

to establish the existence of a relationship of subordination between that person and his putative employer.⁶⁶

Concentrating its interpretation on those factual elements, in *Yodel* the CJEU seems to underestimate the strategic behaviour of most platforms vis-à-vis their workers, which perpetuates the typical gig economy business model wherein an indefinite plethora of individuals are – on paper – free to determine their schedule and even nominate substitutes, but de facto result in performing work similar to subordinate workers.⁶⁷ The many issues which the CJEU was not able or entitled to resolve in the *Yodel* decision are still undetermined and deserve increased attention from the national and/or European legislator. In the following section, certain pieces of EU law will be considered.

4. ROLE AND AMBITION OF EU LEGISLATIVE INITIATIVES

The way in which the EU legislator approached the societal disruptions deriving from the advent of the platform economy is wide in its reach and multi-layered in its sources, but still appears to be disorganised and sectoral. The first explicit move undertaken by the EU Commission to intervene in the field dates back to 2015, when the *Digital Single Market Strategy* came out.⁶⁸ Based on the premise that the state of the market was fragmented and incomplete, the commission pushed for the creation of ‘the right conditions for a level playing field’ that may allow business to operate more transparently in the market. In doing so, the commission pleaded for an overall assessment to cover: (a) transparency in search results; (b) platforms’ usage of data; (c) relations between platforms and suppliers; (d) inter-platform movement; and (e) illegal content. The aims of the *Digital Single Market Strategy* were limited per definition, and did not include the legal status of platform workers, nor any social measure that platforms may adopt in order to at least make their use more transparent.

In 2016 the EU Commission published two distinct documents, conceived to orient EU legislative bodies in the direction of future

⁶⁶ Ibid., para. 45.

⁶⁷ R. BUENDIA, ‘The Court of Justice of the European Union’s Order on B v Yodel Delivery Network’, [2020] *Comparative Labor Law & Policy Journal* – Dispatch No. 24 – United Kingdom.

⁶⁸ EU Commission, *A Digital Single Market Strategy for Europe*, Brussels, 6.5.2015 COM(2015) 192 final.

intervention. The first was the aforementioned *Communication on the European agenda for collaborative economy*.⁶⁹ While focusing on employment law-related concerns, the commission came up with a general recommendation to Member States, focused on a double, conflicting aim: on the one hand, people should be supported to make full use of their potential, stimulated in their participation in the labour market and contribute to boost competitiveness; and on the other hand, fair working conditions and adequate and sustainable social protection must be ensured. To this end, Member States have been urged 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; [and] provide guidance on the applicability of their national employment rules in light of labour patterns in the collaborative economy.⁷⁰

A second document – the *Communication Online Platforms and the Digital Single Market Opportunities and Challenges for Europe* – addressed more specifically the role of online platforms.⁷¹ The drivers to shape a new regulatory landscape were, firstly, the de-regulation of existing telecommunication services ‘as part of its 2016 proposal for revising telecommunication rules’;⁷² secondly, the need to ensure content-wise social responsibility from platforms (i.e. protecting minors, banning hate speech and incitement to hatred, ensuring copyrights, etc.); and thirdly, the protection of consumers and business, in the form of a revision of the Unfair Commercial Practices Directive⁷³ and of a proposal for a regulation on fairness and transparency for business users of platforms.⁷⁴

⁶⁹ EU COMMISSION, *Communication on the European agenda for collaborative economy*, June 2016 (COM(2016) 356 final).

⁷⁰ Ibid., at 13.

⁷¹ EU COMMISSION, *Communication Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, Brussels, COM(2016) 288/2.

⁷² A. SAVIN, ‘Regulating internet platforms in the EU – The emergence of the “Level playing field”’ [2018] 34 *Computer Law & Security Review* 1219, where also references to the recast rules deriving from the Directive 2018/1972 establishing the European Electronic Communications Code, adopted in December 2018.

⁷³ For this purpose, the commission produced a specific document: see *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, COM(2016) 320 final.

⁷⁴ Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final.

In May 2017, based on a report by its Committee on the Internal Market and Consumer Protection, the European Parliament adopted a resolution that called for an intervention by the EU Commission directed to fix the legal uncertainty concerning work performed via digital platforms.⁷⁵ But still, a more robust intervention was needed, since political uncertainty and strategic resistance by some Member States hindered a fully-fledged centralised intervention by the EU.

Meanwhile, on the ‘social side’ of Europe, the commission had proclaimed in November 2017 the European Pillar of Social Rights. Its solemn proclamation may be seen as a clear indication of the EU Commission’s political will to enhance social rights and further streamline the social *acquis*. This patchwork of institutional initiatives toward the introduction of a more coherent set of rules for platforms, consumers and workers led to a number of tangible results, whose value and efficacy must be here considered.

4.1. REGULATION 2019/1150: ANYTHING OTHER THAN TRANSPARENCY RULES?

The increasing awareness among the EU legislative institutions further stimulated the commission to insist on the enactment of some legal instruments before the end of its mandate (November 2019). In this context, the adoption of Regulation 2019/1150 on fairness and transparency for business users of platforms⁷⁶ constituted a crucial step to ensure not only a more transparent service to European consumers, but also a better ‘working’ environment for platform workers. The regulation was adopted in June 2019 and applies as from 12 July 2020. Social issues are not explicitly addressed by Regulation 2019/1150, which is instead focused on the role of ‘business user’,⁷⁷ ‘online intermediation services’,⁷⁸

⁷⁵ European Parliament, ‘European agenda for the collaborative economy’, 2017/2003(INI).

⁷⁶ Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019, on promoting fairness and transparency for business users of online intermediation services.

⁷⁷ Defined as ‘any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession’ (Article 2(1), Reg. 2019/1150).

⁷⁸ Defined as ‘services which meet all of the following requirements: (a) they constitute information society services within the meaning of point (b) of Article 1(1) of

‘provider of online intermediation services’⁷⁹ and on the protection of consumers.⁸⁰ Additionally, work performed via platforms is not mentioned in the indicative list of online intermediation services covered by the regulation.⁸¹ This has correspondence in the legal basis chosen for the adoption of the regulation, undoubtedly identifiable in Article 114 and Article 26 TFEU.⁸² However, labour law issues as such are not excluded from the scope of application of the regulation, which therefore allows, under specific circumstances and to a certain extent, its provisions to find application, particularly when the service provision by an individual may qualify as, or resemble to, the performance of work.

The global nature of platforms has been thoroughly addressed by the Regulation, which provides that its norms

should apply to providers of those services regardless of whether they are established in a Member State or outside the Union, provided that two cumulative conditions are met. Firstly, the business users or corporate website users should be established in the Union. Secondly, the business users or corporate website users should, through the provision of those services, offer their goods or services to consumers located in the Union at least for part of the transaction.⁸³

The regulation provides some general standards that platforms may guarantee, concerning transparency and fairness of their terms and conditions,⁸⁴ the conditions for the restriction in the use of platforms or

Directive (EU) 2015/1535 of the European Parliament and of the Council (12); (b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; (c) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers’ (Article 2(2), Reg. 2019/1150).

⁷⁹ Defined as ‘any natural or legal person which provides, or which offers to provide, online intermediation services to business users’ (Article 2(3), Reg. 2019/1150).

⁸⁰ Defined, on the basis of an established case law of the CJEU, as ‘any natural person who is acting for purposes which are outside this person’s trade, business, craft or profession’ (Article 2(4), Reg. 2019/1150).

⁸¹ Recital (11), Reg. 2019/1150.

⁸² Article 1(1), Reg. 2019/1150 provides that ‘the purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities’.

⁸³ Recital (9), Reg. 2019/1150.

⁸⁴ Article 3, Reg. 2019/1150.

the suspension and termination of the relevant services thereof,⁸⁵ and the reputation that business users may get from consumers or clients.⁸⁶

What is crucial in order to enucleate the legal position of platform workers is the definition of ‘business user’. While referring to the two elements of a) acting in a commercial or professional capacity and b) offering goods or services related to its trade, business, craft or profession, such a definition seems to include what workers on-demand via app and crowdworkers are typically asked to do when performing their contracts with the platforms. Therefore, the definition of ‘business user’ may encompass the provision of services by any individual operating through an online platform and fulfilling the tasks assigned thereby.

Applying to work on-demand platforms and to crowdwork platforms the provisions on fairness, suspension and termination and ratings may ultimately be beneficial to the individuals involved. Changes in contractual terms, for instance, may be subject to notification and give business users the chance to unilaterally terminate the contract before the expiry of any notice period. Moreover, any restriction or suspension of the provision of online services to a given business user may be documented in writings and justified ‘with a statement of reasons for that decision on a durable medium’.⁸⁷ Also, the ranking of the services provided by a business user may be subject to explicit and transparent parameters in order to let business users adequately understand them. Whenever the use of such parameters can influence ranking against ‘remuneration paid by business users or corporate website users to the respective provider, that provider shall also set out a description of those possibilities and of the effects of such remuneration on ranking’.⁸⁸

Albeit covering a number of important aspects of the contractual relationships between platforms and their ‘business users’, the regulation is highly unsatisfactory and seems mono-dimensionally focused on transparency and information, as if full awareness of contractual terms could resolve the multitude of legal issues raised by platforms’ operations. The reasons for this reticence from the EU legislator may be linked to the degree of spontaneous distributive effects of the internal market, which resulted in a limited progress of positive integration in this field.⁸⁹

⁸⁵ Article 4, Reg. 2019/1150.

