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The EU Commission's proposal for a Directive on Platform Work: an overview.

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Abstract

This article discusses the proposal for the EU Directive on Platform Work. While welcoming the proposal advanced by the Commission, it highlights some of its shortcomings and suggests more robust protection both for the draft Chapter on the presumption of employment, which risks being vastly ineffective, and the Chapter on algorithmic management, whose protection needs a full extension to the self-employed, more substantial collective rights for workers, and broadening the scope to the entire EU workforce.

Keyword: Platform work; Algorithmic management; Presumption of employment; Self-employment.

1. Introduction.

In December 2021, the European Commission presented a "package" of measures about platform work in the European Union, which included a proposal for a Directive on Platform Work and a draft for a Communication of the Commission regarding "Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons".[1] An initiative on platform work had been announced since the earliest days of the legislature by Vice-President Vestager and was expressly mentioned in President von der Leyen's "mission letter" to Commissioner Schmit.[2]

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[1] *See* Aloisi A.; Georgiou D., *Two steps forward, one step back: the EU's plans for improving gig working conditions*, in Ada Lovelace Institute Blog, 7 April 2022, available at: https://www.adalovelaceinstitute.org/blog/eu-gig-economy/; Rosin A., *Towards a European Employment Status: The EU Proposal for a Directive on Improving Working Conditions in Platform Work*, in *Industrial Law Journal*, advance articles, published online 30 May 2022.

[2] Espinoza J.,*Vestager says gig economy workers should 'team up' on wages*, in *Financial Times*, 24 October 2019, available at: https://www.ft.com/content/0cafd442-f673-11e9-9ef3-eca8fc8f2d65. The text of the mission letter to Commissioner Schmit is available at: https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-nicolas-schmit_en.pdf.

The "package" presented by the Commission is arguably one of the most important legislative initiatives taken by the European Union in the labour and social fields in recent years. In this short contribution, I discuss some of the most critical elements of the proposal for a Directive, being aware that other articles in this monographic volume will address these elements more specifically and extensively.

2. The "primacy of facts" principle and the presumption of employment status: revise and resubmit.

The first crucial set of provisions of the Directive would address the employment status of platform workers. Chapter II opens by providing that the Member States must put in place procedures to ensure the correct classification of the contractual arrangement between a platform and its workers, "with a view to ascertaining the existence of an employment relationship" between these parties and "ensuring that they enjoy the rights deriving from Union law applicable to workers". To achieve this aim, Article 3 of the Directive also provides that "the determination of the existence of an employment relationship shall be guided primarily by the facts relating to the actual performance of work, taking into account the use of algorithms in the organisation of platform work, irrespective of how the relationship is classified in any contractual arrangement that may have been agreed between the parties involved".

This provision is a restatement of the principle of "primacy of facts", whereby the substance must prevail over form in determining employment status. This idea is hardly novel, as most jurisdictions worldwide follow this principle, whether in light of specific legal provisions or through case law.[3] Moreover, the principle is also a core tenet of the ILO Employment Relationship Recommendation, 2006 (No. 198), expressly recalled in Recital (21) of the proposed Directive. Notably, the Directive on transparent and predictable working conditions in the European Union already referred to this principle in its Recital (8).

Its inclusion in the proposed Directive on platform work, while not surprising, should be welcomed. Firstly, the proposal would expressly establish this principle in an article of the Directive, giving it an explicit legislative sanction instead of confining it in its Recitals. This is all the more critical when addressing a sector like platform work, where the misclassification of contractual arrangements is rampant, and platforms almost invariably dictate terms and conditions of work through boilerplate, and often merely cosmetical, clauses affirming a relationship of self-employment between the parties. Moreover, article 3 explicitly states that in considering the "actual performance of work", adjudicators must consider the use of algorithms in the organisation of platform work. Here, the Directive clearly states that, in the field of platform work, managerial control and supervision that can result in the reclassification of a contractual arrangement into an employment relationship can also occur through "algorithmic management". The Directive, thus, codifies the *acquis*

