COLLECTIVE BARGAINING AND THE GIG ECONOMY

A Traditional Tool for New Business Models

EDITED BY JOSÉ MARÍA MIRANDA BOTO
AND ELISABETH BRAMESHUBER

COLLECTIVE BARGAINING AND THE GIG ECONOMY

This open access book investigates the role of collective bargaining in the gig economy.

Despite the variety of situations covered by the term 'gig economy', collective agreements for employees and non-employees are being concluded in various countries, either at company or at branch level. Offline workers such as riders, food deliverers, drivers or providers of cleaning services are slowly gaining access to the series of negotiated rights that, in the past, were only available to employees.

Embedded in the EU legal framework, including the EU Commission's proposal for a Directive on improving working conditions in platform work and its Draft Guidelines on the application of EU competition law, both from December 2021, the chapters analyse recent high-profile decisions including Uber in France's Cour de Cassation, Glovo in the Tribunal Supremo, and Uber in the UK Supreme Court. They evaluate the bargaining agents in different Member States of the EU, to determine whether established actors are participating in the dynamics of the gig economy or if they are being substituted, totally or partially, by new agents. Interesting best practices are drawn from the comparison, also as regards the contents of collective bargaining, raising awareness in those countries that are being left behind in the dynamics of the gig economy.

The book collects the results of the COGENS (VS/2019/0084) research project, funded by the European Union, that gathered scholars and stakeholders from 17 countries. It will be an invaluable resource for scholars, trade unionists, employers' representatives and policy makers.

This book pertains to the results of the project 'COGENS: Collective Bargaining and the Gig Economy – New Perspectives' (VS/2019/0084), financed by the European Union. The opinions reflected in the text are those of the authors and not backed by the European Commission.

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José María Miranda Boto
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The authors dedicate this volume to their dear friend

MARIE-CÉCILE ESCANDE-VARNIOL

As a testimony of many years of fruitful collaboration, building teams and networks that go beyond the borders of Academia

PREFACE

This is a book that closes many months of research, started physically before the Covid-19 pandemic, and closed virtually when its end was, hopefully, closer. The Covid-19 pandemic has brought along a tremendous change in how we work, leading also to an increased demand for platform work. This is displayed by current figures: the size of the digital labour platform economy in the EU has grown almost fivefold from an estimated €3 billion in 2016 to about €14 billion in 2020 (C(2021) 4230 final, 5). According to the recent proposal of the Commission for a Directive on improving working conditions in platform work (COM(2021) 762 final), 'today, over 28 million people in the EU work through digital labour platforms. In 2025, their number is expected to have reached 43 million'.

COGENS was a research project led by the Universidad de Santiago de Compostela, the Wirtschaftsuniversität Wien and Astrées, with a team composed of researchers from 17 countries. It was co-financed by the European Union (VS/2019/0084). Within the framework of the project, its members started to debate the topic of collective bargaining in the gig economy in 2019. The two main axes of the research were subjects (both those who bargain and those who benefit from the bargaining process) and contents. The main activities of the project were two transnational seminars, held in Vienna and Lund, where a rich debate with stakeholders took place and helped the development of the research, culminating in a final conference, held in Santiago de Compostela, with a hybrid formula, in June 2021.

The COGENS project was integrated by the following researchers: Auriane Lamine (Belgium); Jakub Tomšej (Czech Republic); Judith Brockmann (Germany); José María Miranda Boto, Yolanda Maneiro Vázquez, Diana Santiago Iglesias, Guillermo Barrios Baudor and Daniel Pérez del Prado (Spain); Sylvaine Laulom, Marie-Cécile Escande-Varniol, Cécile Nicod and Christophe Teissier (France); Piera Loi (Italy); Tamás Gyulavári and Gábor Kártyás (Hungary); Luca Ratti (Luxembourg); Nicola Gundt (the Netherlands); Franz Marhold and Elisabeth Brameshuber (Austria); Łukasz Pisarczyk (Poland); Teresa Coelho Moreira (Portugal); Felicia Roşioru (Romania); Barbara Kresal (Slovenia); Jenny Julén Votinius (Sweden); Jeremias Adams-Prassl (United Kingdom); and Kübra Doğan Yenisey (Turkey). José María Miranda Boto and Elisabeth Brameshuber were in charge of the academic coordination of the team. Christophe Teissier, from Astrées, helped them in this task.

Within the project, particular focus was put on giving a voice to persons working in the gig economy, their service partners/employers and their respective representatives. This was effected by roundtable sessions in which, for

example, the CEO of the largest food delivery company in Austria, the head of the department for social policy and health in the Austrian Economic Chambers, the Swedish Transport Workers' Union and the Swedish trade organisation for the self-employed participated. Professionals from institutions such as the International Labour Organization (ILO), the European Trade Union Institute for Research (ETUI) and the European Trade Union Federation (ETUC) also actively participated in the seminars by presenting and discussing, with academics and stakeholders, for example, of the Polish Solidarność, the French 'IRES – Sharers and workers network', the Riders' Union Bologna, the Hans Böckler Stiftung, the Spanish Unión General de Trabajadores and Comisiones Obreras, and the Agence Nationale pour l'Amélioration des Conditions de Travail.

The project's goal was to explore whether and if so, collective agreements could provide a means for guaranteeing (some) labour protection for persons working in the gig economy who are not classed as employees in the sense that the whole corpus of labour law applies. Unlike other research on the gig economy, this project thus took for granted that many persons working in the gig economy are not employees. It aimed at shedding some light on their (potential) collective labour rights. This entails, for example, the evaluation of the bargaining agents in different Member States, to check if the established actors are participating in the dynamics of the gig economy or if they are being substituted, totally or partially, by new agents. Interesting best practices can be drawn from the comparisons, raising awareness in those countries that are being left behind in the dynamics of the gig economy. Contents, of course, were studied too, in order to check the suitability of real collective bargaining in the gig economy. A first, theoretical approach revealed that 'digital' contents, specific issues relating to online work, for example, can be identified. Reality shows, though, that collective partners have also started to bargain on 'classical' issues, such as wages or paid holidays.

This book is the final distillation of the COGENS research project, with chapters moving between the poles of regulation *de lege lata* via interpretation of existing legal frameworks, regulation *de lege ferenda* and case analysis. These are exploratory papers, as collective bargaining is not a consolidated institution in the gig economy. Therefore, major parts of this book are dedicated, actually, to the convergence of possible regulations. Yet, part of the research also dealt with actual collective agreements in the gig economy, displayed by further chapters. Finally, theoretical speculation has left the ground to the study of real deals and the panorama is enriched with the verification of the proposed theoretical hypothesis.

The editors would like to express their gratitude to the authors of this book as well as the other members of the COGENS project for their in-depth, comprehensive but at the same time prospective analyses. This systematic examination of theoretical approaches to and actual practices of collective bargaining in this new field of economy can help and encourage academics and legal practitioners, as well as policymakers and other stakeholders to achieve a better understanding of the advantages of regulating labour relations via collective bargaining agreements.