⁸⁶ Article 5, Reg. 2019/1150.

⁸⁷ Article 4(1), Reg. 2019/1150.

⁸⁸ Article 5(3), Reg. 2019/1150.

⁸⁹ D. ADAMSKI, ‘Lost on the Digital Platform: Europe’s Legal Travails with the Digital Single Market’ [2018] 55 *Common Market Law Review* 719, 720.

All in all, the regulation appears to be merely a first step toward the protection of the public interest of fair and socially responsible performance of work tasks through platforms. The complexity of platforms' reality suggests ample room for improvement. What the regulation failed to address was to 'take into consideration different platform types and sizes and their respective business models' in order to obtain a coherent picture of their market and their behaviour.⁹⁰ Furthermore, its market access nature prevented the regulation from including mandatory substantive rules aimed at limiting platforms' prerogatives concerning, *inter alia*, control, monitoring, remuneration, individual and collective redress.

4.2. THE EUROPEAN PILLAR OF SOCIAL RIGHTS AS A STEPPINGSTONE

The proclamation of the European Pillar of Social Rights (EPSR) significantly contributed to reorienting the EU Commission's action towards social objectives. In fact, not only does the Pillar rely on existing *aquis*, but also further explores regulatory territories to date unaffected by EU law. Its main objectives build on existing general principles of EU social policy, such as the aim of 'full employment and social progress' as well as that of 'a high level of protection and improvement of the quality of the environment' (Recital 1),⁹¹ and further elaborate on a miscellaneous set of standalone rights and principles.⁹²

Principle no. 5 of the EPSR, focused on 'secure and adaptable employment', combines two significant commitments: on the one hand, 'innovative forms of work that ensure quality working conditions shall be fostered' (letter c); and on the other hand, 'employment relationships that lead to precarious working conditions shall be prevented (including by prohibiting abuse of atypical contracts)' (letter d). Principle no. 12 on 'social protection' ambitiously aims to acknowledge the right to adequate

⁹⁰ A. SAVIN, 'Electronic Services with a Non-electronic Component and Their Regulation in EU Law' [2019] 23 *Journal of Internet Law* 26.

⁹¹ S. GARBEN, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' [2018] *European Constitutional Law Review* 210.

⁹² In reality, the terminology and significance of the 'principles' enshrined in the EPSR is all but clear and risks undermining the normative content of some of its propositions: F. HENDRICKX, 'European Labour Law and the millennium shift: from post to Pillar' in F. HENDRICKX and V. DE STEFANO, *Game Changers in Labour Law: Shaping the Future of Work*, KLL, Alphen upon Rhine 2018, p. 49.

social protection to all workers and, under comparable conditions, the self-employed, ‘regardless of the type and duration of their employment relationship’. Principle no. 4 on ‘active support to employment’ similarly extends to ‘everyone’ ‘the right to timely and tailor-made assistance to improve employment or self-employment prospects’.

One could even go beyond the letter of some of those principles, wondering for instance whether other guarantees might be extended to all kind of workers, even self-employed individuals. This may be the case of the provision on ‘Minimum income’ contained in Principle no. 14, for which

everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services. For those who can work, minimum income benefits should be combined with incentives to (re)integrate into the labour market.

These principles as well as other more general propositions contained in the EPSR constitute, if not a proper legal basis, at least the political driver to understand future developments of EU law in the social sphere. As accurately recorded by the EU Commission, each EPSR principle refers to a number of past, present or future initiatives to which the institutions of the EU are committed.

The Commission Staff Working Document monitoring the implementation of the EPSR⁹³ presents a relevant number of initiatives as if the pillar itself generated all of them, or at least its momentum favoured their adoption or implementation.⁹⁴ While this appears controversial, and most initiatives are in fact ‘repackaging exercises’,⁹⁵ the usefulness of the EPSR in assembling diverse regulatory initiatives under the same policy umbrella – labelled as the *Social fairness package*⁹⁶ – must be positively

⁹³ Commission Staff Working Document accompanying *Communication From the Commission to the European Parliament, the Council and the European Economic and Social Committee*, monitoring the implementation of the European Pillar of Social Rights, COM(2018) 130 final.

⁹⁴ A clear example is the adoption – pursuant to long and consuming negotiations – of the recast Directive on the Posting of Workers 2018/957.

⁹⁵ S. GARBEN, ‘The European Pillar of Social Rights: An Assessment of its Meaning and Significance’ [2019] 21 *Cambridge Yearbook of European Legal Studies* 101, 106–7.

⁹⁶ More at: <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-labour/package-social-fairness-package>.

welcomed and may even have interpretative repercussions in the CJEU case law.

In terms of policy-making, the proclamation of the EPSR has undoubtedly enriched the European semester process,⁹⁷ particularly in areas so far immune to EU labour law. Major examples in this respect come from the EPSR Principles on fair and adequate minimum wages and on access to social housing, which may give rise to coercive – albeit non-sanctionable – country-specific recommendations to tackle domestic deficiencies in the levels of protection.⁹⁸

4.3. SOCIAL PROTECTION: FOR ALL?

The first recognised descendant of the EPSR is the 2019 Recommendation on Social protection for all forms of employment.⁹⁹ The act originates from the 2016 ‘Access to Social Security Initiative’,¹⁰⁰ aimed at widening as much as possible Member States’ action in the field of social protection.¹⁰¹ The starting point of this action was that standard employment contracts, which constituted the normative and economic basis to build social protections systems in Europe, have progressively lost their predominance. This risks leaving an increasing number of individuals outside statutory protections, by reason of their non-standard working patterns.¹⁰² The aim was, in particular, to include under a broader umbrella of social protection non-standard employment, self-employment and new forms of employment such as employee-sharing; job-sharing; interim management; casual work; ICT-based mobile work; voucher-based work; portfolio work;

⁹⁷ S. BEKKER, ‘The European Semester Process: Adaptability and Latitude in Support of the European Social Model’ in F. VANDENBROUCKE, C. BARNARD and G. DE BAERE, *A European Social Union After the Crisis*, CUP, Cambridge 2018, p. 238.

⁹⁸ S. GARBEN, ‘The Constitutional (Im)balance between “the Market” and “the Social” in the European Union’ [2016] *European Constitutional Law Review* 23, 46–48.

⁹⁹ Council Recommendation (2019/C 387/01) of 8 November 2019 on access to social protection for workers and the self-employed.

¹⁰⁰ COM [2016] 710 final.

¹⁰¹ According to the Stakeholder Consultation document circulated in 2017, ‘social protection’ encompasses all social benefits in cash and kind, with typical ones being benefits in case of: unemployment, sickness, accidents at work and occupational diseases, invalidity, old-age, pre-retirement, death (i.e. survivors’ pensions and death grants), maternity/paternity, parental and family obligations and the need for health care or long-term care.

¹⁰² EU COMMISSION, *Access to social protection for all forms of employment. Assessing the options for a possible EU initiative*, 2018, pp. 11–13.

crowd employment; and collaborative employment.¹⁰³ A number of social transfers were precluded to non-standard forms of work, such as those covering unemployment, sickness, health care, maternity and parental benefits, work-related sickness, work accidents and others.¹⁰⁴ Moreover, non-standard workers are massively affected by the risk of in-work poverty and social exclusion.¹⁰⁵

The primitive proposal from the commission was to intervene with a directive, based on Articles 153(1)(c), Articles 151 and 352 TFEU, focusing on the following principles: 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.¹⁰⁶ Considering the serious limitations on the EU's actions deriving from subsidiarity and proportionality enshrined in Article 5 TEU, as well as the concern that social protection should be a self-standing right to which all citizens should be entitled against the state,¹⁰⁷ in November 2019 the commission opted for a looser intervention in the field, in the form of a recommendation addressed to all Member States, significantly reducing the importance and impact of the measure.¹⁰⁸ The recommendation is based on Article 3 TEU, on Articles 9 and 151 TFEU and on the relevant Principle enshrined in the EPSR – namely, Principle 12, for which ‘regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed have the right to adequate social protection.’¹⁰⁹ The recommendation covers a wide range of benefits, including: (a) unemployment benefits; (b) sickness and healthcare benefits; (c) maternity and equivalent paternity benefits; (d) invalidity benefits; (e) old-age benefits and survivors’ benefits; and (f) benefits in respect of accidents at work and occupational diseases.