[3] *See* the discussion at International Labour Office, *Non-Standard Employment around the World. Understanding Challenges, Shaping Prospects*, 2016, 263.

of several courts in Europe, particularly the French and Spanish Supreme Courts, according to which control and subordination can also stem from technological forms of management.[4]

Articles 4 and 5 of the Directive provide a rebuttable presumption of employment between a "digital labour platform that controls […] the performance of work and a person performing platform work through that platform". In turn, "controlling the performance of work" is understood as fulfilling at least two out of these five indicators:

a) effectively determining, or setting upper limits for the level of remuneration;
b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;
d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
e) effectively restricting the possibility to build a client base or to perform work for any third party.

A rebuttable presumption of an employment relationship in a field that, as already mentioned, is extensively afflicted by misclassification is, in principle, a welcome instrument. However, one cannot help but notice that the current formulation of the presumption risk being scarcely useful at best and even counterproductive in some cases.

The indicators in letters b), c), and d), in fact, are arguably – per se – strong indicia or even dispositive elements that could trigger reclassification into employment status in several European countries. For instance, one can hardly think of a more apt definition of the control and subordination that is sufficient to determine employment status than one party "effectively restricting the freedom, including through sanctions, to organise [the other party's] work". Yet, if the Directive were adopted as it is now, this element would be "declassed" to just one of the several indicators that, in addition to another one, could trigger a rebuttable presumption of employment. In other words, platforms could restrict the freedom of workers to organise their work and could still prove that this should not result in a reclassification even if one of the other indicators above is met.

Supervising the performance of work, verifying the quality of the results, and requiring to respect specific binding rules should also already be very strong indicia of the existence of an employment relationship. Proving their existence could arguably be enough to obtain a reclassification in several jurisdictions, as occurred in the last two years in several Member States. In any case, if either of them is met there arguably should be no need to fulfil another indicator to trigger a presumption of employment that can still be rebutted. If these indicators are not significantly revisited, the risk is that some courts will set a very high bar to consider

[4] For a global review of the case law concerning the employment status of platform workers, *see* De Stefano V., Durri I., Stylogiannis C., Wouters D., *Platform work and the employment relationship*, ILO Working Paper No. 27.

each one fulfilled, possibly as high as the one to find "control" or "subordination" based on traditional domestic criteria. This would be an erroneous and overly stringent interpretation, as these indicators are designated as elements that can cumulatively amount to "control" and, therefore, the supervision or the imposition of the binding rules should not be as intense as the ones already sufficient to find control under existing standards. Nonetheless, if the draft Directive is not revised, its practical application could paradoxically make it more difficult for platform workers to challenge their employment status in some European countries.

The indicator at a) for now, seems the one that could more easily be mobilised in court and, contrary to the indicator at e), it would also be more difficult for platform to avoid it by merely including and tweaking sham clauses in their terms and conditions. The indicator at a), however, would not be triggered in most cases of online platform work but also for many offline activities, such as domestic work, where it is more often the client that is allowed by the platform to set a compensation unilaterally. This is all the more problematic because the other indicators also seem harder to meet in court for these activities. Accordingly, one of the most important and positive features of the proposed Directive – its ambition to cover every form of platform work, either online or offline – could thus remain a dead letter in practice.

The proposal, as it stands, appears to be hardly "futureproof" – online platform work will scarcely be affected by the Directive, also leaving the EU labour market unprotected against the possible future waves of sham outsourcing of work activities that can be executed remotely;[5] in this respect, the lack of any specific provision to govern the conflicts of laws potentially arising if a person performing platform work is based in a different country from the platform is also particularly concerning. Moreover, offline platform work beyond the sectors where courts have already reclassified workers as employees, such as delivery and transportation, could also remain largely unaffected by the Directive.