Our especial thanks go to Roberta Bassi from Hart Publishing for her dedication and support in editing this book. Throughout the project, Tania Fernández Saborido helped in managing the logistics, for which we would like to thank her, too. The publication of this book would not have been possible without the administrative support of Jasmin Pieper, Universität Wien, and Lidia Gil Otero, Universidad de Santiago de Compostela.

José María Miranda Boto and Elisabeth Brameshuber
Vienna, October 2021

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A Long Road Towards the Regulation of Platform Work in the EU

LUCA RATTI

I. Introduction

The regulation of work performed through online platforms – often referred to as 'platform work' – constitutes probably the most challenging task for regulators in the current socio-economic landscape. Given the characteristics of platform work, including the fact that platforms are often located in countries different from where the person actually performs her tasks, law-makers proved to be cautious in introducing specific rules applicable exclusively to platform workers. Domestic legal systems, depending on how widespread is platform work and how adaptable is labour regulation, mostly responded through case law to the emerging needs of platform workers, who increasingly suffered from insecure working conditions and the precarity depending therefrom.

National responses have been variably commented and systematised in literature, and prompted the European Union (EU) legislator to multiply the initiatives to regulate. Since February 2021, the EU Commission has explored the possibility to regulate platform work at EU level. Aiming to respect Member States' autonomy and the principles of subsidiarity and proportionality, in December 2021 the Commission tabled a proposal for a directive on platform work.

This chapter provides an overview of existing instruments – including soft law initiatives – and first assesses the recent EU Commission's roadmap towards the enactment of a directive regulating platform work. It starts by recalling the novelty of platform work as the object of legal research, an element to keep in mind while questioning which regulatory response is more desirable (section II). It then analyses the latest judicial developments in the field, which call for an intervention of the legislator – particularly at EU level – to settle at least some of the many regulatory issues raised by the performance of platform work across all Member States (section III). Attention is further given to the two rounds of public consultations launched by the EU Commission which culminated in the elaboration of a directive on platform work on the basis of Article 153(3) of the Treaty

on the Functioning of the European Union (TFEU) (section IV). The proposal came as a consequence of the unwillingness of EU social partners to carry on negotiations on the working conditions of platform workers (section V). The final section (section VI) of this chapter concludes the analysis by assessing the proposed directive against the two main forms of platform work, namely crowdwork and work on-demand via app. It argues that treating different types of work in the same manner would risk over-homogenising the legal framework applicable to platform work.

II. Three Ages of the Study of Platform Work: Time to Regulate?

While delving into the brief history of platform work, one could be surprised to discover its real novelty.

In the *Cambridge Handbook of the Law of the Sharing Economy*, Aurélien Acquier recalls that the giants of the platform economy around the world (including Airbnb, Uber and Lyft) were all founded as of 2008.[1] Not only is the emergence of the sharing economy a very recent phenomenon, but so is the very idea behind the expression 'gig economy', meant at the beginning to serve as a proxy for a wide array of new forms of work provision.[2] Hence, the *infancy* of platform work. Against such novelties, organisational economists and labour lawyers correctly defined platform capitalism as a new form of putting-out,[3] which challenged from the very outset the Coasean boundaries of the firm.[4]

At a later stage came the *adolescence*. Scholars articulated their analysis trying to define platform work as their object of study, albeit in a general and incomplete way. They did so by using some identifiers, which in turn showed the emergence of a proper dichotomy. A commonly accepted taxonomy was eventually proposed in the 2018 Eurofound report on *Work on Demand*, which clearly distinguished between work on-demand via app, on the one hand, and crowdwork on the other.[5]

At last came *adulthood*. Labour courts' case law started to develop a proper set of arguments to classify platform work according to existing legal principles. Common features began to emerge across the many forms of platform work – for

[1] Aurélien Acquier, 'Uberization Meets Organizational Theory: Platform Capitalism and the Rebirth of the Putting-Out System' in Nestor M Davidson, Michèle Finck and John J Infranca (eds), *Cambridge Handbook of the Law of the Sharing Economy* (Cambridge University Press 2019) 13–14.

[2] Valerio De Stefano, 'The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork and Labour Protection in the "Gig-Economy"' (2016) 37 *Comparative Labor Law & Policy Journal* 471.

[3] Matthew Finkin, 'Beclouded Work, Beclouded Workers in Historical Perspective' (2016) 37 *Comparative Labor Law & Policy Journal* 603.

[4] Julia Tomassetti, 'Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology' (2016) 34 *Hofstra Labor & Employment Law Journal* 1.

[5] Eurofound, *Work on Demand: Recurrence, Effects and Challenges* (Publications Office of the European Union 2018).

example, the fact that all of them are platform-based jobs, that they address an indefinite plethora of individuals, that they promote at least in principle the freedom to accept and refuse tasks, etc. Yet, other characteristics remained distinctive of only some forms of platform work.

An overall consideration of both common and distinctive characteristics – which also reflect emerging needs of protection – made clear that case law could not accommodate all the variations typical of platform work in existing legal frameworks and showed that regulation is needed. As revealed by a 2019 European Trade Union Institute (ETUI) study, whereas Member States are intervening to regulate specific aspects of platform work, much more needs to be done to accomplish effective protection for workers.[6]

This pleads in favour of an EU intervention, taking into consideration the range of fields that Articles 151 and 153 TFEU put at the core of EU social policy. Moreover, the regulation at Member State level risks being underproportioned vis-a-vis the amplitude of the phenomenon itself. Regulating a phenomenon such as platform work which is currently in its adulthood means, for the EU, encompassing as many facets of the subject as possible, while granting an efficient response in regulatory terms.

III. Partial Responses from EU Initiatives

Several legal initiatives put in place by the EU in the past years have contributed to establishing few legal principles applicable to the performance of work through online platforms. The legal questions considered in the well-known cases such as *Uber Spain*,[7] *Uber France*[8] and *Yodel Delivery*[9] were left partially unravelled and continued to articulate in parallel with a number of EU law instruments.

The attention of EU institutions to the legal issues stemming from online platforms in the internal market started in 2015 with the Communication on a Digital Single Market Strategy.[10] The Communication aimed at ensuring that transparency, users' data protection, inter-platform movement and prevention of illegal contents were respected.

The Digital Single Market Strategy resulted in two intertwined documents: the Communication on Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe[11] and the Communication on the European Agenda

[6] Isabelle Daugareilh, Christophe Degryse and Philippe Pochet, *The Platform Economy and Social Law: Key Issues in Comparative Perspective* (ETUI 2019).

[7] Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL* [2017] ECLI:EU:C:2017:981.

[8] Case C-320/16 *Uber France* [2018] ECLI:EU:C:2018:221.

[9] Case C-692/19 *B v Yodel Delivery Network Ltd* [2020] ECLI:EU:C:2020:288.

[10] European Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM(2015) 192 final.