¹⁰³ Explicit reference to I. MANDL, M. CURTARELLI, S. RISO, O. VARGAS LLAVE, Oscar and E. GEROGIANNIS, *New forms of employment*, Eurofound, 2015.

¹⁰⁴ EUROPEAN SOCIAL POLICY NETWORK, *Access to social protection for people working on non-standard contracts and as self-employed in Europe. A study of national policies*, European Commission, Brussels 2017, p. 33.

¹⁰⁵ EU COMMISSION, above n. 101, p. 17.

¹⁰⁶ COM [2017] 2610 final.

¹⁰⁷ ETUC Position: Proposal for a Council Recommendation on Access to Social protection for Workers and the Self-Employed, 12 April 2018: https://www.etuc.org/sites/default/files/document/files/etuc_position_proposal_for_a_council_recommendation_on_access_to_social_protection_for_workers_and_the_self-employed.pdf.

¹⁰⁸ S. GARBEN, above n. 93, pp. 117–18.

¹⁰⁹ Council Recommendation (2019/C 387/01) of 8 November 2019 on access to social protection for workers and the self-employed, Recitals (1) to (4).

It leaves instead outside its scope both social assistance measures and minimum income schemes (Article 4). When building their own social protection systems, Member States are required to implement the principles of formal coverage, effective coverage, adequacy and transparency (Article 5), all of which are listed in Article 7 and detailed along the document.

The implementation of such principles by the recommendation, however, is weakened by the lack of precise definitions of what a ‘worker’ and a ‘self-employed’ individual are. Compared to its previous versions, the document has abandoned the definition of ‘worker’ as including a person working ‘under the direction’ of another one in return of remuneration. Because the ‘direction’ is problematic for a number of non-standard relationships,¹¹⁰ particularly in the platform economy, this anomaly risks augmenting uncertainties and leads to inefficacy of the action. This is further amplified by the lack of enforceability mechanisms, even at governance level.¹¹¹

Moreover, the operational definition of ‘type of employment relationship’ contained in Article 7(a) – ‘one of the various types of relationship between a worker and an employer that can differ with regard to the duration of employment, the number of working hours or other terms of the employment relationship’ – is highly unsatisfactory and neglects quasi-subordinate employees as well as casual, intermittent and probably on-demand platform workers. Moreover, the same formal coverage principle, recognised to ‘ensure access to adequate social protection for all workers and self-employed persons’ (Article 8) is undermined by the need to take into account ‘national circumstances’ and also by its voluntary application to the self-employed (Article 8(b)).¹¹²

As concluded by Aranguiz and Bednarowitz,

access to social protection should be facilitated and granted to all individuals engaged in genuine employment irrespective of whether a person is a worker or a self-employed person, whether or not engaged in standard or non-standard work. At EU level, there are available mechanisms which could pave the way

¹¹⁰ A. ARANGUIZ and B. BEDNAROWITZ, ‘Adapt or perish: Recent developments on social protection in the EU under a gig deal of pressure’ [2018] 9 *European Labour Law Journal* 342.

¹¹¹ S. SABATO and B. VANHERCKE, ‘Towards a European pillar of Social Rights: From preliminary outline to a Commission Recommendation’ in B. VANHERCKE, S. SABATO and B. BOUGET, *Social policy in the European union: State of Play 2017*, Etui/Ose, Brussels 2017, p. 89.

¹¹² The same applies to unemployment benefits, also made voluntary for self-employed workers (Article 9).

towards recognition of the social standards that ought to apply to all. The social standards have to be safeguarded once and for all by highlighting that social protection is not for granted, it is not certainly a bonus to be enjoyed only by an exclusive group of workers. Quite the contrary, it must remain as a normal corollary feature of employment, typical or atypical; otherwise the vulnerable workforce engaged in non-standard work, be it gig or other, will continue to be trapped in the vicious circle of flexibility and precarity.¹¹³

4.4. THE 2019/1152 DIRECTIVE ON TRANSPARENT AND PREDICTABLE WORKING CONDITIONS: ANOTHER BROKEN PROMISE?

The second, long-awaited product of the EPSR is the Directive on Transparent and Predictable Working Conditions (TPWC Directive, 2019/1152),¹¹⁴ whose significance, if compared to other legislative initiatives, derives from its legal efficacy.¹¹⁵

In its original form, drafted by the EU Commission, the proposal contained a number of provisions aiming to improve the position of a wide array of working people. In the impact assessment, the commission indicated some two to three million workers as the target group, including platform workers.¹¹⁶ While the first draft referred to all workers irrespective of the type of contractual relationship,¹¹⁷ the council heavily criticised the move to introduce a pan-European definition of worker and, based also on concerns on the respect of subsidiarity, significantly diluted the ambition of the document.¹¹⁸

¹¹³ A. ARANGUIZ and B. BEDNAROWITZ, above n. 109, p. 345.

¹¹⁴ Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

¹¹⁵ B. BEDNAROWICZ, 'Workers' rights in the gig economy: is the new EU Directive on transparent and predictable working conditions in the EU really a boost?' [2019] *EU law analysis blog* <http://eulawanalysis.blogspot.com/2019/04/workers-rights-in-gig-economy-is-new-eu.html>.

¹¹⁶ 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, SWD (2017) 478 final.

¹¹⁷ EU Commission's proposal (Article 1(2)): This Directive lays down minimum rights that apply to every worker in the Union.

¹¹⁸ Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union – General approach, Inter-institutional File: 2017/0355 (COD), 14 June 2018, 10054/18, pp. 4–5.

It was then for the European Parliament to mediate, by proposing to add that the material rights provided by the directive should apply to

a natural person who, for a certain period, performs services for and under the direction of another person in return for remuneration in the case of dependency or subordination between the former and the latter. Persons who do not fulfil such criteria do not fall within the scope of this directive. Member States shall ensure that all the persons to which this Directive applies can make effective use of those minimum rights within the framework of national law or practice, including collective agreements.¹¹⁹

Similarly, while the original draft left Member States free to exclude from the personal scope of the directive those ‘workers who have an employment relationship equal to or less than 8 hours in total in a reference period of one month. Time worked with all employers forming or belonging to the same enterprise, group or entity shall count towards that 8 hours period’,¹²⁰ the Parliament proposed to delete this prerogative on the assumption that all workers must enjoy the same rights irrespective of the hours worked.

The final version of the directive is more limited in its scope and reverts to the more traditional language of ‘worker’.¹²¹ The directive, in fact, ‘lays down minimum rights that apply to 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 of the European Union’ (Article 1(2)). Immediately after, the directive scales down, providing a potential exclusion referred to

workers who have an employment relationship in which their predetermined and actual working time is equal to or less than an average of three hours per week in a reference period of four consecutive weeks. Time worked with all employers forming or belonging to the same enterprise, group or entity shall count towards that three-hour average (Article 1(3)).

This seems, however, in contradiction with Recital (12), which provides that:

workers who have no guaranteed working time, including those on zero-hour and some on-demand contracts, are in a particularly vulnerable situation.

¹¹⁹ http://www.europarl.europa.eu/doceo/document/A-8-2018-0355_EN.html?redirect.

¹²⁰ EU Commission’s proposal (Article 1(3)).

¹²¹ B. DE VRIES, above n. 3, p. 58.

Therefore, the provisions of this Directive should apply to them regardless of the number of hours they actually work.

Recital (21) clearly acknowledges the specific situation of on-demand workers, by assuming that whenever it is

not possible to indicate a fixed work schedule because of the nature of the employment, such as in the case of an on-demand contract, employers should inform workers how their working time is to be established, including the time slots in which they may be called to work and the minimum notice period that they are to receive before the start of a work assignment.

These recitals are embodied by Article 11 (Complementary measures for on-demand contracts), which provides that

Where Member States allow for the use of on-demand or similar employment contracts, they shall 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.

As it is common in the social policy field, Directive 2019/1152 is subject to the non-regression principle, impeding Member States to reduce the 'general level of protection already afforded to workers',¹²² and it is of minimum harmonisation – not affecting Member States' discretion 'to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to encourage or permit the application of collective agreements which are more favourable to workers.'¹²³

Let alone that information rights appear clearly unfit to significantly enhance the contractual positions of workers vis-à-vis their employer, the

¹²² Article 20(1), Directive 2019/1152.

¹²³ Article 20(2), Directive 2019/1152. This is also clear from Recital 47, for which the Directive 'lays down minimum requirements, thus leaving untouched Member States' prerogative to introduce and maintain more favourable provisions. Rights acquired under the existing legal framework should continue to apply, unless more favourable provisions are introduced by this Directive. The implementation of this Directive cannot be used to reduce existing rights set out in existing Union or national law in this field, nor can it constitute valid grounds for reducing the general level of protection afforded to workers in the field covered by this Directive. In particular, it should not serve as grounds for the introduction of zero-hour contracts or similar types of employment contracts'.

directive's Achilles heel remains its ambiguous and 'hybrid' definition of worker.¹²⁴ Its references to both national laws, collective agreements and practice, and to the consideration of the CJEU case law risk undermining its applicability beyond the scope of traditional labour laws. The same 'influence', if ever, of the CJEU jurisprudence in the field is limited to the ambit of EU directives and regulations, because of its purposive nature and limited aspirations.

