threat.

From one side, it creates new possibilities in terms of economic advantages for employers related to the innovation in organizational processes and production. The more the job is digital, the more the work can be performed anywhere, granting savings for employers in term of utilities and providing higher degree of autonomy and flexibility for individual workers. From a digitalized labour market can also emerge new jobs opportunities, with innovative tasks or with re-engineered ones. A clear reference is the phenomenon of platform workers, where the traditional activities performed in the past by the “pony-express” is now offered by the rider through an algorithm that even sets the route and the timing for the delivery.

On the other side, new technologies also mean new issues for workers and trade unions. Digital devices can have a pervasive control over the worker, granting access to his position² and to his activity during the entire working time and even beyond. Work-life boundaries are more and more blurred due to the constant availability of the worker at the phone or via e-mail. In fact, it has become harder to disconnect from the job, to avoid that the work could bleed into the employee’s personal time³: a situation that was even exacerbated due to the pandemic. Similarly, the employer has access to a huge amount of data collected by digital devices, such as computers, internal mail providers, electronic badges, wearables⁴ or deriving from the smartphone’s gps.⁵ These data should be manipulated and processed in a transparent way, according to rules and procedures stated by the General Data Protection Regulation (GDPR), avoiding any misuse or discrimination based on them. Moreover, these data should not be used in a manner incompatible with the original purpose or in breach of the dignity and privacy of the worker. The misuse of data becomes quite worrying also in terms of automated decision on hiring procedures. Peculiar is the Amazon’s case, where the company decided to abandon the algorithmic hiring tool built to ensure the application of artificial intelligence to the recruiting procedures due to a discriminatory effect on female recruitment. The recruiting algorithm, fed with 10 years data on Amazon’s recruitment procedures, was basing its discriminatory decision on previous human discriminating actions,

¹ 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*, 1, vol. 37, 2021, 5.

² Aloisi A., Gramano E., *Artificial Intelligence is Watching You at Work: Digital Surveillance, Employee Monitoring, and Regulatory Issues in the EU Context*, in *Comparative Labour Law & Policy Journal*, 2019, 1, 41, 95.

³ Secunda P. M., *The employee right to disconnect*, in *Notre Dame Journal of International & Comparative Law*, 1, vol. 19, 1-39.

⁴ Ingrao A., *Il braccialetto elettronico tra privacy e sicurezza del lavoratore*, in *Diritto delle Relazioni Industriali*, 3, 2019, 895-927.

⁵ Thanks to these wearables’ devices, the employer could even know the speed of the workers in its premises, the name of the people with whom they interact, could track their actions and break during the job. All these data are automatically processed and could pave the way for an undesirable and pervasive monitoring at the workplace. Moreover, the employer could manage their workers and base some decisions on these data, for dismissals, promotions, retentions or for supervising them and evaluate their performances. See, De Stefano V., Taes S., *Algorithmic management and collective bargaining*, in *Etui Foresight Brief*, 2021, 1-16.

where in the IT sector most of the female applications were rejected. Due to this bias, the machine-learning procedure discriminated female applications and proposed to the following hiring step only males. A scenario that is truly worrying if we consider that the phenomenon of algorithmic management, namely the management based on data or on automatized decision, is constantly growing in many aspects of our life, especially with reference to the labour market.

In this scenario, the European Social Partners, after years of slogans and initiatives,⁶ started to discuss about the digitalisation and artificial intelligence issue. They were convinced that the rapid development of artificial intelligence and its impact on workers' life should be governed and anticipated through social partners initiatives, from the European to the national company level, alongside with the legislative intervention.

In this light should be understood the adoption of the European Framework Agreement on Digitalisation (hereinafter referred as EFAD) concluded on the 22 of June 2020 by the European cross-sectoral social partners and applied to the whole of the EU/EEA. It has been concluded by the European Trade Union Confederation (ETUC) on behalf of workers and BusinessEurope, CEEP (now SGI Europe) and SMEunited for employers⁷.

The EFAD is an autonomous cross-industry agreement⁸ concluded under article 155 TFEU⁹ and due to its pure collective nature - without any statutory intervention nor institutional consultation - could be classified as a "Self-Initiated and Self-Implemented Collective Agreement" (Sisica)¹⁰. This classification is supported by the fact that the contents of this autonomous agreement are more procedural and operational rather than normative, so a statutory proclamation was not foregone since the beginning. The operational nature, instead, could be derived from the expected implementation of the EFAD at national level. In the last part of the document, namely "*Implementation and Follow-up*", it is clearly stated that this agreement "*should encourage the adoption of measures that are sustainable and that their effectiveness is valued by the social partners at the appropriate level*". Thus, the purpose of this agreement is guiding national social partners towards this aim rather than setting common rules of general application. The reason for this strategy lays in the shareable evaluation that although the

⁶ ETUC, *The key to fair digitalisation*, available at the following link: <https://www.etuc.org/en/key-fair-digitalisation>

⁷ See Senatori I., *The European Framework Agreement on Digitalisation: a Whiter Shade of Pale*, in *Italian Labour Law e-Journal*, 2, vol. 13, 2021, 159-175; Rota A., *Sull'Accordo Quadro europeo in tema di digitalizzazione del lavoro*, in *Labour & Law Issues*, 2, vol. 6, C.23-C.48; Peruzzi M., *Il dialogo sociale europeo di fronte alle sfide della digitalizzazione*, in *Diritto delle Relazioni Industriali*, 4, 2020, 1213-1219.