It is thus not surprising that a draft report on the Directive introduced in the European Parliament proposes to change the presumption materially.[6] Under this report, the rebuttable presumption of employment status would operate for all digital labour platforms, defined in article 2 as "any natural or legal person using computer programs and procedures for intermediating, supervising or organising in any way the work performed by individuals, irrespective of whether that work is performed online or in a certain location". The indicators previously included in article 4 would now be modified and only included in a Recital.

The aim of these amendments seems to make the presumption more effective by avoiding its application being frustrated, among other things, by the criticalities that emerged before. While this is arguably a positive development, even if the presumption was thus broadened, its operation could still be materially hampered if the possibility for its rebuttal is not also somehow tightened. Neither the current proposal of the Commission nor the draft report's amendments pose meaningful limits to how the presumption can be rebutted. The

[5] Countouris N., De Stefano V., *Working from a distance: remote or removed?*, in *Social Europe*, 16 June 2022, available at: https://socialeurope.eu/working-from-a-distance-remote-or-removed.

[6] *Draft Report on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work* (COM(2021)0762 – C9-0454/2021 – 2021/0414(COD)), Committee on Employment and Social Affairs, Rapporteur: Elisabetta Gualmini, 3 May 2022.

Commission's proposal would also primarily rely on the national definitions of employment relationships "with consideration to the case law of the Court of Justice". If this was the final formulation of the Directive, in any Member State with a particularly narrow definition of an employment relationship, whether in its legislation or case law, platforms would be able to neutralise any presumption of employment by simply relying on overly stringent national traditional criteria that ignore the peculiarities of platform work. This risk may be mitigated if the amendments proposed in the draft report were adopted since the Court of Justice of the EU would have a broader possibility to interpret Chapter III more purposively and the criteria used by the Court of Justice in determining the existence of an employment relationship are traditionally more generous than many national ones (albeit, undoubtedly, the Court's approach to platform work in its *Yodel* decision left much to be desired)[7]. Even in that case, however, it would seem necessary for the Directive to provide more stringent requirements to rebut the presumption to ensure its effectiveness in all the Member States.

This consideration is crucial since the presumption risks being confined to statutes on the books unless more fine-tuned criteria that make it more difficult to rebut the presumption and actually shift the burden of proving the existence of a genuine self-employment relationship on platforms are adopted. Otherwise, the presumption risks being effective only in those countries where the lawmakers and courts had already adapted the criteria for the determination of the existence of an employment relationship to address the employment status of platform workers – in other words, the presumption included in the Directive would be largely irrelevant.

3. Algorithmic management and platform work: techno-determinism and glimmers of regulation.

Chapter III of the proposed Directive introduces protection in case of algorithmic management. Article 6 mandates to inform platform workers about the existence and the specific scope of "(a) automated monitoring systems which are used to monitor, supervise or evaluate the work performance of platform workers through electronic means" and "(b) automated decision-making systems which are used to take or support decisions that significantly affect those platform workers' working conditions". These decisions include, in particular, those that affect platform workers in their access to work assignments, remuneration, occupational safety and health, working time, promotion and contractual status, "including the restriction, suspension or termination of their account".

Regarding the systems at (b), platform workers must also be informed about the criteria used to make a decision, the "weight" of each criterion as well as "the grounds for decisions to restrict, suspend or terminate the platform worker's account, to refuse the remuneration for work, on the platform worker's contractual status" and "any decision with similar effects". Under Article 8, platform workers will have the right to receive a written explanation

[7] *See* Aloisi A., *'Time Is Running Out'. The Yodel Order and Its Implications for Platform Work in the EU*, in *Italian Labour Law e-Journal*, Issue 2, Vol. 13, 2020.

about how these decisions were reached. They will also have the right to access a competent "contact person" designated by the platform "to discuss and to clarify the facts, circumstances and reasons" leading to a decision. They will also have the right to ask the platform to review a detrimental decision.