[11] Commission, 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' (Communication) COM (2016) 0288 final.

for Collaborative Economy.[12] The latter document urged Member States to 'assess the adequacy of their national employment rules considering the different needs of workers and self-employed people in the digital world as well as the innovative nature of collaborative business models' as well as to 'provide guidance on the applicability of their national employment rules in light of labour patterns in the collaborative economy'.[13] The reaction from the EU Parliament further called for an intervention by the EU Commission to resolve the many uncertainties of the regulation of work performed via online platforms.[14]

The issue was raised during the formulation of the 20 Guiding Principles forming the European Pillar of Social Rights. In its final version, the Pillar contained some relevant principles which explicitly or implicitly address the regulation of platform work.

Principle 4 on 'active support to employment' applies to 'everyone' and provides that everyone has 'the right to timely and tailor-made assistance to improve employment or self-employment prospects'.

Principle 5 on 'secure and adaptable working conditions' provides that 'innovative forms of work that ensure quality working conditions shall be fostered' (letter c) and that 'employment relationships that lead to precarious working conditions shall be prevented (including by prohibiting abuse of atypical contracts)' (letter d).

Principle 12 on 'social protection' refers not only to subordinate employees, but extends it to the self-employed, 'regardless of the type and duration of their employment relationship'.

As importantly highlighted in the subsequent Commission Staff Working Document monitoring the implementation of the Pillar,[15] its goal is to

> support a renewed process of convergence towards better working and living conditions across Europe. It is about delivering new and more effective rights for citizens, addressing emerging social challenges and the changing world of work in light of, in particular, emerging types of employment deriving from new technologies and the digital revolution.[16]

The ability of the Pillar to effectively set up ready-to-use principles informing EU social policy may be questioned on technical grounds.[17] Yet, the 'shadow' of the

[12] Commission, 'A European Agenda for Collaborative Economy' (Communication) COM (2016) 0356 final.

[13] ibid, 13.

[14] European Parliament, 'European Agenda for the Collaborative Economy. European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy' (15 June 2017) P8_TA(2017)0271.

[15] Commission, 'Monitoring the implementation of the European Pillar of Social Rights' (Communication) COM (2018) 130 final.

[16] ibid, 2.

[17] Frank Hendrickx, 'European Labour Law and the Millennium Shift: From Post to Pillar' in Frank Hendrickx and Valerio De Stefano (eds), *Game Changers in Labour Law: Shaping the Future of Work* (Wolters Kluwer 2018).

Pillar went far beyond expectations and covered both legal instruments already in place and new legislative proposals, showing an overall intention to label all social policy-related initiatives with the Pillar's imprint.[18]

The year 2019 saw the enactment of two important legal instruments, which did not aim to encompass the specificities of platform work, but whose propositions may nonetheless help platform workers to have some basic rights granted.

The first was Directive 2019/1152 on transparent and predictable working conditions,[19] which repealed the 'Cinderella Directive' (91/533). It aims to promote transparent and stable employment that guarantees adaptability to the labour market. While substantially confirming the previous Directive's material scope (see especially Article 4), Directive 2019/1152 expands its personal scope to cover 'every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice' (Article 2). As correctly observed, this definition reflects the 'tensions between the Europeanist pursuit of the Commission's proposal and the national will of the Member States, represented in the Council, to maintain control over their labour regulation systems'.[20] A narrow interpretation may result in having platform workers left outside the scope of the Directive, at least given the current state of domestic legislation and of the Court of Justice of the European Union (CJEU) jurisprudence. While the original formulation of the Directive's personal scope explicitly included platform workers,[21] its final version may result in undermining its very ambition.[22]

As argued elsewhere, the definition of worker contained in Article 1(2) of Directive 2019/1152 may include those who work under disguised contractual forms, whose independency is merely notional (Recital (8)).[23] Moreover, the constant use of the *effet utile* principle by the CJEU may result in a broader application of Directive 2019/1152 which takes into account the evolving concept of a

[18] Sacha Garben, 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance' (2019) 21 *Cambridge Yearbook of European Legal Studies* 101, 106.

[19] Council Directive (EU) 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L186.

[20] José María Miranda Boto, 'Much Ado about Anything? The New Directive (EU) 2019/1152 on Transparent and Predictable Working Conditions in the European Union' in Franz Marhold et al (eds), *Arbeits- und Sozialrecht für Europa. Festschrift für Maximilian Fuchs* (Nomos 2020) 157.

[21] Commission, 'Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Directive the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union' (Staff Working Document) SWD (2017) 478 final.

[22] Bartłomiej Bednarowicz, 'Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union' (2019) 48 *Industrial Law Journal* 604, 613.

[23] Luca Ratti, 'Crowdwork and Work On-Demand in the European Legal Framework: Promises and Expectations' in Maria Teresa Carinci and Filip Dorssemont (eds), *Platform Work in Europe. Towards Harmonisation?* (Intersentia 2021) 203.

'worker' under EU law.[24] It remains that both the preambles and some provisions in the body of the Directive (Article 11, Directive 2019/1152, Complementary measures for on-demand contracts) point to the inclusion of casual work arrangements, asking Member States to

> take one or more of the following measures to prevent abusive practices: (a) limitations to the use and duration of on-demand or similar employment contracts; (b) a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period; (c) other equivalent measures that ensure effective prevention of abusive practices.

The second legislative initiative of the late Juncker Commission was Council Recommendation (2019/C 387/01) of 8 November 2019 on access to social protection for workers and the self-employed. Built on the premise that people working on a status different from that of a typical subordinate employee deserved to benefit from proper social protections,[25] the Commission had initially planned to issue a Directive on the basis of Articles 153(1)(c), 151 and 352 TFEU. Its guiding principles should have been: (a) ensuring similar social protection rights for similar work; (b) tying social protection rights to individuals and making them transferable; (c) making social protection rights and related information transparent; and (d) simplifying administrative requirements.[26] The process ended up with a soft law instrument – a Recommendation – the only result achievable after the serious criticism received from the Council. The Recommendation's stipulations now feature rather generic definitions (eg, Article 7(a) on 'type of employment relationships') and make constant reference to domestic legislation (eg, Article 8 mentioning the 'voluntary application to the self-employed'), which eventually risks leaving the most vulnerable work relationships (especially those performed through online platforms) 'trapped' in precarity.[27]

Considering the above, it is easy to conclude that until recently the regulation of platform work remained highly controversial and unsatisfactory. The need to respect the principles of subsidiarity and proportionality (Article 5 TEU) eventually contributed to weaken the position of the EU Commission vis-a-vis its Member States. Furthermore, the state of both the domestic and European case law in the field left unresolved a number of crucial issues, *in primis* that of the

[24] See Commission, *Report Expert Group: Transposition of Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union* (Publications Office of the European Union 2021).

[25] This was initially at the core of the Commission's action. See Commission, *Access to Social Protection for All Forms of Employment: Assessing the Options For a Possible EU Initiative* (Publications Office of the European Union 2018).

[26] Commission, 'Consultation Document of 26.4. 2017. First phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights' COM (2017) 2610 final.