⁸ Similarly, to previous European Framework Agreements, such as the ones on Telework (2002), Work-related stress (2004) and Inclusive Labour Market (2010), the EFAD should be implemented at national level according to the domestic normative procedures and/or industrial relations praxis. For an in-depth analysis of soft-law tools within the social dialogue, see Peruzzi M., *L'autonomia nel dialogo sociale europeo*, Il Mulino, Bologna, 2011.

⁹ Lo Faro A., *Art. 154, 155 TFEU*, in Ales E, Bell M., Deinert O., Robin-Oliver S. (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos Verlagsgesellschaft, Baden Baden, 2018, 165-176.

¹⁰ See, Senatori I, nt. (5), 160. The Sisica acronym derives from the Smismans' studies about the different social dialogue's outputs, with or without the institutional intervention. The four possible combinations proposed by Smismans could be classified as follows: Cococa (Commission-initiated and Council-implemented collective agreements), Sicoca (Self-initiated and Council-implemented collective agreements), Cosica (Commission-initiated and Self-implemented collective agreements), Sisica (self-initiated and self-Implemented collective agreements). See Smismans S., *The European Social Dialogue in the Shadow of Hierarchy*, in *Journal of Public Policy*, 28, 2008, 161.

challenges deriving from the digital transformation and the measures proposed in the document are identical for every Country, the process of implementation should be adjusted and adapted to the different industrial relations systems. There are many factors that could affect the success or the failure of measures and procedures, from the different collective bargaining coverage, the divergent propension to innovation and digitalisation among enterprises and within sectors or the theme of national technological infrastructure that could impact on the adoption of appropriate actions. Thus, this “tailoring” strategy, as has been called in the EFAD in reference to the adaptability of technologies at the workplace, is easier to achieve through the “soft methodological guidance”¹¹ without any strict regulation that could hinder its success.

About its scope of application, the EFAD covers all employers and workers in the public and private sectors, including also those performing an activity using online platform and only in presence of an existing employment relationship, as defined nationally. However, this scope of application raises some concerns. Firstly, it seems quite peculiar that in an agreement dedicated to digitalisation and AI there is a limited attention paid to the well-known and debated platform economy. In fact, in the entire document there is only a single reference to platforms. It is true that the EFAD aims to have a transversal impact in the different issues raised by the ongoing digital transformation of work, but this limited attention screeches with the several initiatives supported by ETUC to protect platform workers. Secondly, it is not clear if the concept of “worker” used in this agreement takes into consideration or not the relevant elaboration of the CJEU, because in the EFAD there’s much more interest in defining the “enterprises” concept, namely all the organizations from private to public sector, rather than defining the notion of employee. As said by other authors, this strategy adopted by the European Social Partners seems at odds with the recent EU provisions that make a clear reference to the CJEU’s cases when dealing with the concept of “worker”.¹²

For what concerns the contents of the EFAD, the agreement is intended to achieve a positive integration of digital technologies at the workplace preventing and minimizing the risks for workers and employers. To reach these twofold and interconnected objectives, the European Social Partners prescribed a methodological approach, based on the partnership between workers and enterprises, to assess the effects of digitalisation on the work organization and on its four implicit facets: work content skills, working conditions related to the employment contract and work-life balance, work relations and environmental working conditions with a clear reference to health and safety at the workplace.

Starting from these different facets of the work organization, the EFAD introduces a circular process in which the worker’s representatives could engage the management and, thanks to proper trainings and information, influence the decision-making process related to the digital transition. This first stage of the process concerns a joint study of the issues related to the digitalisation with the aim of increasing the trust regarding its potential. Secondly, there will be a mapping activity of risks driven by the digitalisation alongside with the potential

¹¹ Senatori I, nt. (5), 160.

¹² Senatori I, nt. (5), 166; Menegatti E., *The Evolving Concept of “worker” in EU Law*, in *Italian Labour Law e-Journal*, 2019, 1, vol. 12, 71-83; Battista L., *L’evoluzione del concetto di lavoratore nel diritto dell’Unione Europea*, in *Argomenti di Diritto del Lavoro*, 3, 2021, 624-642.

benefits, and thirdly the adoption of strategies based on the previous evaluations. The last stage is the most impacting one with the adoption of concrete measures and actions, taking into consideration the possibility of a prior steered and controlled test, the timing, the implementation procedures, the resources to finance them and the responsibilities for the possible positive or negative consequences (shared among worker's representatives and management). All of these stages are, obviously, accompanied by a regular monitoring, from both parties, that could grant a possible intervention to modify some adopted measures or, as a follow-up, to test the effectiveness of the actions and improve/remove them.