Albeit significant, the improvements in the elaboration of such definitions are to be strictly referred to the facts of each case decided by the CJEU, as is demonstrated by the fact that the *Lawrie-Blum* test was never nominally abandoned by the court.¹²⁵ It was, instead, the factual adaptation of such a test that allowed the CJEU to include an increasingly wide spectrum of personal work relationships, much beyond the field of workers' free movement governed by Article 45 TFEU.¹²⁶

The most important interpretative tool to avoid a restrictive approach in the reading of Article 1(2), Directive 2019/1152 remains the argument of *effet utile* – often overlapped with teleological interpretation¹²⁷ – which may give the CJEU the opportunity to enlarge the directive's personal scope. The recitals of the directive, which are normally utilised to run such purposive interpretation, show that the need to guarantee all workers 'an adequate degree of transparency and predictability as regards their working conditions' (Recital (6)) is particularly evident for the new forms of work, and may lead to a situation in which almost only platform workers are kept in a state of 'uncertainty with regard to the applicable rights and the social protection' (Recital (4)).

It remains, instead, a mere optimistic (and circular) assertion that Article 1(2) may help 'domestic workers, on-demand workers, intermittent workers, voucher-based workers, platform workers, trainees and apprentices' fall within the scope of the directive (Recital (8)), the condition for this

¹²⁴ B. 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.

¹²⁵ S. GIUBBONI, 'Being a Worker in EU Law' [2018] 9 *European Labour Law Journal* 223.

¹²⁶ M. RISAK and T. DULLINGER, *The Concept of "Worker" in EU Law: Status Quo and Potential for Change*, ETUI, Brussels 2018, p. 23.

¹²⁷ R. REBHAHN, 'Effet Utile – Towards a General Principle of Law?' in L. TICHY, M. POTACS and T. DUMBROVSKY, *Effet Utile*, Charles University, Prague 2014, p. 147; J. CRUZ VILLAÇA, 'Le principe de l'effet utile du droit de l'Union dans la jurisprudence de la Cour' in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law*, Springer, Cham 2013, p. 279; S. MAYR, 'Putting a Leash on the Court of Justice? Preconceptions in National Methodology v Effet Utile as a Meta-Rule' [2011] 4(2) *European Journal of Legal Studies* 3.

being that they fulfil the criteria established by the CJEU for determining the status of a worker.

On a positive note, the definition of worker contained in Article 1(2) seems at least capable of providing sufficient room to include those who work under disguised contractual forms, whose independency is merely notional (Recital (8)).¹²⁸ Refining the tests already used in *FNV Kunsten* may prove to be beneficial in a number of occasions, particularly in the light of national jurisprudence in the field.¹²⁹

5. TOWARD A COHERENT EU STRATEGY ON PLATFORM WORK

The overall picture of the interactions between policy initiatives, regulatory intervention, and the case law of the CJEU is multifaceted. The current EU Commission, on the basis of what its predecessor already planned, is willing to deliver in the shortest period possible a comprehensive response to the needs of platform workers, and showed its willingness by putting the initiative amongst the 100 days priorities by EU Commissioner on Jobs and Social Rights.

Such initiative became reality in February 2021. The commission consulted social partners on their disposition to initiate social dialogue according to Article 154(2) and 154(3) TFEU.¹³⁰

The commission's consultation document is particularly interesting in addressing the main concerns on platform work, leaving to social partners the task to further identify other issues. According to the commission, a number of challenges deserve attention from the social partners, namely the clarification of the employment status of platform workers and their working conditions; their access to social protection; their ability to get collective representation and bargaining; the cross-border dimension of platform work; its algorithmic management; and training and professional opportunities for platform workers.

The commission's consultation document, on the one hand, is broad enough to accommodate any initiative from the social partners, particularly when it comes to issues such as collective representation and

¹²⁸ B. BEDNAROWICZ, above n. 114, p. 621.

¹²⁹ See, for further references, Chapters 2 to 8 in this volume.

¹³⁰ EU Commission, Consultation Document "First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work" (C(2021) 1127 final).

collective bargaining, or even algorithmic management, some of which have been already the object of local or national agreements between social partners. On the other hand, the document is not detailed enough to let us appreciate the consistency of the EU's action, nor its technical aspects.

For instance, while it seems advisable that the EU intervenes in order to discourage the misclassification of platform workers, the document fails to clarify whether a (rebuttable or absolute) presumption on employment status will be introduced, nor if different approaches (such as that of introducing a third category between subordinate employment and self-employment) will be undertaken. On platform workers' classification, the room for manoeuvre for social partners and collective bargaining is relatively limited, being an issue typically reserved to national legislators, and implying delicate constitutional balances.

A substantial step forward is made by the overall purpose to enhancing working conditions of platform workers, an overarching rationale further articulated into specific measures that could be quite easily introduced at EU level. The main measures can be summarised as follows.

- a) First of all, the consultation document mentions transparency and predictability of working conditions. The aspect of predictability is of particular importance, for the widespread use of zero-hours or on-demand contracts not engaging the platform and neither the client to grant a given amount of work occasions.
- b) Secondly, the document mentions surveillance and performance appraisal, two items already on the forefront of platform workers' claims at the domestic level.
- c) In the third place, the consultation document focuses on earnings and working time: while on earnings it seems the role of EU law is limited (at least in terms of reversing current practices of considering platform work as cognitive piecework),¹³¹ on working time the perspective seems to be much more promising, the established case law of the CJEU serving as a good basis to further enhance working time-related entitlements.
- d) Fourthly, the consultation document calls into question health and safety at work, and recalls the already existing ability of national labour inspectorates to help guaranteeing the respect of health and safety both for on-demand workers and for crowdworkers.

¹³¹ A. FELSTINER, 'Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry' [2011] 32 *Berkeley Journal of Employment and Labor Law* 143.

- e) Fifthly, the consultation document addresses the need to ensure access to social protection, which is both a domestic issue for the systems of social security – rarely involved as a consequence of the low level of income and the formal self-employment classification of platform workers – and a transnational problem of the law applicable in transnational operations. The aforementioned recommendation on social security for all forms of employment may find further relevance if social partners decide to pick up this issue and require Member States to enlarge the scope of application of social security, possibly based on the temporary measures already undertaken during the 2020–2021 pandemic for the benefit of self-employed workers.
- f) Finally, the document addresses the debated topic of collective representation and collective bargaining of platform workers. While at domestic level, the document mentions a number of autonomous initiatives by consolidated and newly born trade unions, which have concluded collective agreements particularly in the field of delivery services, at EU level the commission leaves unresolved the pivotal issue of the compatibility with EU competition law of any form of collective bargaining for the self-employed. As expressly clarified in the document, the consultation ‘does not address the issue of potential impacts of EU competition law, notably prohibitions under Article 101(1) TFEU, on platform work’.¹³²

Not all the crucial features in the regulation of platform work addressed by the consultation document may be picked up by social partners, in case they would welcome the invitation to negotiate on the topic. Some of them seem, in fact, hardly manageable in the context of the European social dialogue process. Failing a willingness to negotiate, it will be for the EU Commission to further substantiate its proposal and address the complex articulation of protection needs from a regulatory standpoint.

In June 2021, the EU Commission launched a second phase consultation with social partners, pursuant to Article 154(3) TFEU.¹³³ While the document is still quite general, an important step forward can be seen in

¹³² EU Commission, Consultation Document ‘First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work’ (C(2021) 1127 final), 20.

¹³³ EU Commission, Consultation Document ‘Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work’ (C(2021) 4230 final).

its ‘proposed objectives’. The document makes an explicit reference to the purpose of ‘supporting the sustainable growth of digital labour platforms in the EU’, while ensuring decent working conditions to people working through platforms.¹³⁴

The document further elaborates on a number of challenges, stressing in particular the need to ensure that: a) people working through platforms have – or can obtain – the correct legal employment status in light of their relationship with the platform and gain access to associated labour and social protection rights; b) fairness, transparency and accountability in algorithmic management; and c) clarity on applicable rules for all people working through platforms operating across borders.¹³⁵

As correctly pointed out in the two consultation documents, the EU legislator already intervened in the field of platform business from an internal market perspective. This, however, left a number of issues unresolved, particularly concerning platforms’ liabilities and the recognition and enforcement of individual rights upon business users. On the social side, the picture is also still incomplete, as the efforts put on social protections seem not to have reached the expected results in terms of effectiveness and coverage.