[27] Ane Aranguiz and Bartłomiej Bednarowitz, 'Adapt or Perish: Recent Developments on Social Protection in the EU under a Gig Deal of Pressure' (2018) 9 *European Labour Law Journal* 329, 345.

legal qualification of the different forms of platform work, often dependent on the concrete circumstances of the single case.[28]

The lack of political consensus over a clear legislative intervention further amplified platforms' ability to benefit from judicial uncertainty and often avoid being subject to labour law's protective rules.

IV. A Preliminary Assessment of the Current EU Commission's Roadmap to Regulate Platform Work

The 'bits-and-pieces' approach taken by the EU legislative institutions in the past years was eventually altered once the von der Leyen Commission took office. Initially through political statements, and more concretely with a specific legislative action during its first months of mandate, the current Commission clearly manifested its intention to legislate in the field of platform work.

A. The First-Phase Consultation

In February 2021, the Commission launched a first-phase consultation with the EU social partners on a possible action addressing the challenges related to working conditions in platform work.[29]

The consultation followed the procedure laid down by Article 154 TFEU, pursuant to which social partners are asked to give their opinion on the opportunity to take legislative action in the field. Several important topics were discussed at the first stage, including platform workers' employment status, working conditions and access to social protection. Of specific relevance in the context of the COGENS book project, the first-phase consultation document expressly addressed access to collective representation and bargaining, and the cross-border dimension of platform work. On collective representation, the document made access to collective bargaining conditional on the employment status of people working through platforms, while leaving aside the interaction with EU competition law, targeted by an ad hoc consultation with social partners.[30]

[28] Valerio De Stefano et al, 'Platform Work and the Employment Relationship' (2021) ILO Working Paper.

[29] Commission, 'First Phase Consultation of Social Partners Under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work' (Consultation Document) C(2021) 1127 final.

[30] Commission, 'Collective Bargaining Agreements for Self-Employed – Scope of Application of EU Competition Rules', available at: www.ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12483-Collective-bargaining-agreements-for-self-employed-scope-of-application-EU-competition-rules_en.

In particular, the first-phase consultation document aimed to

> consult the social partners on collective bargaining aspects in platform work that go beyond the competition law dimension. Taking due account of the autonomy of social partners and in line with national practices, such aspects could for example support social partners' coverage of platform work, facilitate contacts between people working through platforms, and promote social dialogue, also to cater to new technological developments and the impact these may have on the world of work.[31]

One of the fields that the same document expressly mentions is algorithmic management and the way collective agreements may regulate it. Building on examples of collective agreements which already include some managerial prerogatives within the list of matters to be negotiated with employees' representatives, collective agreements should be given more space by EU law. This can be done in the form of promotion and recognition of collectively agreed solutions to accommodate the novelties brought about by the massive use of technologies in the management of platform workers, including data protection and AI management.[32]

On the cross-border dimension of platform work, the first-phase consultation document is less straightforward. It simply mentions that the global nature of online platforms that intermediate work 'potentially poses challenges to the application of EU law relating to freedom of movement (of workers and of services), jurisdiction and applicable law (Brussels Ia and Rome I regulations) and social security coordination'.[33] Particularly concerning social security, the mismanagement of social security benefits could impact the sustainability of national public budgets.[34] Therefore, the main challenge remains determining the country where contributions are to be paid.

The first-phase consultation document received attention from the media, politicians, academics and especially from social partners at the European level. BusinessEurope warned the Commission of the risk of adopting a one-size-fits-all approach to govern the many forms of platform work. It contended that Member States are best placed to regulate, and that existing EU law instruments require effective implementation and enforcement.[35] The European Trade Union Confederation (ETUC), on the contrary, reacted positively to the first consultation. While acknowledging that a basic distinction between on-location labour

[31] See (n 29) 20.

[32] Valerio De Stefano, "Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection' (2019) 41 *Comparative Labor Law & Policy Journal* 15.

[33] See (n 29) 16–17.

[34] Here the Consultation Document cites the Report prepared for the European Commission by Grega Strban (coordinator), Dolores Carrascosa Bermejo, Paul Schoukens and Ivana Vukorep, *Social security coordination and non-standard forms of employment and self-employment: Interrelation, challenges and prospects* (2020) (Luxembourg, Publications Office of the European Union).

[35] BusinessEurope, 'Consultation Response to the First phase social partner consultation on possible action addressing the challenges related to working conditions in platform work' (2021), available at: www.businesseurope.eu/sites/buseur/files/media/position_papers/social/2021-04-06_platform_work_-_final_response_1st-phase_consultation_.pdf.

platforms and online labour platforms should remain, it also insisted that the distinction

> cannot imply that workers active in some type of platform company continue to be denied their labour and social rights. It can only help identifying additional challenges and issues that must be tackled over and beyond the minimum level of rights.

The ETUC further argued in favour of introducing a rebuttable presumption of employment status and a reversal of the burden of proof to the employer in cases establishing the employment relationship.[36] The main message coming from the first-phase consultation, however, was that neither side was willing to enter negotiations according to Article 155 TFEU.

B. The Second-Phase Consultation

In June 2021 the Commission launched a second consultation to further question the EU social partners regarding the direction of a possible legislative intervention in the field.[37]

The analysis of the second document elaborates on three main components: (a) challenges; (b) existing regulatory gaps; and (c) policy proposals.

(a) Some regulatory challenges are presented in the document as pivotal for articulating EU rules on platform work.[38]

The first is the lack of clarity on the employment status of platform workers. The Commission provides evidence of the high risk of misclassification, mainly relying on the diversified case law across EU Member States. The starting point of any discussion, however, is that the classification as self-employed is highly unsatisfactory and exacerbates litigation in the field.[39]

A second challenge is identified in algorithmic management. The consultation document highlights that the many stages of an employment relationship are nowadays permeated by algorithms, from recruitment to surveillance, from supervision to termination. This calls for increased transparency and accessible information is of paramount importance, since the lack of information may lead to undermining the very functioning of social dialogue and collective representation.[40]

[36] ETUC, 'ETUC Reply to the First Phase Consultation of Social Partners under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work' (1 April 2021), available at: www.etuc.org/en/document/etuc-reply-first-phase-consultation-social-partners-under-article-154-tfeu-possible-0.

[37] Commission, 'Second-Phase Consultation of Social Partners Under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work' (Consultation Document) C(2021) 4230 final.

[38] ibid, 5–13.

[39] Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32 *Australian Journal of Labour Law* 4.

[40] Valerio De Stefano and Simon Taes, 'Algorithmic Management and Collective Bargaining' (2021) 10 *Foresight Brief*, available at: www.etui.org/sites/default/files/2021-05/Algorithmic%20management%20and%20collective%20bargaining-web-2021.pdf.

The third challenge highlighted in the consultation document deals with the cross-border nature typical of platform work. This point proves to be the most controversial. On the one hand, it implies a clear classification of the status of platform workers functional also to the collection of social security contributions and, on the other, replicates the practical impossibility to capture the performance of online work as if it was carried out in a given workplace.