Alongside with the circular implementation process, the innovative part of the EFAD is the concrete indication of four issues or challenges raised by digitalisation that, according to European Social Partners, deserve to be rapidly intercepted. The four challenges are deeply connected to the evaluation made by the European Social Partners that the digital transformation of work is a “*multifaceted topic*”, with different effects in several facets of the work. The four challenges, that are the nucleus of the EFAD, deal with several topics related to the digital transformation of work, namely “Digital skills and securing employment”, “Modalities of connecting and disconnecting”, “Artificial intelligence (AI) and guaranteeing the human in control principle” and “Respect of human dignity and surveillance”.

3. Reading the four challenges in terms of disruptiveness.

The four challenges highlighted by the signatories have a horizontal reading key that could help in understanding the necessity to manage the digitalisation and the disruptive effect that this ongoing phenomenon can have on different perspective of the world of work. Analysing the issues brought by the digitalisation in term of “disruptiveness” could have the beneficial effect of never undermining or underestimating the risks, trying to introduce industrial relations measures, strategies and actions addressed to convert them into opportunities.

The first challenge is named “*Digital skills and securing employment*” and deals with the disruptive effect of the digitalisation with reference to the ongoing obsolescence of some traditional jobs, processes or skills. It is obvious that the digital conversion of tasks and process within enterprises, even in SMEs, could bring to the disappearance of some tasks and jobs, or could decrease the need for some competencies that in the past were pivotal in the company.

To counteract it, the EFAD shares the same path suggested by EU's initiatives towards a “Just transition”¹³ to Digitalisation and Artificial Intelligence, such as the *White Paper on Artificial Intelligence - A European approach to excellence and trust*.¹⁴ The EFAD strongly promotes the need to invest in re-skilling and up-skilling workers to intercept and anticipate the digital transformation in the world of work and to secure a long-term employment, filling

¹³ Available link: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en

¹⁴ European Commission, *White Paper on Artificial Intelligence - A European approach to excellence and trust*, COM(2020) 65 final.

competence shortages¹⁵. In doing so, the EFAD stresses the commitment and sharing of interests between employers and workers. From the employer' side there should be a commitment to “*use digital technology positively, seeking to improve innovation and productivity, for the long-term health of enterprises, and for the employment security of the workforce and for better working conditions*”; while workers should commit themselves to support the growth and success of enterprises, recognizing the potential role of digital technology, in terms of competitiveness in the market and opportunity to grant longer employment security. However, both commitments are strictly bond to the introduction of new skills (digital, technological or specialised) and new automated processes at the workplace, with the consequent organization of adequate training measures, at every level (national, sectorial and company one).

The adequate training should contribute to upskill and reskill workers, combining technical and sector specific skills alongside with transversal soft-skills or problem-solving capacity, seen both as key elements in approaching to a more automated workplace. A prior evaluation of the workers' existing skills made by the employer with the support of trade unions is relevant to understand the appropriate training schemes and to foster ad hoc investments to address specific lacks in terms of skills.

The EFAD considers the different normative and industrial relations praxis, among Countries and sectors, with reference to the access and arrangement of training and the possible and divergent way of financing it through sectorial/national/company funds. At the same time, the EFAD leaves the possibility for in-house or external training, but it's precise when stresses the arrangement of an appropriate compensation if the trainings take place outside the working time.

All the different measures proposed in the EFAD seems to be fully in line with most of the actions already in force in many European Countries, both at normative and collective level. At the same time, the expected results are shareable. The signatories are truly convinced that retraining and upskilling could be translated into a major adaptation of these workers to new or redesigned jobs within the enterprise. This adaptation has a positive effect in securing employment and allows workers to remain within the enterprise in a new role or modifying his/her tasks, while employers could innovate their enterprises and being competitive. Referring to the circular process at the basis of the EFAD, this adaptation brought by appropriate training measures impacts on the work organization, granting a twofold consequence, seen in the avoidance/reduction of job losses and the improvement of competencies and skills among the workforce.

The second issue refers to the modalities of connecting and disconnecting of workers during their working activity. The possibility of performing work anywhere and anytime obviously created many opportunities for workers; a major flexibility is just part of the benefits carried by the new technologies and digital devices. At the same time, European

¹⁵ A strong focus on skills is one of the principles enshrined in the White Paper on Artificial Intelligence - A European approach to excellence and trust. In fact, “developing the skills necessary to work in AI and upskilling the workforce to become fit for AI-led transformation” will be a priority for European Institutions in the following years. A target that could not be reached without the involvement of social partners as a crucial factor in ensuring a “human centred approach to AI at work”. See, European Commission, *White Paper on Artificial Intelligence - A European approach to excellence and trust*, COM(2020) 65 final, 7-8.

Social Partners are aware of the risks and challenges that derive from an uncontrolled flexibilization of work, that brought to a more and more blurred line between working and personal time.

The phenomenon of “always connected and available” workers is highly disruptive in respect to their health and safety. Employers, through smartphones, e-mail and company devices, can easily reach their employees requiring them to complete assignments, projects and tasks even outside the working time. These behaviors are sometimes “*in the language of compulsion, while other times these messages may casually pose the question of whether the employee is available to complete a task*”¹⁶. In both cases, however, these after-work requests negatively affect the work-life balance, impacting on workers’ health, both physically and mentally. Moreover, if we consider the normative context, the Directive no. 88/2003 about working time has neither an explicit reference to the possibility for employers to contact their workers beyond the working time nor introduce any right of disconnection for them. In this blurred scenario, we observed only a recent and quite problematic legislative initiative by the European Parliament for the introduction of a directive on the right to disconnect¹⁷, but still the Commission has not included any *ad hoc* act on its legislative agenda as will be addressed in the paragraph 4.1.

