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# Improving working conditions in platform work in the light of the recent proposal for a directive

edited by

Stefano Bellomo, Domenico Mezzacapo, Fabrizio Ferraro, Dario Calderara

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*Giuseppe Antonio Recchia, Associate Professor of Labour Law at the Department of Political Science, University of Bari Aldo Moro*

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## 1. Introduction

In his seminal work, "Labour and the Law", Otto Khan-Freund stated that "on the labour side, power is collective power",[1] on the grounds that the employment relationship is always a power relationship, based on the inherent inequality of bargaining power between the two parties. Such socio-economic imbalance has proven, through the years, to affect not only the traditional employment relationships, but also, if not more, new forms of work, whether non-standard or even self-employed, pushing for a rediscover of the 'personal' scope of work as the essence (and the reason) of the contractual imbalance.[2]

Once again, Khan-Freund's words have proven prophetic as, on the one hand, the collective autonomy (from organization to action to bargaining) is the only authentically incisive form of workers' power, and, on the other hand, "the main object of labour law has always been, and we venture to say will always be, to be a countervailing force to

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1 O. Khan-Freund, *Labour and the Law*, Steven & Son (III ed.), 1983, 17.

2 From an Italian standpoint, see, *inter alia*, A. Perulli, T. Treu, *In tutte le sue forme e applicazioni*, Giappichelli, 2022.

counteract the inequality of bargaining power which is inherent" in the labour relations.[3]

As platform work does not seem to be exempt from this relation of command between platforms and those working for/on them, it appears fundamental to assess whether and how the existing and forthcoming legislation seeks to support such counter-collective power.

To this purpose, we will analyse to what extent the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, launched at the end of 2021, provides for platform workers' collective rights, and its possible implementation in Italy.

## 2. Platform workers do organise with or without the law

When looking at the gig economy as a social phenomenon, one key fact becomes clear.

Exactly as it happened in the aftermath of the first industrial revolution and the development of Taylorist factories, workers – and, therefore, platform workers also – show a tendency to organise *outside* the given legal framework, *i.e.*, regardless of the State's recognition of such organizational capacity as a right.[4]

The premises are often the most obvious, namely negotiating or, at least in the initial stages of organizing, *contesting* the exchange price of (digital) labour. It may be recalled, in fact, how public opinion became aware for the first time of the, albeit at the time quite limited in numbers, work 'hidden' behind digital platforms when in August 2016 hundreds of Deliveroo's riders took to the streets of London striking against a proposed change in the courier pay structure that would have resulted in a perspective income not sustainable without working longer hours or rushing. The standoff, which lasted six days and was resolved largely in the riders' favour, revealed both an already existing solidarity between the couriers – the platform's suggestion to discuss the new contract terms on a one-on-one basis was quickly dismissed as the protesting riders would only discuss the terms collectively – and the presence of a grassroot organisation siding with the strikers

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[3] O. Khan-Freund, *Labour and the Law*, 18.

[4] A. Lassandari, *La tutela collettiva del lavoro nelle piattaforme digitali: gli inizi di un percorso difficile*, in Labour & Law Issues, 4(1), 2018, VI.

(Independent Workers of Great Britain, founded only four years before). Even more significantly, the strike was not initiated through recognised unions or using established legal processes, but occurred outside of the formal industrial relations system without the protections such systems afford, but also circumventing their constraints.[5]

However, representation and collective action are not a given for this new form of work. Indeed, it's been remarked how platform workers, irrespective of their labour market status (employee or self-employed) or type of platform work (online or on-location), face far more obstacles to organizing and being heard than those who work in traditional workplace settings.[6]

A few reasons can be given. First of all, platforms are based on labour processes which seem to lack a collective nature: tasks, whether it's the transport of passengers or the photo/data check offered online to a crowdworker, do not require the (traditionally) necessary coordination among those who perform the same job for the same company, leaving all organisational issues, at least *prima facie*, to the individual interaction between the worker and the platform. Besides, most platform work is performed in isolation and sometimes in anonymity, or at least, in the case of food delivery, transport, and manual labour, spread over geographically expansive areas: as a consequence, platform workers have limited chances to meet and build networks, while also being in a direct competition with each other, according to schemes such as 'the fastest wins the task offered' or a ranking-based distribution of more lucrative tasks/working time slots. There are also subjective factors, since the uncertainty and vulnerability of working conditions has built, at least initially, the bias that these are *jobs not worth fighting for*; however, while platform work faces high workforce turnover rates, a second misconception – the idea that it's a temporary or a second job for those involved – has been debunked.[7]

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5 J. Woodcock, C. Cant, *Platform Worker Organising at Deliveroo in the UK: From Wildcat Strikes to Building Power*, in Journal of Labor and Society, 22, 2022, 223 ff.