EU law scholars so far disagree not only on the way to tackle platform workers’ weakness, but also whether a tailored intervention would be more desirable than simply adapting existing legal tests or frameworks. For instance, and because of the variety of subordination tests employed by domestic courts, there is no clarity on the qualification issue. The second phase consultation document pays specific attention to the status of platform workers, envisaging different possible avenues of intervention, such as a rebuttable presumption, a mere shift in the burden of proof, or an administrative or certification procedure.¹³⁶ On the qualification issue, some scholars argue that employment law duties should be levied where doing so will discourage domination of workers by companies or by market forces: holding platforms to employment duties is therefore justified on these grounds.¹³⁷ Others proposed to consider platform workers as

¹³⁴ Ibid., p. 19.

¹³⁵ Ibid., p. 20.

¹³⁶ Ibid., p. 21–22.

¹³⁷ B. ROGERS, ‘Employment Rights in the Platform Economy: Getting Back to Basics’ [2016] *10 Harvard Law & Policy Review* 479, 480.

agency workers,¹³⁸ or as intermediated by mere employment agencies,¹³⁹ or even as virtually posted workers, with the aim of resolving the question of the applicable law.¹⁴⁰ In the context of a broader analysis, it has also been argued to conceive platform work globally, thus using as a blueprint the existing legislation of maritime law, more adaptable to the virtually infinite horizons of platform work.¹⁴¹

It is a matter of fact that in the European regulatory space some pieces of legislation may be used notwithstanding the qualification of platform workers as employees, self-employed, third-categories or even falsely self-employed. This is particularly the case of anti-discrimination law. Most of its self-standing rights, in fact, operate irrespective of individual's legal status. Both the recast (2006) and the 2000 directives seem to leave enough space for the inclusion of any kind of relationship between an individual providing her service for a platform and the platform itself. This may help tackling algorithmic discrimination, as well as discriminatory assessments (ratings) or other conditions that platform workers live discriminatorily compared to standard workers.¹⁴²

Conversely, the issue of collective representation and collective bargaining on platform workers still remains unsettled, for it appears that the CJEU is very much prudent to extend the *Albany* immunities beyond bogus self-employment¹⁴³ and so must be the same Commission while granting bargaining rights to platform workers.¹⁴⁴

¹³⁸ L. RATTI, 'Online Platforms and Crowdwork in Europe: A Two-Step Approach to Expanding Agency Work Provisions?' [2017] 38 *Comparative Labor Law & Policy Journal* 477, 500–7. The idea was to build on a stretched interpretation of Directive 2008/104, in line with what the CJEU did in the *Betriebsrat* case (Case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH* ECLI:EU:C:2016:883).

¹³⁹ V. DE STEFANO and M. WOUTERS, *Should digital labour platforms be treated as private employment agencies?* ETUI brief #07, Brussels 2019.

¹⁴⁰ CSL (Chambre des salariés, Luxembourg), Conference Nouveau monde du travail, nouveau droit du travail, Luxembourg, 7.11.2019.

¹⁴¹ M. CHERRY, 'Beyond Misclassification: The Digital Transformation of Work' [2016] 37 *Comparative Labor Law & Policy Journal* 544, 596.

¹⁴² N. COUNTOURIS and L. RATTI, 'The Sharing Economy and EU Anti-Discrimination Law' in N. DAVIDSON, M. FINCK and J. INFRANCA, *The Cambridge Handbook of The Law of the Sharing Economy*, CUP, Cambridge 2018, p. 486.

¹⁴³ I. LIANOS, N. COUNTOURIS and V. DE STEFANO, above n. 56, p. 291.

¹⁴⁴ EU Commission, Consultation Document 'First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work' (C(2021) 1127 final), 20.

The recent activism by the EU Commission is a remarkable effort to attribute substantive rights to platform workers. Based on the rights and principles recognised by the EPSR, the commission's intention to intervene in the field must be seen as an important step toward the establishment of a level playing field, not only for the workers involved, but also for the platforms. It remains to be seen how far social partners at the EU level are willing to be part of the regulatory machinery and, in the negative, which legal tools ('hard' or 'soft') the Commission will employ.

COLLECTIVE WORKERS' RIGHTS FOR WORKERS IN THE GIG ECONOMY

Filip DORSSEMONT*

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1. INTRODUCTION

Numerous studies have attempted to analyse the phenomenon of digitalisation from a labour law perspective.¹ The question of whether workers who provide their services through a digital platform (or application) are bound by an employment contract and perform their work in a subordinate relationship continues to both captivate and divide the epistemic community of labour lawyers. The employment contract is often seen to be gateway to the application of labour law. The question that seems to have occupied the majority of authors is whether the relationship between the platform and the worker can be construed as an employment relationship, that is, as a relationship based upon *legal* subordination.

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¹ See *inter alia*: M.A. CHERRY, 'Beyond misclassification: the digital transformation of work' [2016] 37 *Comparative Labor Law & Policy Journal* 577–602; V. DE STEFANO, 'The rise of the "just-in-time workforce": on-demand work, crowd work and labour protection in the "gig-economy"' [2016] 37 *Comparative Labor Law & Policy Journal* 471–504; J. PRASSL and M. RISAK, 'Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' [2016] 37 *Comparative Labor Law & Policy Journal* 619–51.

It is therefore the individual relationship that is highlighted. This concern is probably explained by the aforementioned *idée fixe* that a worker can only gain access to the application of labour law through the employment contract. However, collective labour relations and their fragmentary legal institutionalisation actually predate the invention of the employment contract.

The relationship between platform workers taken collectively and the platform, conditioned by their ability to organise, to defend and promote their interests, is often overlooked. It is more or less a no-brainer to state that the law of industrial relations in many countries is modelled on an industrialised society. But are its legal categories so fossilised and impermeable that they risk to obscure a new mode of work organisation, or are they sufficiently lively or auto-poetic to allow platform workers to resist?²

This question cannot be developed exhaustively, or even systematically, in the context of this chapter. It will focus on the human rights that constitute the foundations of collective labour relations law enshrined in high-profile legal instruments (constitutions, international and European charters). The issue will also be addressed and illustrated on the basis of provisions of Belgian and French labour law. It is therefore right to speak of fundamental rights. These human rights are the freedom of association, the right to collective bargaining, the right to collective action and the right to information and consultation. The recognition of the freedom of association and the right to collective bargaining constitute the opening bars of the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work (1998). The right to strike has not been mentioned.

Both rights underpin the right of workers to defend and promote their rights and interests, including the more substantive fundamental principles and rights listed in this declaration. In short, the object of research is not to be confused with the more classical topic of the qualification of the employment relationship of platform workers. Above all, the fact that some of these workers cannot be qualified as workers bound by an employment contract is not sufficient to deprive them of trade union freedom. The notion of 'worker' is not monolithic and can be understood in a different way with regard to the enjoyment of the fundamental rights underlying

² 'Auto-poetic' in the sense of G. Teubner: G. TEUBNER, *Law as an autopoietic system*, Blackwell, Oxford 1993.

the right of collective relations, such as freedom of association, the right to collective bargaining and the right to information and consultation.

This chapter will not address the more specific issue of the practical obstacles, inherent to the precariousness of the employment relationship, which prevent an effective exercise of these fundamental rights, which presupposes a more stable insertion in a working community.³ Nor will it deal with the question of the limits of these fundamental rights, particularly those arising from EU competition law.

2. FREEDOM OF ASSOCIATION

A potential convergence of constitutional practices is a relevant element in the interpretation of certain European instruments, such as the European Convention on Human Rights. Hence, it is worthwhile to take a birds-eye view of some constitutional interpretations of the recognition of the freedom of associations. Two questions should guide such a study. Firstly, do constitutions enshrine a specific right to organise, that is, to establish trade unions? Secondly, does this right also cover workers in general, irrespective of the status of the employment relationship? An initial survey of the French legal order highlights the usefulness of such a project. The preparatory work on the Preamble to the 1946 Constitution shows that the person who can defend his rights and interests through trade union action and join the trade union of his choice is a worker *sensu lato*. This notion includes both private and public sector workers, as well as craftsmen, agricultural workers tradesmen and members of the professions who would also be entitled to these rights.⁴ Italian doctrine, having been confronted with a constitutional provision on freedom of association where employers are ignored, is leaning towards a recognition of freedom of association in favour of self-employed workers, *a fortiori* those who are in a state of economic dependence on certain entrepreneurs (i.e. the case of *parasubordinati*).⁵ This approach seems to be beneficial for platform workers.

³ V. DE STEFANO, 'Non-standard works and Limits on Freedom of Association: a Human Rights-Based Approach' [2017] 46 *Industrial Law Journal* 185–207.

⁴ See on this subject: V. OGIER-BERNAUD, *Les droits constitutionnels des travailleurs*, Economica, Paris 2003.