Article 6 also bans some of the most abusive forms of data processing, including on "any personal data on the emotional or psychological state" of platform workers, data concerning their health, and private conversations. It also prohibits collecting "any personal data while the platform worker is not offering or performing platform work". While a ban on processing the data just mentioned is a step forward, it is unclear why the collection of those extremely sensitive data is not outright banned – data about emotional and mental states, for instance, can hardly be collected by chance without systems that track them specifically. To prevent abuses, collecting these data should also be prohibited, in addition to their processing.

Article 7 of the Directive would impose an obligation to regularly review automated monitoring and decision-making systems, particularly concerning occupational health and safety risks. Platforms must also not "use automated monitoring and decision-making systems in any manner that puts undue pressure on platform workers or otherwise puts at risk the physical and mental health of platform workers". This is a much welcome notion, as occupational health and safety risks have tragically materialised for platform workers on many occasions in these years. For these risks to be mitigated effectively, however, a broad interpretation of the word "system" is necessary, including the policies operationalised or facilitated by managerial technologies. For instance, piece-rate payments materially pressure workers to disregard safety rules to increase earnings in the food-delivery and logistic sectors. Piece-rate payments of platform workers are a policy that can only function if the technology is used to automatically monitor and track the number of tasks executed during a particular shift; these policies, thus, arguably fall under the prohibition in Article 7.

It is not clear, instead, why this article does not explicitly address the risk of algorithmic discrimination, despite a burgeoning academic literature showing how this is a risk that may well affect, among others, platform workers[8] and the existence of at least one decision adopted by a court in the European Union finding that a platform had discriminated against its workers through the functioning of an algorithmic system.[9]

Article 9 of the Directive introduces information and consultation duties *vis-à-vis* workers' representatives about the introduction of and substantial changes in the use of automated monitoring and decision-making systems. While this article does not go as far as providing for a fully-fledged right to "negotiate the algorithm", it allows collective actors to assess algorithmic systems before they are put into place and offer *ex-ante* inputs to the adoption and modification of these systems. This is a much-needed measure since individual transparency rights that only operate *ex-post* do not adequately allow to prevent the risks

[8] *See*, also for further references, Gramano E., Kullmann M., *Algorithmic discrimination, the role of GPS, and the limited scope of EU non-discrimination law*, in De Stefano V., Durri I., Charalampos S., Wouters M., *A Research Agenda for the Gig-Economy and Society*, Cheltenham and Camberley and Northampton, Massachusetts, forthcoming.

[9] Aloisi A., De Stefano V., *"Frankly, my rider, I don't give a damn"*, in *Rivista il Mulino*, 7 January 2021, available at: https://www.rivistailmulino.it/a/frankly-my-rider-i-don-t-give-a-damn-1.

connected to algorithmic management systems and may also be ineffective unless individual workers receive adequate assistance when dealing with the outcomes of these systems. Nonetheless, there are at least two significant shortcomings concerning algorithmic management and collective rights in the current proposal of the Directive.

The first is the exclusion of the self-employed from the application of article 9. The Directive extends the provisions that foster transparency by providing a right to information, explanation, and to challenge automated decision-making systems to "persons performing platform work who do not have an employment contract or employment relationship" (article 10). While this extension is positive, excluding persons performing platform work outside the framework of employment relationships from the collective aspects of that protection, namely the information and consultation duties vis-à-vis workers' representatives, seems to be entirely insufficient for adequately tackling the challenges of algorithmic management in platform work. Platforms widely use invasive algorithmic management systems regardless of their workers' employment status – mere "individual" transparency rights are not more sufficient to protect the self-employed than they are for platform workers engaged in an employment relationship.