To decrease the disruptive impact of these modalities of connecting and disconnecting and with the aim of anticipating future legislative interventions, the EFAD signatories highlighted the employers’ duty “*to ensure the safety and health of workers in every aspect related to the work*”, including the respect of working time. This employer’s priority should respect the principle of prevention, with the commitment of the management for the introduction of appropriate measures and actions to limit the “out of hours contact”. Measures that can refer to a revision of work organization and workload, the redistribution of tasks among workers and a regular collaboration between managers and workers’ representative on the work processes. Moreover, the EFAD stresses the need for an appropriate monetary or break compensation for any extra time worked¹⁸, granting the recognition of worker’s decision to dedicate personal time to enterprises’ issues.

However, the topic of disconnection treated in the EFAD can be criticized from many perspectives. Firstly, there is no linkages between the ongoing initiatives at European level, mainly from the Parliament¹⁹, and the EFAD. Moreover, there is no definition of the concept of disconnection. This absence could be an issue for the national implementation and adoption of tailored measures, with reference to the different meaning that this notion can have in several sectors or with reference to the emerging and fluid phenomenon of remote

¹⁶ Secunda P., nt. (2), 3.

¹⁷ European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL), point H.

¹⁸ Peculiar is the Volkswagen case in Germany, where the employer and workers’ representatives signed a company agreement on the use of smartphones and internal app during rest periods to protect the separation between working and private life. See, 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., *Working in digital and smart organizations. Legal, economic and organizational perspectives on the digitalization of labour relations*, Springer, Berlin, 2018, 240.

¹⁹ On the contrary there is a clear reference in the proposal <https://www.etuc.org/en/document/right-disconnect-joint-etucetufs-letter-members-european-parliament>.

work (smart or agile work) where the boundaries between working and personal time are less visible. Secondly, the measures proposed seem to be too general and abstract, asking for a major commitment of the management for the reduction of workloads with respect to workers' representatives. We should recall the fact that not in every EU Countries there is a trade unions' coverage high enough to be relevant and capable of negotiating disconnecting measures. There are Countries with a low level of coverage where instead could be easier to reach agreements at company level rather than at the sectorial one, so a more precise description of actions could have been beneficial for them. Thirdly, while the EFAD is very innovative in highlighting the need for the introduction of procedures aimed at avoiding the blaming culture for those workers refusing to be contacted outside their working time, this principle could deserve a major attention. As briefly anticipated, the employers could "oblige" the worker to perform tasks outside his/her working time, with the acceptance of the latter scared for detrimental actions in case of refusal. Due to that, we observe a minor attention paid by the EFAD, about the possible negative consequences with regard to career advancement. At the same time, there is no reference to the high degree of gender discrimination when the refusal come from a female worker, normally more involved in caring responsibilities; an issue that, on the contrary, is deeply highlighted in the European Parliament resolution of 21 January 2021 with recommendations to the Commission of the right to disconnect.

The third challenge refers to Artificial Intelligence (AI) and the need to guarantee and safeguard the "human in control principle", namely the human choice on how and whether delegating decisions to an automated system. This challenge is the most liquid and futuristic one. As noted by the EFAD, "*most enterprises in Europe are still in the early stages of using new AI-based possibilities to optimize work processes or create new business*". However, due to the possibility of anticipating the disruptive impact of AI on the world of work, the European Social Partners are convinced that it is essential to explore the options/facets/effects of using AI and Machine Learning systems. They do not neglect that in the future the AI will optimize labour processes or create new economic sectors, but at the same time, there is the willingness to set some guidelines and coordinates to drive the introduction of AI.

The collaboration between management and workers' representatives should increase the control of humans over machines, limiting the possible risks carried out by an uncontrolled use of AI at the workplace. This jointly collaboration should consider different potential risks, from the opaque assessment of responsibilities related to automated decisions over workers, such as the case of dismissals linked to an automated performance evaluation, or any other kinds of discrimination, already experienced in Human Resources Management²⁰.

The last challenge faced by the EFAD is strictly connected with the previous one. It concerns the need to guarantee the respect of human dignity, minimizing risks for a non-transparent use of data. The exponential increase of control mechanisms and technological devices capable of collecting data, even in absence of a clear consent by the worker, have a disruptive effect on his/her personal sphere. Workers could distrust the employer if they notice a misuse of data that could impact on their work or some managerial decisions, such

²⁰ Kullmann M., *Discriminating Job Applicants Through Algorithmic Decision-Making*, in SSRN at the following link: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3373533, 2019.

as timesheets or directives, driven by data collected without the workers' consents. The EFAD aims at stressing the need for the introduction of precise and transparent rule for data management, recalling the art. 88 of the General Data Protection Regulation (GDPR) no. 679/2016. This provision gives the possibility for collective agreements to set specific and more stringent rules to assure data protection in the workplace and even outside. The GDPR focuses also on data minimization limiting the risk of intrusive monitoring by the employer; a situation that could deteriorate working conditions and well-being of workers.