⁵ See: M. V. BALLESTRERO, *Diritto sindacale*, G. Giappichelli, Turin 2004, pp. 104–07; G. GHEZZI and U. ROMAGNOLI, *Il diritto sindacale*, Zanichelli, Bologna 2001, pp. 45–47; G. GIUGNI, *Diritto sindacale*, Cacucci, Bari 2000, pp. 67–69; L. LAZZERONI,

In the absence of substantial ‘vernacular’ references, it is necessary to refer first to European and international instruments to identify the holder of trade union freedom.

Article 11 of the European Convention on Human Rights (ECHR) complements the generic recognition of freedom of association with the recognition that *everyone is entitled to form and join trade unions for the defence of his or her interests*. Given the specificity of the trade union in relation to the association, it is difficult to accept that anyone can found or join a trade union and that the means of collective defence of *any* interest fall within the scope of this recognition. They should logically be reserved for workers. A judgment of the Grand Chamber of the ECHR seems to us to identify the ‘worker’ in question. In the *Sindicatul Pastoral Cel Bun v. Romania* judgment,⁶ the court had to consider whether members of the clergy of the Romanian Orthodox Church could invoke freedom of association vis à vis their bishopric. Romania contested this applicability by denying that the popes (i.e. priests) were bound by an employment contract. This exercise presupposed an interpretation of the concept of a worker who could invoke freedom of association. The Grand Chamber seems to insist only on the quid pro quo of subordination, work and remuneration. Neither the origin of this relationship (a civil law contract or a vow of a sacral nature), nor the source of financing (the church or the state) are relevant. In another earlier judgment on freedom of association (negative), *Sigurður Sigurjónsson v. Iceland*, the court held that the distinction between self-employed and subordinate workers is not relevant in determining whether or not Article 11 ECHR is applicable to the case at hand.⁷ The court held that Article 11 ECHR enshrines both the generic freedom of association and the specific trade union freedom. This position is valid insofar as it concerns the assessment of issues relating to freedom of association or trade union rights at the individual level. However, this distinction seems relevant when assessing the question of essential or important means for the defence of the interests of a member of a trade union. This obligation to provide essential means has only been recognised in favour of trade unions.

The European Social Charter (ESC) recognises freedom of association for workers and employers without specifying these notions. The use of the

‘Libertà sindacale e contrattazione collettiva: una norma impegnativa’, in L. GAETA, *Prima di tutto il lavoro. La costruzione di un diritto all’Assemblea Costituente*, Ediesse, Rome 2014, pp. 229–54.

⁶ *Sindicatul Pastoral Cel Bun v. Romania*, no. 2330/09, 9 July 2013, ECHR.

⁷ *Sigurður Sigurjónsson v. Iceland*, no. 16130/90, 30 June 1993, ECHR.

English word (*workers*) pleads in favour of a broad interpretation of the word 'worker'. The same is true for the opening up of trade union freedom to retired workers and the unemployed.⁸ M. Nikkola, a former member of the committee, also considers that so-called 'self-employed' workers would fall within the scope of Article 5 of the ESC⁹

Convention No. 87, adopted within the ILO, takes a stronger stance. Its Article 2 states that: 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.'¹⁰

The phrase 'without distinction of any kind' seems to argue for the broadest possible understanding of the word 'worker'. This is what the latest version of the Compilation of Decisions of the Committee on Freedom of Association, renamed Compilation (2018), states:

By virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and the police – should have the right to establish and join organisations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organise.¹¹

It should also be noted that this maxim of jurisprudence, which was listed in the previous case law of 2006, has been confirmed by the Committee on Freedom of Association.¹²

⁸ See in this regard: A. JACOBS, 'Article 5. The right to organize', in N. BRUUN, K. LOERCHER, I. SCHOEMANN and S. CLAUWAERT, *The European Social Charter and the employment relation*, Hart, Oxford 2017, p. 235. The author refers to a 2010 Statement of Interpretation of the European Committee of Social Rights.

⁹ M. MIKKOLA, *Social Human Rights of Europe*, Karelactio Legisactio, Porvo 2010, p. 242.

¹⁰ J. HODGES-AEBERHARD, 'The right to organise in Article 2 of the convention No 87. What is meant by workers without distinction "whatsoever"?' [1989] 128 *International Labour Review* 177–94.

¹¹ INTERNATIONAL LABOUR OFFICE, *Freedom of Association, Compilation of decisions of the Committee on Freedom of Association*, ILO nr. 387, Geneva 2018.

¹² See, in this respect, the cases listed in S. BORELLI and J.M. SERRANO GARCÍA, 'Il necessario riconoscimento dei diritti sindacali ai lavoratori dell'economia digitale', in C. ALESSI, M. BARBERA and L. GUAGLIANONE, *Impresa, lavoro e non lavoro nell'economia digitale*, Cacucci, Bari 2019, pp. 537–56 and cases nr. 2686 (Dominican Republic); 2868 (Panama); nr. 2888 (Poland).

The reference to agricultural workers is not purely coincidental. Convention No. 141 (ILO) defines its scope of application very broadly. Article 2 states that:

For the purposes of this Convention, the term *rural workers* means any person engaged in agriculture, handicrafts or a related occupation in a rural area, whether as a wage earner or, subject to the provisions of paragraph 2 of this Article, as a self-employed person such as a tenant, sharecropper or small owner-occupier.

Convention No. 141 tries to delimit its scope according to the concept of employer. It thus reverses the classic semantic approach of defining the concept of employer according to the worker. In the spirit of the convention, there is a watertight division between the worker and the employer. The convention applies to 'all categories of rural workers, whether they are wage earners or self-employed' (Article 3). Article 2 (2) states:

This Convention applies only to those tenants, sharecroppers or small owner-occupiers who derive their main income from agriculture, who work the land themselves, with the help only of their family or with the help of occasional outside labour and who do not

- (a) permanently employ workers; or
- (b) employ a substantial number of seasonal workers; or
- (c) have any land cultivated by sharecroppers or tenants.

Instead of examining the question of whether a worker is in a state of subordination to an employer, a revolution of a Copernican nature is needed. The question that should be asked is whether a worker can be qualified as an employer. If not, he or she could invoke freedom of association. In other words, although employers are disqualified in a second stage, self-employment does not exclude falling within the scope. In short, the first real question is whether a farmer is an employer who employs workers. If he is not, he falls within the scope of Convention No. 141. It is interesting to note that the convention does not settle the question of whether an agricultural worker managing an undertaking has economic 'autonomy'. The right of farmers to form or join a 'trade union' is to be assessed on an autonomous basis.

It is sufficient in my view that farmers have the right to set up a professional organisations endowed with the essential prerogatives for the collective defence of the interests of its members. In fact, this idea

was put forward in a judgment of the European Court of Human Rights, stating that the mere fact that domestic law prevents farmers from joining a trade union within the meaning of domestic law is irrelevant, provided that the constitution of such a professional organisation is indeed possible according to another statute.¹³

The ILO's openness to the freedom of association of all workers, regardless of whether they have concluded a contract of employment, is consistent with the history of French and Belgian labour law. In France¹⁴ and Belgium,¹⁵ laws providing a legal status for trade unions and professional unions were put in place before the invention of the employment contract. The legal invention of the trade union thus preceded the recognition of an atypical contract based on a relationship of subordination between the signatory parties. Moreover, the Waldeck Rousseau Law as well as the Law on Professional Unions have opened this status to self-employed persons exercising a liberal profession.^{16,17}

In keeping with this long French liberal tradition, a recent amendment to the French Labour Code recognised the right of self-employed workers using one or more electronic networking platforms to 'set up a trade union organisation, to join it and to assert their collective interests through it' in order to carry out their professional activity.¹⁸

3. RIGHT TO COLLECTIVE BARGAINING

The recognition of the freedom of association for workers is not limited to the right to pay dues. It implies that the state recognises so-called essential means for workers to defend and promote their interests in

¹³ *Manole and the Direct Farmers of Romania v. Romania*, no. 46551/06, 16 June 2015, ECHR.

¹⁴ See, in this respect, the Waldeck Rousseau Law (1884) which predates the law.

¹⁵ In Belgium, the invention of the 'employment contract' dates back to the Law of 10 March 1900 on the employment contract (H. VELGE, *Elements of Belgian Industrial Law*, Librairie Dewit, Brussels 1927, pp. 39–129).

¹⁶ See Article 2 of the Waldeck Rousseau Law (March 21, 1884) and Article 2 of the Law on Professional Unions. In both acts, the scope of application is defined in terms of persons practising the same profession or trade.

¹⁷ For a comparative study of these two laws from a historical perspective, see: 'The Belgian law on Professional Unions (1898) as an *avatar* of the Waldeck Rousseau law (1884)?' [2006] *Annales de la Faculté de droit de Strasbourg* 169–91.