(b) As for regulatory gaps,[41] the Commission correctly mentions that a number of existing legal instruments already cover workers. Yet, only some of them include the self-employed in their personal scope (eg, anti-discrimination directives). As the previous analysis has shown (above section III), EU rules already in force (including soft law such as the Recommendation on social protection for all forms of employment) are unable to meet the emerging needs of platform workers and would require the adaptation of an extensive circumstantial interpretation.

(c) The most promising part of the second-phase consultation document consists of the policy proposals that the Commission put on the table,[42] aimed at stimulating social partners' discussion and finally get into more complex negotiations.

A first concrete proposal is to address misclassification in employment status. This can be done by introducing a rebuttable presumption of an employment relationship between the person performing work and the platform, by merely shifting the burden of proof (*rectius*, allowing claimants to provide prima facie evidence of their status), or introducing an administrative procedure which may certify the exact qualification of the relationship.

A second proposal aims to address the main issues stemming from the massive use of algorithmic management. It includes improving information, guaranteeing 'timely and justified human oversight' over the performance, ensuring 'appropriate channels for redress', reinforcing the involvement of social partners in their information and consultation rights, promoting ratings portability, and excluding automatic termination or equivalent practices via algorithms.

A third proposal is meant to tackle the cross-border nature of platform work, and suggests considering 'either a register of, or transparency obligations for, platforms', as well as to identify people performing through platforms in order to ensure the portability of their social security rights.

Finally, the consultation document recognises the importance of collective actors in ensuring compliance with the rules and supports the collective representation of people performing via platforms. This may also include the removal of legal obstacles to collective bargaining for platform workers from an EU competition law perspective.[43]

[41] See Commission Consultation Document, 'Second-Phase Consultation' (n 37) 13–15.

[42] ibid, 19–25.

[43] On which see extensively Ioannis Lianos, Nicola Countouris and Valerio De Stefano, 'Re-thinking the competition law/labour law interaction: Promoting a fairer labour market' (2019) 10 *European Labour Law Journal* 291. See also BusinessEurope, 'EC public consultation on collective bargaining agreements for self-employed – scope of application EU competition rules' (20 May 2021),

In September 2021, the chances that an agreement on platform work would be concluded at EU level appeared to be very small. The ETUC issued a reasoned opinion responding to the second-phase consultation, where it conveyed some clear messages.[44] First, platform workers should not be considered as a special category of workers, thus the idea of introducing third-way classifications should be rejected. Second, while platforms may take different forms 'there is nothing structurally novel about "work through platforms" (in its many manifestations) that would prevent existing general labour law principles and in relevant cases collective agreements to regulate this social phenomenon'.[45] Third, a rebuttable presumption of employment relationship should be introduced, with the reversal of the burden of proof, as well as the protection of new rights for platform workers relating to algorithmic management and safety at work. The ETUC highlighted the importance for the EU to 'encourage Member States and social partners to stimulate social dialogue in platform work and to support capacity building in this context', which 'is yet one more argument in favour of the liability of platform companies as employers'. Only by recognising platforms as employers would workers' representatives be entitled to and effectively engaged in collective actions, including negotiating collective agreements.[46]

The political momentum to take action in the field of platform work was further stressed in a Resolution adopted by the European Parliament, emphasising the importance to guarantee that people working for digital labour platforms have the same level of social protection as standard comparable workers.[47]

C. The Proposal for a Directive on the Working Conditions of Platform Workers

Eventually, on 9 December 2021, the Commission tabled a Proposal for a Directive on improving working conditions in platform work.[48]

According to its explanatory memorandum,[49] the proposed directive is based on three main objectives: (1) to ensure that people working through platforms

available at: www.businesseurope.eu/sites/buseur/files/media/position_papers/social/2021-05-21_self-employed_collective_bargaining_-_reply_to_consultation.pdf.

[44] ETUC, 'ETUC reply to the Second phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work' (10 September 2021), available at: www.etuc.org/en/document/etuc-reply-second-phase-consultation-social-partners-under-article-154-tfeu-possible.

[45] ibid.

[46] ibid.

[47] European Parliament, 'European Parliament Resolution of 16 September 2021 on fair working conditions, rights and social protection for platform workers – new forms of employment linked to digital development (2019/2186(INI))' (16 September 2021) P9_TA(2021)0385.

[48] COM(2021) 762 final.

[49] Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work (COM(2021) 762 final).

have – or can obtain – the correct employment status in light of their actual relationship with the digital labour platform and gain access to the applicable labour and social protection rights; (2) to ensure fairness, transparency and accountability in algorithmic management in the platform work context; and (3) to enhance transparency, traceability and awareness of developments in platform work and improve enforcement of the applicable rules for all people working through platforms, including those operating across borders.

As mentioned in the Directive's Impact assessment, 'as a result of actions to address the risk of misclassification, between 1.72 million and 4.1 million people are expected to be reclassified as workers (circa 2.35 million on-location and 1.75 million online considering the higher estimation figures)'.[50] The Directive's Recitals stress the importance of digital labour platforms 'in matching the demand for the service with the supply of labour by an individual who has a contractual relationship with the digital labour platform and who is available to perform a specific task, and can include other activities such as processing payments'.[51]

Article 1(1) defines a 'digital labour platform' as

> any natural or legal person providing a commercial service which meets all of the following requirements:
>
> (a) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application;
> (b) it is provided at the request of a recipient of the service;
> (c) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location.

An innovative aspect of the Directive concerns its personal scope of application, which includes not only 'platform workers' who have an employment contract or relationship, but also 'persons performing platform work', meaning a broader set of individuals, including genuine self-employed. While the distinction is determined by the criteria and procedures laid down in Articles 3, 4 and 5 of the Directive, a substantial floor of rights is recognised for all individuals performing platform work.

Of the articulated text – comprised of 54 Recitals and 24 Articles – we will here focus on the Directive's ability to address the complexity of platform work. Considering its main forms, namely crowdwork (online) and work on-demand via app (on-site), three main aspects deserve attention.

First, Article 4(1) introduces a legal presumption whenever a digital labour platform 'controls, within the meaning of paragraph 2, the performance of work'. Controlling the performance of work is meant by:

> (a) effectively determining, or setting upper limits for the level of remuneration;

[50] Commission staff working document accompanying the Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work (SWD(2021) 396).
[51] ibid, Recital 18.

(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.

When two of the listed situations occur, the relationship between the digital labour platform and the individual is presumed to be an employment relationship. Such a presumption is not absolute, since Article 5 entitles any of the parties to rebut it in legal or administrative proceedings and places the burden of proof on digital labour platforms (Article 5(2)).

The presumption builds on existing experiences at national level and reflects the need to introduce more legal certainty, which would also facilitate enforcement by judicial and administrative authorities.[52] By favouring the qualification of platform workers as employees, the legal presumption further supports trade unions in their collective representation and bargaining, exempting the relevant collective agreements from competition law rules.