6 European Commission, *Study to gather evidence on the working conditions of platform workers*, Final Report, March 2020, 84 ff.

7 See A. Piasna, W. Zwysen, J. Drahokoupil, *The platform economy in Europe*, in ETUI Working Paper n. 5, 2022, 42 ff.: according to the report, about a quarter of platform workers can be classified as main platform workers, since platform work represents a significant part of their working lives (i.e. they work more than 20 hours a week on digital labour platforms or earn more than 50 per cent of their income from this type of work).

And yet, as already mentioned, the individualistic model of platform economy has been undermined by sufficient evidence that collectivism can still work. Moreover, it could be argued that it is precisely platform workers' vulnerability and their economical (and even hierarchical) dependency that help and reaffirm the relevance of collective representation and bargaining.

In the few years since the first wildcat strikes, we have witnessed an accelerated digest of century-long organizing and campaigning strategies. Although in different national contexts platform workers' tactics have taken different forms and involved different dynamics, similar trends can be traced all over Europe and, for that reason, we will focus here on the platform workers' mobilisation in Italy, which, like in other countries, appears to have developed mainly in food delivery platforms.[8]

A first trend is the rise of self-organised and grassroots unions, operating outside the established channels of workers' representation and borne out of a bottom-up approach in mobilisation; in the Italian case, self-appointed informal unions, such as *Deliverance* in Milan, *Deliverance Project* in Turin, *Riders Union* in Bologna, have moved initially at a 'safe distance' from the more established and representative unions, suspicious of the risk of diluting or 'institutionalising' their campaigns and demands.[9] However, the awareness of the intrinsic weakness of this representation model has paved the way for a more fruitful relationship, an alliance of sorts, with traditional trade unions: an example is the *Carta dei diritti fondamentali del lavoro digitale nel contesto urbano*, a trilateral pact signed in may 2018 between the Bologna Municipality government, workers' representatives (not only Riders Union Bologna, but also the three main confederal Italian unions CGIL, CISL and UIL) and a few food delivery platforms, establishing provisions for fixed hourly wage rates and compensation for overtime work, accident and sickness insurance, freedom of association and the right to strike;[10] more recently, the bond was strengthened in the network *RidersXIDi-*

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[8] For a general and more detailed overview, see M.T. Carinci, *Case Law Approaches and Regulatory Choices on Platform Work: The Italian Case*, in M.T. Carinci, F. Dorssemont (eds.), *Platform Work in Europe. Towards Harmonisation?*, Intersentia, 2021, 57 ff.

[9] A. Tassinari, V. Maccarrone, *Riders on the Storm: Workplace Solidarity among Gig Economy Couriers in Italy and the UK*, in Work, Employment and Society, 34 (1), 2020, 43.

[10] M. Marrone, G. Peterlongo, *Where platforms meet infrastructures: digital platforms, urban resistance and the ambivalence of the city in the Italian case of Bologna*, in Work Organisation, Labour & Globalisation, 14 (1), 2020, 119.

*ritti*, set up among new and old unions to launch joint campaigns at national level, such as the #*nodeliveryday* (26 March 2021).[11]

A second trend is the use of strategic litigation to challenge the misclassification of riders' employment contracts or to address the contractual imbalance between the couriers and the platform. The most significant decisions – here it will suffice to mention the Court of Cassation's recognition of riders' quasi-subordinate status allowing to claim employee's protections in full,[12] the Tribunals' decrees awarding health and safety protections during the 2020 Covid-19 spread,[13] and the unprecedented ruling on Deliveroo's app and reputational ranking system deemed to be in violation of anti-discrimination law[14] – are well-documented examples of litigation being used by trade unions as part of a broader strategy, making legal claims likely to secure new (or improved) rights and protections as well as resolving industrial disputes on grounds where platforms look less like the proverbial Goliath.[15]