¹⁸ Art. L. 7342–6.

relation to antagonists. The European Court of Human Rights has identified a limited number of these so-called essential means. In the *Demir and Baykara*¹⁹ judgment, the court, overruling its earlier case law, recognised that the right to collective bargaining is indeed an essential means. Its case law on collective bargaining concerns only workers bound by a contract of employment. The court has not yet had the opportunity to rule on whether self-employed workers can also invoke a right to collective bargaining.

However, the ILO Committee on Freedom of Association (FAC) has had occasion to consider the right to collective bargaining invoked by self-employed workers. In a collective complaint (No. 2888), the FAC thus condemned Poland by considering:

1084. The Committee recalls that the term ‘organization’ used in Convention No. 87 means any organization of workers or of employers for furthering and defending the interests of workers or of employers (Article 10), such organizations should therefore have the possibility of engaging in collective negotiations in the interest of its members. The Committee notes, however, the Government’s indication that the model of labour relations in the country does not permit self-employed or independent professionals to enter into negotiations. The Committee recalls in this regard that, by virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and the police – should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize [see Digest of decisions and principles of the Freedom of Association Committee, fifth (revised) edition, 2006, para. 254]. The Committee therefore, like the Committee of Experts, requests the Government to take the necessary measures, including where necessary, the amendment of the legislation in order to ensure that all workers, without distinction whatsoever, including self-employed workers and those employed on the basis of civil law contracts, enjoy the right to establish and join organizations of their own choosing within the meaning of Convention No. 87. Further, recalling that Convention No. 98 protects all workers and their representatives against acts of anti-union discrimination and that the only possible exceptions from its scope of application are the police, armed forces and public servants engaged in the administration of the State, the Committee requests the Government to ensure

¹⁹ *Demir and Baykara v. Turkey*, no. 34503/97, 12 November 2008, ECHR.

that all workers and their representatives enjoy adequate protection against acts of anti-union discrimination regardless of whether they fall into the definition of employees under the Labour Code or not.

The committee thus decided not to dissociate the recognition of freedom of association from the right to collective bargaining. In principle, this approach implies that recognition of a worker's right to form and join a trade union implies recognition of the essential means for the defence of members' interests. These include the right to collective bargaining of the union in question.²⁰

The question of whether self-employed workers have the right to collective bargaining is unfortunate, given that only organisations can invoke this right, as opposed to workers. Sometimes, specific statutory instruments regulating collective bargaining require an *aggiornamento*. In Belgium, it must be noted that the *Loi sur les conventions collectives et les commissions paritaires* is not applicable to self-employed workers. It defines workers as 'persons who, by virtue of a contract of employment or otherwise than by virtue of a contract of employment, provide work under the authority of another person'.²¹

The recognition of the right to collective bargaining for the benefit of organisations representing platform workers does not imply an obligation on the part of the platform to enter into any negotiations, even if the representative organisation so requests. Such recognition imposes an obligation on the head of state to promote and encourage bargaining, as well as an obligation to respect the outcome of bargaining. It can only be observed that the *Loi sur les conventions collectives et les commissions paritaires* is not sufficiently auto-poetic to serve as a framework for formalising the results of such negotiation.

The exclusion of self-employed workers from collective bargaining by Irish competition law has been the subject of a collective complaint to the European Committee of Social Rights.²² This is not the first time that the

²⁰ For a more in-depth study on the position of the ILO with regard to the right to collective bargaining of the independent workers, see: X. BEAUDONNET, 'Le droit de négociation collective des travailleurs considérés comme indépendants au regard des normes de l'organisation internationale du travail' in D. DUMONT, A. LAMINE and J.B. MAISON, *Le droit de négociation collective des travailleurs indépendants*, Larcier, Brussels 2020, pp. 55–86.

²¹ Article 2 §1 1) *Loi sur les conventions collectives et les commissions paritaires*.

²² Collective Complaint nr 123/2016. See: S. BORELLI and J.M. SERRANO GARCÍA, above n. 12, pp. 537–56.

Council of Europe has been confronted with the vicissitudes of competition law and its impact on the freedom to bargain. In the case *Swedish transport workers Union v Sweden*, the European Court of Human Rights did not want to censure a decision of the Swedish authority declaring a clause in a collective agreement null and void on the basis of free competition law. This judgment predates the landmark *Demir and Baykara* judgment, and therefore could not take into account the recognition of the right to collective bargaining.²³

In its decision in the Irish case, the committee affirms, as do the ILO supervisory bodies, that self-employed workers should enjoy the right to bargain collectively through organisations representing them, including in respect of remuneration for the services they provide, subject only to such restrictions as are prescribed by law, pursue a legitimate aim and are necessary in a democratic society (Article G of the Charter). It considers that the general prohibition of collective bargaining in favour of the self-employed was excessive. On the other hand, the committee considers that this non-compliance has been resolved following a legislative amendment (Competition [amendment] Act 2017), which recognises the right to collective bargaining for a specific category of workers such as actors recruited as dubbing actors, musicians recruited as session musicians and others. The committee considers that the prohibition of collective bargaining for self-employed persons, as well as for journalists recruited as freelance journalists and two more generic categories (bogus self-employed workers and economically dependent self-employed workers specified in an order issued by the Minister), was excessive. The discretionary vagueness surrounding the Minister's intervention led to a joint dissenting opinion of Mr Stangos and Ms Kresal.

4. RIGHT TO COLLECTIVE ACTION

The historiography of collective action and its legal construction by state law reveals that the combinations of journeymen (boycotts) and their legal regime preceded both the emergence of the strike and its late legal recognition, and the very invention of the employment contract. In an auto-poetic way, the criminal incriminations prohibiting the coalition of workers (the Le Chapelier Law 1791) and the concept of the freedom

²³ *Swedish Transport Workers' Union v. Sweden*, no. 53507/99, 18 July 2006, ECHR.

to work have been mobilised to the detriment of people who would be qualified retrospectively as workers in a state of subordination.

Why not overturn this auto-poetic dynamic by dissociating the right to strike from the status of worker in a state of subordination? Such an approach presupposes extending the scope *ratione personae* of the right to strike as well as its scope *ratione materiae* in favour of a broader conception of collective action, which could include the boycott of platforms that do not respect the dignity of their 'collaborators'.

In France, a recent amendment to the French Labour Code has effectively recognised the right of self-employed workers using one or more electronic networking platforms in the exercise of their professional activity to take part in 'concerted refusals to provide their services ... with a view to defending their professional claims'.²⁴ The recognition of this right is implicit, and can be inferred from the statement that these movements:

may not, except in cases of abuse, engage their contractual responsibility, or constitute grounds for breaking off their relations with the platforms, or justify measures penalising them in the exercise of their activity²⁵

The use of the phrase '*concerted* refusal movement' suggests that it is a collective movement. Although the refusal to provide services may occur before or after the conclusion of a commercial contract, the explicit prohibition of sanctions in the contractual sphere suggests that this means of collective action has been conceptualised according to the image of the strike. It is mobilised *ex post*. In other words, the French Labour Code suggests that the platform worker who 'refuses' to respond to a call is already in a contractual relationship with the platform. If one had considered that this link is created only after having responded to an appeal, the refusal to respond to it could never engage contractual liability. In such a reading, the means of collective action does not resemble a strike, but a boycott, or as it was once called, a combination or coalition.

This reform of the Labour Code was foreshadowed by the case law of the Italian Constitutional Court as well as the Italian Court of Cassation allowing certain self-employed workers to resort to strike action.²⁶ This option remains reserved for so-called self-employed workers who are in a

²⁴ Art. L. 7342-5 Code du travail.

²⁵ Art. L. 7342-5 Code du travail.

²⁶ See: M. V. BALLESTRERO, above n. 5, pp. 298–99; G. GHEZZI and U. ROMAGNOLI, above n. 5, pp. 200–01; G. GIUGNI, above n. 5, pp. 232–33.

state of dependency and who do not themselves employ workers. Rather than reserving the right to strike or coalition to workers who are in a state of legal subordination, it would be more coherent to reserve it to economic actors who are not employers, nor entrepreneurs with autonomy in the management of their economic risks. Although the right to collective action is recognised for both workers and employers, the disqualification of an economic actor as a *subordinate* worker does not necessarily imply in Italian law a requalification as an employer.

A legislative reform as planned in France is lacking in Belgium. The question therefore arises as to whether the classical or historical basis for the right to strike under Belgian Law, the *Loi sur les Prestations d'intérêt public en temps de paix*, is sufficiently lenient to legitimise a recourse by self-employed persons to the refusal to provide their services. In this respect, it should be noted that the formula of 'collective and voluntary cessation of work'²⁷ does not refer to the person who performs the work, nor to the nature of this work (subordinate or self-employed). On the other hand, it is difficult to disregard the contextual reference in that law to the Belgian act on collective agreements and joint committees which would imply that the work in question must be performed by persons falling under the latter legislative act. Inevitably, this presupposes that the worker performs his or her work *under the authority* of the platform.