In the same vein, the EFAD provides some guidelines or measures to be considered by national social partners and implemented at the appropriate level, such as their control over the purpose for the collection of data that should be concrete, transparent, ethical and non-exceeding. The fourth principle could be seen as the poorest in terms of contents and proposed measures. In fact, the presence of the GDPR with its national implementation already created a normative scheme capable of dealing with the impact of digitalisation in the field of data management. However, another reason lays in the abstractness of the data itself that should be added to the difficulty for workers' representatives to control the use made by the employer; a problem that could be counteracted only with specific and tailored training on data management.

4. The EFAD and the EU mosaic of action.

All the issues proposed by the EFAD are strictly connected with the mosaic of interventions that the European Union launched recently. However, while some proposals included in the EFAD are in clear continuity with EU actions, there are some concerns about the relationship with two recent initiatives at supranational level, namely the *European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect*²¹ and the *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial intelligence and amending certain Union legislative acts* (hereinafter Artificial Intelligence Act).²²

Starting from the conjunction points with the EU actions, it is possible to highlight that the aim of improving digital skills among workers is deeply bond within the framework of actions enshrined in the initiatives towards a "Just Transition" to a greener and digitalized economy. Initiatives like the "*Digital Skills and Jobs Coalition*" or the "*European Skills Agenda for Sustainable Competitiveness, Social Fairness and Resilience*" have already paved the way for the implementation of measures devoted to support reskilling of workers or vocational training programs to intercept new jobs and competencies, with the final aim of reducing obsolescence and securing employment in the long run.

Being specifically dedicated to digitalisation, the EFAD has the merit of highlighting the positive effect driven by the intervention of the national social partners, as support to

²¹ European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)).

²² Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM/2021/206 final).

institutional programs or as main actors, in governing the upskilling and reskilling process towards a more digital labour market. In the same vein, it is possible to recall the “*Pact for Skills*” and the relative *Charter* where the social dialogue was seen as an important contributor for the success of training programs.²³ So even if it not so innovative in terms of measures proposed for skills improvement, the EFAD shares the same path indicated by EU institution for a more skilled and reactive labour market, ready to positively respond to future challenges. Moreover, the possibility to introduce tailored actions at the workplace could be a key for more structured projects, based on real workers’ needs and adapted to the relevant technologies applied in the company. In this way, exploiting social partners guidance at the appropriate level, it should be possible to reach workers that could be negatively affected by digital transition and to intercept specific needs for specific sectors, adapting the upskilling and reskilling directly to the competencies involved.

A similar conjunction point comes from the linkages, expressed in the fourth issues about respect of human dignity and surveillance, between EFAD and the GDPR. As said before, the presence of GDPR could hinder some new actions taken at company level by trade unions and employers, however, relaunching the topic of data management and privacy at the workplace, after four years from the adoption of the Regulation, could be beneficial. In fact, the EFAD stresses the principles proclaimed by the GDPR, such as the minimization of data collection or the transparency and, recalling the art. 88 GDPR, reiterated the possibility to set more stringent rules in this context through collective agreements. Due to that, it is straightforward to recognize a pivotal role for workers’ representatives in setting and adopting national or industrial policies with regards to privacy and data management.

Another convergent point it’s the measure regarding the possibility for trade unions to access to data, addressing issues to their use and requesting information about the different stages of manipulation. A measure that has been introduced and suggested to national social partners after a controversial situation related to the misuse of GDPR, specifically with regards to art. 6 point 1, that ETUC strongly contested in recent years²⁴. As stressed in 2020, the “GDPR laws were put in place to protect people from the power of corporations but now corporations are misusing them to protect themselves from people power”²⁵ and from the intervention of trade unions. As reported by several ETUC affiliates, some companies and even public administrations hindered information and documentation to workers’ representative due to the GDPR and the wrong conception that it was not allowing the sharing of information to trade unions; an action that seems to be in breach of the European legislator’s willingness to grant a transparent access to data. A situation that could be avoided adopting measures at national level as those reported in the bullet points regarding the fourth issue, granting the access for trade unionist and digital tools to “*fulfil their duties in a digital era*”.

For what concerns other issues, such as modalities of disconnection or the Artificial Intelligence, the EFAD has less conjunction points with the recent initiatives at EU level. As reported at the beginning of the paragraph, many concerns regard the relationship of the EFAD with the European Parliament Resolution on the right to disconnect and the Proposal

²³ <https://ec.europa.eu/social/main.jsp?catId=1517&langId=en>

²⁴ <https://www.etuc.org/en/pressrelease/gdpr-being-misused-employers-hinder-trade-unions>

²⁵ *Ibid.*

for an Artificial Intelligence Act. Even if have they have a different legal nature and are referred to two separate topics, both initiatives raise doubts about the EFAD, creating some loopholes in its implementation or in the possibility to achieve some effective results.