Beyond article 153 of the TFEU, the proposed Directive indicates article 16(2) as its legal basis. This article allows adopting rules "relating to the protection of *individuals* with regard to the processing of personal data". There is no distinction between the self-employed and employees in this article, and, yet, limiting the protection of self-employed platform workers to *ex-post* transparency rights means confining these workers to a patent form of second-rate protection. This limitation is all the more inexplicable as the "package" on platform work presented by the Commission includes, beyond the proposed Directive, some draft guidelines that unequivocally acknowledge that collective bargaining practices are ever more concerning self-employed persons, including platform workers. Moreover, trade unions in Europe are also progressively interested and active in addressing algorithmic management also through collective bargaining.[10] In light of these developments, excluding the self-employed from the protection of article 9 seems to be hardly reasonable.

A final but crucial remark about extending individual transparency protection concerning algorithmic management systems to the self-employed regards its possible interaction with employment status and reclassification claims. It should not be underestimated that some of these management systems can be radically at odds with genuine forms of self-employment. Self-employed work is incompatible with some of the intrusive and detailed monitoring of the work performance enabled by technology. A business's reliance on constant tracking of

[10] *See*, for instance, the presentations at the March 2022 *Collective bargaining and algorithmic management* conference available at: https://www.etui.org/events/collective-bargaining-and-algorithmic-management. Notably, in June 2022, the European social partners expressly referred to challenges that digital monitoring presents to workers' privacy in the context of remote work and affirmed: "monitoring and surveillance tools should only be used where necessary and proportionate and the workers' right to privacy should be ensured. […] Due to the accelerated rate of adoption of workplace technologies which have monitoring and surveillance capabilities, social partners need to create the space for exchanging views on these trends and the relevance this has for social partners and collective bargaining at all appropriate levels across Europe". See https://www.businesseurope.eu/sites/buseur/files/media/reports_and_studies/2022-06-28_european_social_dialogue_programme_22-24_0.pdf

workers' movements, strict monitoring of the work pace, and tech-enabled control of messaging, browsing activity and use of computers contrasts with a worker's self-employed status, especially when automated systems are used to combine information deduced from these features.[11]

Even if these systems complied with Chapter III of the Directive, if they were put in place to monitor self-employed platform workers, they may ground the reclassification of the working relationship into one of employment. It would be opportune to clarify better that the fact that a management system is allowable under Chapter III does not prevent that the use of this system in relation to self-employed platform workers could lead to the reclassification of those persons under Chapter II of the Directive. This seems implicit in the current wording of the "primacy of facts" principle in Article 3, which specifies that, among the facts that relate to the "actual performance of work", the "use of algorithms in the organisation of platform work" must be taken into account. Nonetheless, it may be preferable to expressly provide that some forms of algorithmic management of workers classified as self-employed can lead to reclassification even if compliant with Chapter III.

A second major shortcoming of the current proposal is its "techno-deterministic" approach to algorithmic monitoring and decision-making. In other words, the Directive accepts that these managerial systems and practices should be allowed in principle as if this was a natural consequence of the fact that these systems are available and these practices made possible by recent technological developments. It could be argued, instead, that algorithmic management should not be assumed as a "given". Its introduction should be – at the very least – a matter of negotiation with workers' representatives, sometimes also subject to administrative authorisation. This has been the approach taken in the past by some European national legislation concerning the use of technology, such as cameras, that may allow monitoring work performance.[12] It seems unreasonable that algorithmic management – which relies on technologies that could be much more invasive than those more severely scrutinised in the past – should be held to lower regulatory standards.

4. The proposed Directive, more favourable provisions, and the potentially deregulating effects of the EU "Artificial Intelligence Act.

The techno-deterministic approach of Chapter III could be mitigated by Article 20 of the Directive, which allows the Member States to apply or introduce more favourable regulations for workers. Nonetheless, the risk of a potential clash of these domestic regulations with other EU instruments should not be neglected. In particular, the current proposal for a

[11] A similar issue exists concerning the EU "Artificial Intelligence Act" referred to below. *See* De Stefano V., Wouters M., *AI and digital tools in workplace management and evaluation. An assessment of the EU legal framework*, STUDY Panel for the Future of Science and Technology EPRS | European Parliamentary Research Service, Scientific Foresight Unit (STOA), PE 729.516 – May 2022, 55.