The approach taken by the proposed directive reflects an idea of a legal presumption as a bureaucratic process run by the authorities entitled to qualify employment relationships. The list of criteria provided by Article 4(2) departs from existing presumptions based on general legal concepts (such as carrying out an activity 'on behalf and within the scope of the organisation and management of another': Article 8(1) of the Spanish Estatuto de los Trabajadores)[53] or on the non-recurrence of certain situations (such as the presumption of self-employment provided by Article L. 8222-1 of the French Code du Travail),[54] or on the mere passing of time (such as the Dutch presumption as per Article 7:610a of the Civil Code).[55] As argued by Kullmann,[56] it remains to be seen how strict the CJEU's scrutiny of the limits of EU internal market freedoms deriving from the legal presumption of platform work will be, given the loose criteria established in the case of *Commission v France*.[57]

[52] Miriam Kullmann, '"Platformisation" of Work: An EU Perspective on Introducing a Legal Presumption' [2021] *European Labour Law Journal*.

[53] Manuel Carlos Palomenque López and Manuel Alvarez de la Rosa, *Derecho del Trabajo* (Editorial Universitaria Ramón Areces 2021) 549.

[54] Gilles Auzero, Dirk Baugard and Emmanuel Dockès, *Droit du travail* (Dalloz 2022) 277.

[55] Guus Heerma van Voss, 'The Concept of "Employee": The Position in the Netherlands' in Bernd Waas and Guus Heerma van Voss (eds), *Restatement of Labour Law in Europe. Vol I. The Concept of Employee* (Hart Publishing 2017) 499, 500.

[56] See (n 52).

[57] Case C-255/04 *Commission v France* [2006] ECLI:EU:C:2006:401.

A second nucleus of provisions which unquestionably innovates the EU legal landscape concerns Chapter III on algorithmic management. Of particular interest are Article 6, which introduces information duties including platform workers, their representatives and labour authorities as addressees; Article 7, which obliges platforms to regularly monitor the effects of automated decisions on the safety and health of platform workers; and Article 8, which requires platforms to provide an explanation and, if necessary, a timely review, of any decision affecting platform worker's working conditions, without prejudice to existing protections against dismissals (Article 8(4)).

A third important aspect, where the proposed directive is however less incisive in formulating a coherent set of rules, concerns the provisions on collective bargaining and collective representation of the interests of platform workers. The issue emerges here and there in the text (for instance, in Articles 6(4), 9(1), 9(3), 12(1) and 12(3)), and more directly in Article 14, which grants the 'representatives of persons performing platform work' having a 'legitimate interest' the right to 'engage in any judicial or administrative procedure to enforce any of the rights or obligations arising from this Directive'.

The above-mentioned aspects of the proposed directive show that the objective is to enable a large number of persons performing platform work to qualify as workers, as far as work on-demand via app is concerned. It seems less evident where the work activities are carried out entirely online and the labour platform's control is less intrusive – at least in theory – of the individuals' freedom to autonomously organise their work. In the same way, many of the rights recognised for the representatives of persons performing platform work may be less effective when it comes to crowdwork tasks. More adherent to the crowdwork model is the Directive's clear commitment to regulating algorithmic management, including human review of significant decisions, which may apply indifferently to online and on-location work performances.

D. The Commission's Guidelines on Collective Bargaining for Solo Self-Employed Persons

Concomitantly with the proposed directive on the working conditions of platform workers, the EU Commission initiated a consultation procedure on a draft Communication containing 'Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons'.[58]

[58] Commission, Approval of the content of a draft for a Communication from the Commission 'Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons' (2021), available at: ec.europa.eu/commission/presscorner/detail/en/ip_21_6620.

While such guidelines are not intended to become an integral part of the directive on platform work, they will surely serve as a useful complement to its provisions.

What is here of interest (more details in Brameshuber, chapter fourteen in this volume) is that the consultation guidelines apply to any form of collective negotiation concerning solo self-employed persons in matters such as 'remuneration, working time and working patterns, holidays, leave', etc.[59] The regulatory strategy expressed by the guidelines implies their binding nature only with regard to the EU Commission, in its role to ensure compliance with Article 101 TFEU. Whenever solo self-employed persons are considered to be 'in a situation comparable to that of workers, their collective agreements should be considered to fall outside the scope of Article 101 TFEU regardless of whether they would fulfil the criteria for being false self-employed persons'.[60]

The Commission proposes considering as being in a 'comparable situation' three types of individuals: (a) economically dependent solo self-employed persons, meaning those who earn at least 50 per cent of their annual work-related income from a single counterparty;[61] (b) solo self-employed persons working 'side-by-side' with workers, even if they do not qualify as workers under the applicable domestic rules; and (c) solo self-employed persons working through digital labour platforms.

It is in particular this last category which demonstrates the importance of also including in the exemption from Article 101 TFEU persons performing via platforms as defined by the above-mentioned Directive. Irrespective of their classification as 'platform workers', such persons may nonetheless benefit from having their working conditions defined by collective agreements without any interference from the same EU Commission.

V. The Collective Self-Regulation of Platform Work: EU Social Partners Lagging Behind

Labour law historians taught us that the main achievements in the early stages of the second Industrial Revolution were intrinsically a consequence of the collective (re)action aimed at demands for more legal protections and to get basic labour rights recognised.

In the (convoluted) journey – expertly described by Antoine Jacobs[62] – which brought the collective self-regulation of work from 'repression' to 'toleration' and finally to 'recognition', a crucial role was played by the virtuous combination

[59] ibid, para 16.
[60] ibid, para 21.
[61] ibid, para 25.
[62] Antoine Jacobs, 'Collective Self-Regulation' in Bob Hepple (ed), *The Making of Labour Law in Europe: A Comparative Study Of Nine Countries Up To 1945* (Hart Publishing 1986) 196.

between concrete actions by social partners and ambitious legal reforms.[63] Reforms were made possible by the introduction of legal instruments aimed at supporting and nurturing the system of collective self-regulation of work. Particularly important was constitutional coverage, as that provided by the Weimar Constitution, and the creation of legal institutions and instruments to make collective self-regulation possible and enforceable.[64]

What we can now see on platform work is that social partners at national and even local level are taking the initiative, by imaging alternative forms of cooperation or even by organising industrial action and signing collective agreements.[65] Both are done in a regulatory vacuum and have placed excessive responsibilities on the social partners themselves, as well as on the judiciary. Lacking specific rules to adequately respond to platform workers' needs, labour courts at all levels have adapted existing rules.[66] The results of judicial scrutiny are all but consistent and point to the need for the legislator to take into account the most pressing regulatory issues, some of which have already been considered by the EU Commission's initiative.

In contrast, dissimilar momentum is recorded amongst social partners at EU level. Albeit invited by the Commission in its two-stage consultation process, social partners did not demonstrate the willingness to negotiate on the rights of platform workers.