4.1. The EFAD and the European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect: an own goal?

Adopted by the European Parliament (EP) at the beginning of 2021 - exactly 6 months after the EFAD - the Resolution regarding recommendations to the Commission on the right to disconnect seems to create more problems in this context than solutions. In fact, looking at the Preamble there is a clear connection between the aims of the EP Resolution and the EFAD, with the latter recalled by the former several times. Both consider the digitalisation and the use of technological devices as a possible threat for workers with reference to the working time regulation. They share the conviction that the “always online and always connected” culture can have a detrimental effect on worker’s fundamental rights and fair working conditions, with an impact on workers’ health and safety and limitation to the work-life balance. As stressed in the Resolution’s Preamble, working beyond working time has a disproportionate impact on workers with caring responsibilities, who tend to be women, even leading to their exclusion from the labour market. Moreover, both acts are aware that the current working time directive 2003/88/CE does not consider the disconnection issue, and, except the rest period rules (quite flexible), there are no provisions limiting any employer’s call on duty beyond working time.

To cope with this phenomenon and recognizing that the “*right to disconnect is a fundamental right which is an inseparable part of the new working patterns in the digital area*”,²⁶ the European Parliament, through the Resolution, recommended the European Commission’s intervention to submit “*a proposal for a Union directive on minimum standards and conditions to ensure that workers are able to exercise effectively their right to disconnect and to regulate the use of existing and new digital tools for work purposes, whilst taking into consideration the European Social Partners Framework Agreement on Digitalisation, which includes arrangements for connecting and disconnecting*”.²⁷ A directive that could be adopted on the basis of point (b) of art. 152 (1) 2 TFEU and in conjunction with art. 153 (1), (a), (b), (c) TFEU, as proposed by the European Parliament.

As expected, there is coherency between the two acts, however, the European Parliament Resolution imposed a three-years stoppage for the European Commission to take any legislative action in the field of disconnection. This three-year delay has been introduced by the European Parliament in the 13th point of the Resolution recalling that “*the Framework Agreement [on Digitalisation] provides for the social partners to take implementation measures within the next three years and that a legislative proposal before the end of that implementation period would disregard the role of social partners laid down in the TFEU*”.²⁸

²⁶ European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL), point H.

²⁷ European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL), point 13.

²⁸ *Ibid.*

This provision seems to be problematic for several legal and political reasons.

Firstly, it has been highly contested by ETUC because this delay from any intervention has no linkages with the art. 155 TFEU, being, instead an “erroneous interpretation of the Treaty provisions linked to social dialogue”²⁹. In fact, according to the 13th point of the Preamble, the European Commission should restrain from proposing any legislation on this issue in early course, leaving the floor to the EFAD for the implementation at national level of measures on the right to disconnect. This amendment, added to the first draft of the Resolution, could be considered exaggerated because, as seen in the previous paragraphs, the EFAD is only a “blueprint for negotiation”³⁰ at national, industry or company level about the possible measures that could be introduced to grant disconnection rights to workers. The EFAD has no normative role neither prescriptive but should be intended only as a guiding tool for national social partners. Thus, proposing a limitation to EC to regulate the right to disconnect at EU level based on the presence of the EFAD is detrimental for workers that are experiencing problems in the field of working time and need prescriptive and binding solutions. Moreover, the idea that the any EC intervention in this field could limit the results of the EFAD and social dialogue is only a false problem because the Framework agreement aimed at improving the understanding of the different players involved of the opportunities and challenges resulting from the digital transformation and relieving its impact over workers; an aim that is coherent with any future legislative action in the field of the right to disconnect or in other issues treated in the EFAD.

Secondly, the 13th point of the Preamble of the EP Resolution is in contrast with a prior European Commission’s Communication on the relationship between the Commission and the European social partners. In the 2004 Communication “*Partnership for change in an enlarged Europe – Enhancing the contribution of European social Dialogue*”, the European Commission fully recognized the negotiating autonomy of the social partners on the topics falling within their competences, however, if the Commission decides that any Framework agreement “*does not succeed in meeting the Community’s objectives, it will consider the possibility of putting forward, if necessary, a proposal for a legislative act*”.³¹ The European Commission may also exercise its right of initiative at any point, even during the implementation period, if there are fundamental rights or important political option at the stake; a situation that suits with the one regarding the right to disconnect.

Thirdly, the European Parliament went beyond its competencies based on art. 225 TFEU requesting a three-year stoppage. According to art. 225 TFEU, the European Parliament can request “*the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties*”, but there is no provision that gives the possibility for requesting a delay from any legislative intervention, even in presence of Framework Agreement. In fact, as stated by Commissioner Schmit during the debate for the adoption of the European Parliament Resolution, the Commission is “*ready to accompany and*

²⁹ ETUC, *Right to disconnect - Joint ETUC/ETUFs Letter to the Members of the European Parliament*, <https://www.etuc.org/en/document/right-disconnect-joint-etucetufs-letter-members-european-parliament>

³⁰ *Ibid.*

³¹ European Commission, *Partnership for change in an enlarged Europe – Enhancing the contribution of European social Dialogue*, COM(2004) 557 final, 10: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0557&from=EN>.

support” social partners in their endeavor of introducing rules on the right of disconnection through collective agreements but, at the same time, it is also ready to activate the legislative procedure provided by art. 225 TFEU;³² so, even before the three-years delay disposed by the Resolution.