[12] *See*, for instance, Aloisi, A. Gramano E., *Artificial Intelligence Is Watching You at Work: Digital Surveillance, Employee Monitoring, and Regulatory Issues in the EU Context*, in *Comparative Labor Law & Policy Journal*, Vol. 41, 2019, 95.

Regulation on artificial intelligence (the so-called Artificial Intelligence Act)[13] could be a material obstacle to applying or introducing more robust protective standards than the ones allowed by this Regulation (or the ones exactly corresponding to the content of the Directive). The legal basis of the Artificial Intelligence Act, and its entire conceptualisation, go in the direction of liberalising the production and marketing of AI systems in the EU, provided that these systems comply with the standards of the Act. As extensively discussed elsewhere,[14] these standards are utterly inadequate to the algorithmic management systems that are increasingly common in today's world of work since, among other things, they completely ignore the role of the social partners in regulating the introduction of technological tools at work.

Moreover, the liberalisation thrust (and legal basis) underpinning this initiative risks overcoming any domestic regulation, including work-related ones, that provides for higher protection standards. If that was the case, the Artificial Intelligence Act would act as a "ceiling" rather than a "floor" of protection, something that would not be unheard of in the field of EU employment and labour legislation if one thinks, for instance, to how provisions with a "liberalising" legal basis were interpreted by the Court of Justice of the EU in a disruptive way in the "Laval Quartet".

Despite all its shortcomings, the Directive on platform work already includes protective standards that are much more specific and adequate than those set out by the Artificial Intelligence Act. It also expressly allows the application and introduction of more vigorous levels of protection by the Member States. It seems reasonable to argue that both the Directive's and the domestic provisions explicitly sanctioned by article 20 of the Directive should be interpreted as a *lex specialis* to the Artificial Intelligence Act, being the Directive based on a more specific legal basis addressing labour and social matters particularly. Construing those provisions in this way would override the possible disruptive interpretation of the Act within the scope of application of the Directive. A contrary interpretation based on the Artificial Intelligence Act would arguably abrogate article 20 implicitly, something that would seem impossible to justify for instruments that are adopted by the same legislative bodies in the same period.

These latter considerations make all the more urgent to consider the scope of the provisions of algorithmic management in Chapter III of the Directive. In its proposed formulation, the Directive would only cover persons performing platform work, leaving outside the scope of its protection all the workers who are not engaged by platforms. Algorithmic management systems, which pose enormous challenges to national and EU labour protection systems, have long spread beyond platform work.[15] This development, coupled with the Artificial Intelligence Act's potential liberalising effects, represents a significant threat to the working conditions and labour rights of workers in the EU.

[13] 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 {SEC2021) 167 final} - {SWD(2021) 84 final} - {SWD(2021) 85 final}.
[14] De Stefano V., Wouters M., nt. (9).
[15] Aloisi A., De Stefano V., *Your Boss Is an Algorithm. Artificial Intelligence, Platform Work and Labour*, Hart Publishing, Oxford, 2022.

Therefore, it seems all the more urgent to extend the protection of Chapter III (besides strengthening this protection, as argued above) beyond platform work. The draft report mentioned above has presented potential amendments of the EU Parliament that would effectively go in this direction. These amendments would be entirely compatible with the legal basis and the impact assessment of the proposed Directive. Although this is not the place to discuss how potentially hard would be to adopt these amendments at the political level, it is essential to say here, in concluding these remarks, that few legislative measures in the field of EU labour and employment law seem as vital and legally reasonable as affording adequate protection about the introduction and operation of algorithmic management systems to all workers in the EU, regardless of their employment status and sector.

The proposed Directive is a crucial first step towards a sounder human-centric approach to introducing and applying technology at work, particularly compared to the free-rain practices that platforms and tech companies have benefitted from in recent years. Strengthening and extending its protection, nonetheless, is essential to ensure that its objectives are pursued effectively.

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