On the one side of the spectrum, employers reiterated that any regulation would undermine competitiveness. Therefore, a spontaneous development of social dialogue at national level would suffice.[67] On the other side, trade unions made clear that, while being 'always ready to enter into dialogue with employers on how to improve working conditions', mere voluntary instruments (eg, codes of conduct, charters or labels that have already been introduced in some Member States) would simply delay legislative action and must therefore be repudiated. The ETUC, for instance, insisted that an EU Directive would be the only way to achieve in a reasonable time the protections needed by platform workers.[68]

[63] Jacobs (ibid 232) included in 'repression' the prosecution of trade unions and particularly of industrial action, happening in almost all legal systems from late medieval times until the end of the nineteenth century. 'Toleration' meant the affirmation of a certain liberty to conclude collective agreements and even to manifest and strike, in a scenario of abstention of state powers in the field, thus resulting in an immunity rather than a state's support. Finally, 'recognition' identified the positive actions by public authorities and/or amongst social partners.

[64] Antoine Jacobs, 'Collective Labour Relations' in Bob Hepple and Bruno Veneziani (eds), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945–2004* (Hart Publishing 2009) 203.

[65] See Judith Brockmann, ch 7 in this volume.

[66] See extensively, Jeremias Adams-Prassl, Sylvaine Laulom and Yolanda Maneiro Vázquez, ch 5 in this volume.

[67] BusinessEurope, 'Consultation Response to the First phase social partner consultation' (n 35).

[68] 'ETUC, reply to the Second phase consultation' (n 44).

In assessing this hesitation, some attention should be drawn to the (increasingly) controversial understanding of collective autonomy in the EU legal framework. The recent case of *EPSU v Commission*,[69] clearly demonstrates that even when an agreement is found amongst social partners at EU level, the Commission retains a wide margin of discretion not only to run formal checks (such as that on the representativity of signatory parties pursuant to *UEAPME v Council*),[70] but to decide whether the merit of the agreement is in line with the EU's aims and priorities. According to the CJEU:

> Article 155(2) TFEU confers on that institution a specific power which, although it can be exercised only following a joint request by management and labour, is, once such a request has been made, similar to the general power of initiative laid down in Article 17(2) TEU for the adoption of legislative acts, since the existence of a Commission proposal is a precondition for the adoption of a decision by the Council under that provision. That specific power falls within the scope of the role assigned to the Commission in Article 17(1) TEU, which consists in the present context in determining, in the light of the general interest of the European Union, whether it is appropriate to submit a proposal to the Council on the basis of an agreement between management and labour, for the purpose of its implementation at EU level.[71]

Another element to consider is the strict approach taken by EU and domestic competition authorities vis-a-vis some collective agreements. One of the most innovative – the Danish Hilfr-3F collective agreement concluded in April 2018 – introduced a number of entitlements for workers performing cleaning services via the platform, including their status, hourly rates and some paid holiday and pension rights.[72] Soon after, the Danish Competition Authority targeted the agreement asking for the removal of the provisions regarding hourly rates, seen as 'price floors' contrary to internal competition amongst undertakings. This step made the platform remove the remuneration schemes from the agreement.[73] The matter was of concern to trade unions, which saw it as a 'severe setback on the spread of collective bargaining with platform companies'.[74]

VI. Conclusion: *sectari rivulos*?

A conclusive point remains unaddressed by the Commission's legislative initiative and seems underestimated also at doctrinal level: should online platforms, and

[69] Case C-928/19 *EPSU v Commission* [2021] ECLI:EU:C:2021:656.
[70] Case T-135/96 *UEAPME v Council* [1998] ECLI:EU:T:1998:128.
[71] *EPSU* (n 69) para 47.
[72] Anna Ilsøe, 'The Hilfr Agreement – Negotiating the Platform Economy in Denmark' (2020) FAOS Research Paper 176.
[73] Danish Competition and Consumer Authority, 'Commitment Decision on the Use of a Minimum Hourly Fee' (26 August 2020), available at: www.en.kfst.dk/nyheder/kfst/english/decisions/20200826-commitment-decision-on-the-use-of-a-minimum-hourly-fee-hilfr/.
[74] 'ETUC Reply to the First Phase Consultation' (n 36).

platform work accordingly, be distinguished according to the nature of the work performed? As a consequence, should the rules on work on-demand be separated from those on crowdwork and other online work arrangements?

It is argued elsewhere that fundamental differences exist, which is an element to be considered while regulating.[75] Comparative studies have underlined the irreconcilable dissimilarity (at least) between the two main forms of platform work,[76] while economic considerations may bring further elements of complexity, such as distinctions based on the level of skills required to perform the tasks via the online platform.[77]

According to the same consultation documents accompanying the Commission's initiative, 'on-location labour platform' refers to a digital labour platform which only or mostly intermediates services performed in the physical world, for example, ride-hailing, food delivery, household tasks (cleaning, plumbing, caring), while 'online labour platform' refers to a digital labour platform which only or mostly intermediates services performed in the online world, for example, AI training, image tagging, design projects, translations and editing work, software development.[78]

It is understandable that the position taken by trade unions at EU level is that any regulation on platform work should encompass all forms thereof, the heterogeneity argument not fitting with trade unions' requests.[79] Yet, we may nonetheless consider the risks relating to an underestimation of the persistent differences between the various business models of platform work.

Assessing the state of litigation in the field, we can observe that the vast majority of cases decided on platform workers deal in fact with workers on-demand who are mostly riders and drivers.[80] Very few cases deal with crowdworkers,[81] an element

[75] Luca Ratti, 'Online Platforms and Crowdwork in Europe: A Two-step Approach to Expanding Agency Work Provisions?' (2017) 38 *Comparative Labor Law & Policy Journal* 477.

[76] Harald Hauben, Marta Kahancová and Anna Manoudi, *European Centre of Expertise in the field of labour law, employment and labour market policies: Thematic Review 2021 on Platform Work* (Publications Office of the European Union 2021) 6; Harald Hauben, Karolien Lenaerts and Willem Waeyaert, 'The Platform Economy and Precarious Work; Publication for The Committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies' (2020), available at: www.europarl.europa.eu/RegData/etudes/STUD/2020/652734/IPOL_STU(2020)652734_EN.pdf; Maria Cesira Urzí Brancati, Annarosa Pesole and Enrique Fernández-Macias, *New Evidence on Plat-Form Workers in Europe: Results from the Second COLLEEM Survey* (Publications Office of the European Union 2020).

[77] Zachary Kilhoffer et al, *Study to Gather Evidence on the Working Conditions of Platform Workers* (Publications Office of the European Union 2019), available at: www.ceps.eu/wp-content/uploads/2020/03/KE-01-20-054-EN-N.pdf.

[78] ibid.

[79] 'ETUC reply to the Second phase consultation' (n 44).

[80] Christina Hießl, 'Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions' *Comparative Labor Law & Policy Journal* (forthcoming)

[81] For an interesting case where the worker performed both on-location and online tasks, see the decision by the German Supreme Court: BAG 1.12.2020, 9 AZR 102/20, ECLI:DE:BAG:2020:011220.U.9AZR102.20.0, available at: www.rechtsprechung-im-internet.de/jportal/portal/t/19ke/page/bsjrsprod.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumbe

which may derive from their inability to get access to justice, probably hindered by the cross-border character and the overseas location of most crowdwork platforms and/or from the micro-nature of crowdwork tasks that generate lower revenues and consequently less remunerative litigation.