Even if the European Parliament Resolution has no binding power neither could hinder the Commission from proposing any legislative procedure in the field of disconnection, it is undoubtable that this act could create some political pressure related to the presence of this three-years delay, that is to detriment of European workers. It also creates a “dangerous precedent” that could “undermine the European Social Partners’ capacity to negotiate and conclude a European autonomous agreement in the future, if the existence and implementation of that autonomous agreement means no legislative action can be taken by the Commission for a period of three years”³³. A situation prompted by the European Parliament Resolution adoption that, due to the several concerns raised, seems more an own goal than a proposal for evaluating the introduction of a right to disconnect at EU level.

4.2 The EFAD and the Artificial Intelligence Act: no space for social dialogue?

The problems of coexistence seen in the previous paragraph between the EFAD and the European Parliament Resolution could be noticed also in the relationship with the Artificial Intelligence Act, namely the Proposal for a Regulation on artificial intelligence.

Released in April 2021, the Proposed Regulation aims at harmonizing rules for the use of Artificial Intelligence systems (AI systems) in the European Union and prohibiting certain AI practices. At the same time, it focuses on the introduction of specific requirements for high-risk AI systems and rules for monitoring and surveillance (art. 1). All those aims apply to several players (providers, users and distributors) and issues related to the use of AI systems, from the controlled use of innovative services based on algorithms, the safeguards of fundamental rights and safety and the counterbalanced mechanisms to manage the risks through monitoring evaluation systems and human supervision over the process, as stated by the combination of art. 22 GDPR and art. 14 of the proposed Regulation.

This pioneering proposal, even tackling the AI from different perspectives, pays attention to the use of Artificial Intelligence and algorithms at work or in work-related contractual relationship, classifying this practice as a high-risk one. The Recital 36 of the Proposed regulation stated that “*AI systems used in employment, workers management and access to self-employment, notably for the recruitment and selection of persons, for making decisions on promotion and termination and for task allocation, monitoring or evaluation of persons in work-related contractual relationships, should also be classified as high-risk, since those systems may appreciably impact future career prospects and livelihoods of these persons*”. This Recital is coherent with the third issue of the EFAD, where the European Social Partners stressed the fact that the deployment of AI systems could introduce risks for workers impacting on their lives. Due to that, both

³² https://www.europarl.europa.eu/doceo/document/CRE-9-2021-01-20-ITM-015_EN.html

³³ ETUC, *Right to disconnect - Joint ETUC/ETUFs Letter to the Members of the European Parliament*, <https://www.etuc.org/en/document/right-disconnect-joint-etucetufs-letter-members-european-parliament>

highlighted the need for a risk assessment to prevent harm related to decisions based on algorithm.

However, the risk assessment disposed by the Proposed Regulation is questionable. In fact, this specific safeguard, that should assess the conformity of AI systems used for “*recruitment or selection of natural persons, notably for advertising vacancies, screening or filtering applications, evaluating candidates in the course of interviews or tests*”³⁴ or “*for making decisions on promotion and termination of work-related contractual relationships, for task allocation and for monitoring and evaluating performance and behavior of persons in such relationships*”³⁵, will only be subject to the self-assessment by the provider. Looking at the different experiences in majority of European Countries, this self-assessment is highly disappointing and worrisome. We observed for decades a specific and stringent set of norms for limiting the introduction of technological systems at the workplace, such as video surveillance ones, with the request for the employer to satisfy specific requirements, to respect workers’ fundamental rights and being subjected to agreements with trade unions or national authorities. In the proposed Regulation, on the contrary, there is no obligation for the provider (the employer) to overcome any evaluation by worker’s representatives, leading to a possible uncontrolled use in case of an unfair behavior or a non-transparent use of collected data. This could be detrimental for workers that will have no safeguards against the use of AI systems at their workplace or during important phases of their working career: recruitment, performance of the working activity and termination of work. Three phases were normally trade unions, at different level, could be beneficial in supporting workers and relieving them from their vulnerable position compared to the employer. The use of AI systems without any external control will not grant “the neutrality required for a sound evaluation of the potential implication of AI systems”³⁶ as stated by ETUC, convinced that only a third-party evaluation would guarantee the respect of workers’ prerogatives, limiting the adverse impact on working and personal life. Thus, this proposed Regulation on AI risks to function more a “as a ‘ceiling’ rather than a ‘floor’ for labour protection”³⁷, relegating the experiences in terms of use of technologies at the workplace and the social partners to a minor role. Moreover, the proposed Regulation and the several Annexes do not mention neither the role of social partners in managing the Artificial intelligence nor the EFAD, that, as seen in the previous paragraphs, dedicated attention to this challenge and proposed measures to positively face it. An absence that could have the effect of minimizing the role of social partners, at every level, in managing the transition towards a more automated world of work. Instead, as stated by ETUC, the involvement of social dialogue, through collective bargaining and participation of trade unions and workers’ representatives, is a “key to providing the necessary support for workers

³⁴ Annex III, point 4 (a) of the the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial intelligence and amending certain Union legislative acts.