In a more contemporary approach to the basis of the right to strike and collective action, it is better to turn to international instruments.

Supervisory bodies are often silent on the precise question of whether self-employed workers can strike. On the other hand, the ILO has made it clear that freedom of association should be extended to some self-employed workers. It is clear that strikes are seen as an inseparable corollary of freedom of association, or as the most powerful means of defending workers' interests promoted by trade unions.²⁸ If freedom of association and the self-employed go hand in hand, like freedom of association and the right to strike, there should logically be an 'associative' relationship between self-employed workers and the right to strike.

In the *Hrvatski liječnički sindikat v. Croatia*, the European Court of Human Rights found a violation of the right of a doctors' and dentists' trade

²⁷ Article 1 of the Law of 19 August 1948.

²⁸ Inseparable corollary: INTERNATIONAL LABOUR OFFICE, *Freedom of Association, Compilation of decisions of the Committee on Freedom of Association*, ILO nr. 754 Geneva 2018. and 'most powerful means': *Hrvatski liječnički sindikat v. Croatia*, no. 36701/09, 27 November 2014, ECHR.

union to strike.²⁹ There is nothing in this case to suggest that the union was organising only doctors or dentists with an employment contract. The government of Croatia did not dispute at all that the union in question could invoke freedom of association and the right to strike. However, it would be presumptuous to consider that this judgment definitively and explicitly settles the question of the ownership of the right to strike in favour of self-employed workers.

5. RIGHT TO INFORMATION AND CONSULTATION

In the area of employee involvement, the question arises as to whether platform workers have the right to be informed and consulted through their representatives. Article 23 of the Belgian Constitution recognises a right to information and consultation for 'everyone', without specifying its purpose. The Law on the organisation of the economy, establishing works councils, defines the concept of employee by reference to the employment contract – without, however, excluding the King's power to assimilate certain categories of persons who, without being bound by an employment contract or an apprenticeship contract, provide work under the authority of another person.³⁰ Such a royal decree assimilating digital workers to platform workers does not exist and would seem problematic. Either some of these workers work under the authority of the platform, and then the existence of an employment contract seems obvious, or they do not work under its authority, and the King will not be able to assimilate them.

Apart from the threshold of workers required, another obstacle must be highlighted. The establishment of a works council presupposes that employees can be attached to the company, defined as a technical operating unit on the basis of economic and social criteria. The preponderance of social criteria seems to indicate that its workers carry out their tasks within a working community. It is not so obvious that workers who have a 'virtual' link with a platform can be counted as full members of such a community. Against this overly historicising interpretation of the enterprise, it should be noted that the act on the organisation of the economy also views the notion of enterprise from a more 'corporatist' angle, that is, as an enterprise run by a *legal person*.³¹

²⁹ *Hrvatski liječnički sindikat v. Croatia*, no. 36701/09, 27 November 2014, ECHR.

³⁰ Article 14 para. 1 2° Law on the Organisation of the Economy.

³¹ Article 14 para. 2 Law on the Organisation of the Economy.

The digitalisation of work organisation will inevitably raise the question of the applicability of Collective Labour Agreement No. 39. This convention, concluded in *tempore non supecto* (1983), establishes an obligation to inform and consult on the social consequences of the introduction of new technologies. Such an obligation exists as soon as ‘the employer has decided on an investment in a new technology and when this investment has significant collective consequences with regard to employment, work organisation or working conditions’.³² It must be implemented ‘no later than three months before the start of the implementation of the new technology’.³³ The information to be disclosed in writing to the works council – or, where there is no such body, to the trade union delegation – should specify ‘the nature of the new technology, the factors justifying its introduction and the nature of the social consequences it entails’.³⁴ The decision creates an obligation ‘to consult with employee representatives on the social consequences of the introduction of the new technology’.³⁵ The word ‘concertation’ is interesting in that it suggests a more dynamic and interactive exchange of views than mere consultation.

However, the applicability and usefulness of this provision will depend on the conditions attached to these obligations. For an obligation to exist, the investment decision must have significant collective consequences, that is:

affecting 50 per cent and 10 or more *workers* in a given occupational category or all occupational categories where there is a change in employment, work organisation or working conditions resulting from the introduction of the new technology, where all such occupational categories comprise fewer than 100 workers³⁶

This raises the question of whether digital workers who have not concluded an employment contract with the employer concerned can be considered as belonging to ‘a specific occupational category’. It should be noted that there is no explicit requirement in the collective agreement that this should be an occupational category of employees with an employment contract with the employer in question.

³² Article 2 §1 Convention Collective nr 39.

³³ Article 2 §1 Convention Collective nr 39.

³⁴ Article 3 §1 Convention Collective nr 39.

³⁵ Article 2 §1 Convention Collective nr 39.

³⁶ Article 2 §2 Convention Collective nr 39.

If the threshold of 100 employees has actually been reached on the basis of those who are undoubtedly under an employment contract – for example, those who carry out administrative tasks for the platform – or a lower threshold for the institution of an employee delegation; then the institution of a works council or an employee delegation seems conceivable. The prerogatives of the works council and the trade union delegation are not limited to information and consultation on social, economic and financial matters relating to employees in the strict sense. The works council has the power to monitor legality.³⁷ In the case of trade union delegation, this legality control is limited to the so-called social legislation. Nothing leads to a restrictive interpretation of the concept of social legislation. This competence is not in any way reduced to the fate of workers in the strict sense, but it is exercised by all persons concerned by the exercise of freedom of enterprise, provided that they are affected by the application of any general provisions of relevance to the enterprise. In addition to this specific task, it is worth mentioning the task assigned to the works council 'to examine all measures likely to promote the development of a spirit of collaboration between the head of the company and its staff'.³⁸ As this latter notion has not been defined by law, nothing seems to be opposed to a broader definition of the notion of personnel than workers unquestionably under a contract of employment, *a fortiori* in a sector of an economy which claims to be collaborative.

An overview of the European doctrine on the issue of digital workers gives the impression that platforms such as Deliveroo and Uber are organised at the European level. Sooner or later the question will arise as to whether these structures could not be qualified as groups of undertakings with a community dimension within the meaning of Directive 2009/38, which presupposes that a threshold of 1000 employees has been reached at group level and that at least one undertaking which is a member of the group employs at least 150 employees in one Member State, and at least one other undertaking which is a member of the group employs at least 150 employees in another Member State.

The purpose of the information as defined by the subsidiary requirements could be a catalyst for requesting information that also concerns 'digital employees'. In this respect, reference should be made to formulas included in the description of the purpose, such as 'the probable development of the activities, production and sales of the community-scale undertaking or group of undertakings' as well as 'the introduction of new

³⁷ Article 15 (f) Law on the Organisation of the Economy.

³⁸ Article (i) Law on the Organisation of the Economy.

working methods.’³⁹ This directive does not resolve the problem of the ‘community’ definition of the digital worker, since the concept of worker is not defined in the directive and is not relegated to the contracting parties to the agreement. Only the concept of employee representatives has been defined by reference to the law of the Member States. This lack of legislation therefore casts doubt on the national or European, or even autonomous, nature of the concept of employee. It would be foolhardy to imagine that the court would opt for an autonomous scope. Such an approach – justified by the ‘fundamental’ nature of the right to information and consultation – could generate a discrepancy with the explicitly national approach to the concept of employee in other directives on information and consultation of employees.⁴⁰ An approach to the concept of the ‘worker’ through national law would, moreover, imply taking account of digital employees according to a variable geometry, depending on the state of jurisprudence in the country concerned.

6. CONCLUSION

The ‘platform’ worker continues to be a challenge for labour law specialists. This chapter has tried to demonstrate that an analysis of the holding of fundamental rights allows us to build a bridge that allows these workers to have a say in the industrial relations system. This question cannot be approached in isolation from the international, European and national legal order recognising the underlying fundamental rights. The answer to this question will not be identical for all legal orders concerned. It depends on the permeability of each legal order to deal with workers who are still atypical.

The impermeability of certain national legal systems must not prevent these workers from fully enjoying the fundamental rights recognised in international and European legal orders. Such a perverse use of these national instruments is an obstacle to international cooperation. It is not difficult to identify both the fundamental right and the most permeable

³⁹ Point 1 a) Subsidiary Requirements Directive 2009/38.

⁴⁰ See Article 2 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community; and Article 2 of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

legal order for integrating platform workers. Freedom of association *sensu stricto*, the right to form and join a trade union and *a fortiori* the generic freedom of association, cannot be denied them. However, such a right to pay a membership fee to a structure is deprived of its useful effect if these workers are not given the essential means to defend their interests through collective action to conclude collective labour agreements. Comparing the different legal orders, it is clear that the ILO, through its supervisory bodies, has developed by far the most open position in collective bargaining. Collective Complaint No. 123/2016 has provided a unique opportunity for the European Committee of Social Rights to rally to the position adopted by the ILO supervisory bodies.