The main characteristics of the job performed by crowdworkers, on the one hand, and workers on-demand on the other, relate to different features such as the virtual or rather non-virtual nature of work, the global or rather local execution of it, the different methods of adjudication, the bid-based or rather defined rate of payment, the complexity of tasks and control over the performance, and the general or rather specialised nature of online platforms themselves.

The history of labour law and industrial relations may serve as a good basis for further reflection on this dichotomy. While the very first 'indications of labour law are found some time after the process of industrialisation had begun', regulatory changes were prompted by the activism of workers' organisations throughout the nineteenth century.[82] 'Workers' at that time meant especially 'labourers', ie, manual workers. The importance of labourers well before the emergence of a new class of working people made it possible for collective agreements and social laws to start protecting health and safety, and providing minimum standards, such as minimum remuneration rates and maximum working hours.[83] Later on, in the history of labour law emerged the need to specifically regulate employees' work, and there came the distinction between blue-collar and white-collar workers, a distinction finally repealed in recent times in some European countries.[84] Albeit increasingly blurred, the boundaries between the two categories of workers are still reflected in some pieces of legislation (eg, occupational health and safety) as well as collective bargaining agreements.

It would be entirely fictitious to simply transpose that distinction in the field of platform work. Furthermore, one may tend to stick to the Latin adage *melius est petere fontes quam sectari rivulos*, and then resisting the temptation to dissect too much reality, for the sake of clarity and consistency of any legal intervention in the field.

Nonetheless, some elements of reflection may lead to conclude that the dichotomy between work on-demand via app (on-location) and crowdwork (online) should be carefully considered while assessing the current Proposal for a Directive on platform work. The Directive's provisions, in fact, leave unresolved some regulatory conundrums arising from the ubiquitous character of crowdwork, including its typical cross-border nature.

r=1&numberofresults=10908&fromdoctodoc=yes&doc.id=KARE600061600&doc.part=L&doc.price=0.0&doc.hl=1#focuspoint.

[82] Bob Hepple, 'Introduction' in Bob Hepple (ed), *The Making of Labour Law in Europe* (Hart Publishing, 1986) 14, 22.

[83] Jaques Le Goff, *Du silence à la parole: Une histoire du droit du travail des années 1830 à nos jours* (PUR 2019) 117.

[84] In some countries the 'statut unique' was introduced very recently (2009 in Luxembourg; 2014 in Belgium), while in other countries it was already achieved in the 20th century (eg, Italy).

First, on the status of platform workers, the EU Commission's proposal introduces a rebuttable presumption of subordination (chapter II) and internal procedures aimed at increasing information and transparency (chapter III). The criteria listed to guide labour inspectorates and judges' qualification of work performed through platforms are hardly referrable to crowdworkers. Amongst such criteria (Article 4), for instance, crowdwork platforms typically do not require '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' (letter (b)), and neither do they effectively restrict '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' (letter (d)) nor typically restrict 'the possibility to build a client base or to perform work for any third party' (letter (e)). Given the very functioning of the presumption introduced by Article 4, it seems therefore that most crowdworkers will find it hard to see their status assimilated to an employment relationship, thus failing to enjoy the rights recognised for workers by EU and national legislation.

A second aspect deserves attention. The cross-border nature of online work activities is not explicitly addressed by the proposed directive. The common practice by most crowdwork platforms, to include in the 'terms of service' specific clauses for the choice of applicable law and jurisdiction, may well be overturned by the application of Article 8, Rome I Regulation. Its concrete functioning, however, is entirely dependent on the ability to identify the place where the work was 'habitually carried out'. From a platform worker's perspective, determining the habitual place of work is still controversial.[85] Considering that oftentimes platform work (particularly crowdwork) is merely a secondary source of income and involves a shorter working time than the main worker's occupation,[86] the identification of the habitual place of work is virtually impossible. But even from an online platform perspective, the idea of applying to each and every crowdworker a distinct set of legal rules depending not on the type of work, but rather on exogenous factors such as the worker's place of residence, makes clear that any all-purpose solution would encounter critical implementation issues.

Against this background, scholars have elaborated on possible strategies to overcome the extraterritoriality of crowdwork. One proposal argues mirroring existing regulations on specific types of work performed in mobile contexts, such as road transport or at sea. This sectorial option would have the advantage of being backed not only by international laws and treaties, but by a dedicated set

[85] The case law of the CJEU demonstrates that some highly mobile workers pose serious issues to its identification. See Eva van Ooij, 'Highly mobile workers challenging Regulation 883/ 2004: Pushing borders or opening Pandora's box?' (2020) 27 *Maastricht Journal of European and Comparative Law* 573, 581–83.

[86] See *European Centre of Expertise* (n 76).

of principles provided by the ILO Maritime Labour Convention 2006.[87] Another scholarly proposal refers to the current General Data Protection Regulation (GDPR) to argue for a number of indicators which may trigger the application of EU law.[88] While in a GDPR context, such indicators refer to offering multiple languages, offering payment in euros, using domain names of Member States, or offering local testimonials, in a platform work context we may think of criteria able to reveal the EU-based nature of the work performed (eg, the fact the final recipient is based in an EU Member State) in order to trigger the application of EU rules.

Policy questions relating to the global nature of crowdwork evidently do not have cut-and-dried answers. Nonetheless, the fact that the proposed directive seems to apply to the prototype of a 'rider' or 'driver' carrying out their activity through a 'digital labour platform' as defined by Article 2(1) remains controversial. The same rules and procedures laid down for 'persons performing platform work' (Article 2(1)(3)) perfectly cover work performed 'in a certain location' (Article 2(1)(c)) but are less adaptable to work performed 'online'. The position of crowdworkers vis-a-vis digital platforms remains therefore partly unaddressed by the proposed directive, which risks leaving behind large groups of persons and thus fails to achieve the very declared objective to reclassify 1.5 million online workers.

Underestimating the many differences between the forms of platform work – as the proposed text of the directive seems to be doing – not only misses the opportunity to tailor EU rules, but ignores the embryonic forms of collective representation and collective bargaining that in the two fields of work on-demand via app (on-location) and crowdwork (online) already exist.

[87] Miriam A Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 *Comparative Labor Law & Policy Journal* 577, 584, 596; Miriam A Cherry and Winifred R Poster, 'Crowdwork, Corporate Social Responsibility, and Fair Labor Practices' in F Xavier Olleros and Majlinda Zhegu (eds), *Research Handbook on Digital Transformations* (Edward Elgar Publishing 2016) 307.

[88] Miriam A Cherry, 'A Global System of Work, A Global System of Regulation? Crowdwork and Conflicts of Law' (2019) 44 *Tulane Law Review* 48, 50.