³⁵ *Ibid.*, point 4 (b).

³⁶ ETUC, *Commission’s proposal for a regulation on Artificial Intelligence fails to address the workplace dimension*, at the following link: <https://www.etuc.org/en/document/commissions-proposal-regulation-artificial-intelligence-fails-address-workplace-dimension>

³⁷ De Stefano V., *The EU Proposed Regulation on AI: a threat to labour protection*, in *Regulating for Globalization*, 16 April 2021, at the following link: <http://regulatingforglobalization.com/2021/04/16/the-eu-proposed-regulation-on-ai-a-threat-to-labour-protection/>

to better build and be part of the uptake and monitoring of AI used at the workplace”.³⁸ A support that EFAD highlighted in the third challenge on AI, suggesting proper trainings on AI for workers’ representative and the collaboration among the different parties involved a soft and positive introduction of automation at work.

Thus, the absence of any reference to the EFAD leads to the idea that this Framework Agreement is already overcome by the EU debate, limiting the space for its national implementation and suggesting that the role for European social partners in this context is very limited.

5. Final remarks

The path towards the implementation of the European Framework Agreement on Digitalisation is still on the road, even if stained by some legal and political issues. Many national social partners are already involved in actions directly driven by the EFAD or share with it similar objectives, trying to positively respond to digitalisation and automation challenges. At the same time, the EFAD proposed some measures that are coherent with the ongoing debate at EU level, like those regarding upskilling and reskilling of workers, where the collaboration among national authorities, workers’ representatives and employers could lead to positive results.

However, this first year from the adoption showed the difficulty of the EFAD to perfectly fit into two EU initiatives, such as the EP Resolution on the right to disconnect and the proposed Regulation on Artificial Intelligence. In this mosaic, the EFAD has some unmatched edges that could impact on its effective implementation. From one side, the EP Resolution on the right to disconnect is posing more responsibilities on the EFAD asking for an erroneous three-years delay to the European Commission from any legislative action in this field. On the other side, the proposed Regulation on Artificial Intelligence is totally disavowing the role of European Social Partners – and their Framework Agreement – in managing the introduction at the workplace of AI systems.

Both situations, even if different, could be tremendously dangerous for the European Social Partners, minimizing the positive effect and results achievable through the social dialogue at EU level and leading to a possible collapse of negotiation in the future.

Bibliography

Aloisi A., Gramano E., *Artificial Intelligence is Watching You at Work: Digital Surveillance, Employee Monitoring, and Regulatory Issues in the EU Context*, in *Comparative Labour Law & Policy Journal*, 2019, 1, 41, 95.

³⁸ *Ibid.*

- Battista L., *L'evoluzione del concetto di lavoratore nel diritto dell'Unione Europea*, in *Argomenti di Diritto del Lavoro*, 3, 2021, 624-642.
- De Stefano V., Taes S., *Algorithmic management and collective bargaining*, in *Etui Foresight Brief*, 2021, 1-16.
- De Stefano V., *The EU Proposed Regulation on AI: a threat to labour protection*, in *Regulating for Globalization*, <http://regulatingforglobalization.com/2021/04/16/the-eu-proposed-regulation-on-ai-a-threat-to-labour-protection/>
- Ingrao A., *Il bracciale elettronico tra privacy e sicurezza del lavoratore*, in *Diritto delle Relazioni Industriali*, 3, 2019, 895-927.
- 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., *Working in digital and smart organizations. Legal, economic and organizational perspectives on the digitalization of labour relations*, Springer, Berlin, 2018, 240.
- Kullmann M., *Discriminating Job Applicants Through Algorithmic Decision-Making*, in SSRN at the following link: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3373533, 2019.
- Lo Faro A., *Art. 154, 155 TFEU*, in Ales E., Bell M., Deinert O., Robin-Oliver S. (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos Verlagsgesellschaft, Baden Baden, 2018, 165-176.
- Menegatti E., *The Evolving Concept of "worker" in EU law*, in *Italian Labour Law e-Journal*, 2019, 1, vol. 12, 71-83;
- Peruzzi M., *L'autonomia nel dialogo sociale europeo*, Il Mulino, Bologna, 2011.
- 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*, 1, vol. 37, 2021, 5.
- Rota A., *Sull'Accordo Quadro europeo in tema di digitalizzazione del lavoro*, in *Labour & Law Issues*, 2, vol. 6, C.23-C.48; Peruzzi M., *Il dialogo sociale europeo di fronte alle sfide della digitalizzazione*, in *Diritto delle Relazioni Industriali*, 4, 2020, 1213-1219.
- Secunda P. M., *The employee right to disconnect*, in *Notre Dame Journal of International & Comparative Law*, 1, vol. 19, 1-39.
- Senatori I., *The European Framework Agreement on Digitalisation: a Whiter Shade of Pale*, in *Italian Labour Law e-Journal*, 2, vol. 13, 2021, 159-175;
- Smismans S., *The European Social Dialogue in the Shadow of Hierarchy*, in *Journal of Public Policy*, 28, 2008, 161.

Copyright © 2021 Leonardo Battista. This article is released under a Creative Commons Attribution 4.0 International License