A third trait is to be found in the way the mobilisation also serves the purpose to create pressure on the lawmaker and the public opinion, and is often linked to the use of (strategic) litigation. In the Italian case, for example, the initial judicial defeat in the claim for riders' rights,[16]

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11 It has to be noted how mainstream unions also worked to set the grounds for a collective framework of protection: in December 2017, the renewal of the national collective agreement for the logistics service sector (signed by CGIL, CISL and UIL sectoral federations) committed to regulate new forms of work employed in the delivery of goods by bicycles and similar modes of transport; a few months later, its implementation (*Accordo integrativo del 18 luglio 2018 del CCNL Logistica e Trasporti*) included the "rider" in the job classification scheme and provided clauses on working conditions such as wage levels, working time, insurance and social security measures. Unions were aware that such choice wouldn't affect per se the status qualification of riders already engaged by platforms but offered a set of standards for the judges to refer to when ruling the consequences of a misclassification, together with the chance of opening possible company-level collective bargaining.

12 Corte di Cassazione, 24 January 2020, n. 1663.

13 Among many, Tribunale di Firenze, (decree) 1° April 2020, n. 886; Tribunale di Bologna, (decree) 14 April 2020, n. 745.

14 Tribunale di Bologna, 31 December 2020, which deemed Deliveroo's ranking system discriminatory as it did not factor-in the legitimate grounds a rider may have for not cancelling a session or for not showing up to work (e.g., illness or the intention to strike), and *de facto* limited access to future bookings for riders with legitimate justification; for an in-depth analysis of the judgement, S. Borelli, M. Ranieri, *La discriminazione nel lavoro autonomo. Riflessioni a partire dall'algoritmo Frank*, in Labour & Law Issues, 7(1), 2021, I.18 ff.

15 J. Moyer-Lee, N. Countouris, *The "Gig Economy": Litigating the Cause of Labour*, in ILAW, *Taken For A Ride: Litigating The Digital Platform Model*, Issue Brief, March 2021, 32 ff.

16 Tribunal di Torino, 11 April 2018, n. 778.

delivered at the same time of the Bologna Charter signing, was pivotal in the involvement of riders' union in the Ministry of Labour's round table for social dialogue and future legislation on platform work, leading to the Law no. 128/2019 and a set of specific provisions for "self-employed couriers delivering goods by means of two-wheelers vehicles in urban areas".

All these developments cannot conceal two key shortcomings. Food delivery riders are not the only platform workers needing protection; if the Covid-19 crisis has helped and expanded the demand for home delivery services, all kinds of platform work are increasing in numbers and do not show any sign of slowing down. Furthermore, the platform/worker relationship does not operate in a legal *vacuum*: digital platforms have consistently hired and organised work through service contracts, qualifying those who work on and for them as self-employed. Such status affects not only the individual but also the collective dimension of the protection.

## 3. The collective scope of the proposal for a Directive on platform work

Against this background, in December 2021 the European Commission presented a set of measures with a view to improving the working conditions of people working through digital platforms; the measures include a proposal for a Directive on Platform Work (COM(2021) 762 final) and a draft for a Communication regarding "Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons" (C(2021) 8838 final).

Although forming one single package (so-called *Platform Work Package*), it is the proposed Directive that has attracted most attention, and particularly the introduction of a legal presumption of employment, set to curb the platform and worker's relationship misclassification: the presumption, largely influenced by Spain's 2021 *Ley Riders*,[17] has ignited a wide debate not only among scholars,[18] but also among trade

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[17] On the Spanish legislation, and the way it incorporated the doctrine of the Supreme Court promoting a modification of the labour regulation, J. Gorelli Hernandez, *Sobre la presunción de laboralidad de los repartidores de plataformas digitales*, in Trabajo y Derecho, 2022, 91.

[18] On the topic, see at least A. Rosin, *Towards a European Employment Status: The EU Proposal for a Directive on Improving Working Conditions in Platform Work*, in Industrial

unions and platforms, mirrored in the diverse reactions of EU Member States and the strenuous route towards the Directive's yet-to-come adoption.[19] The Platform Work Directive (PWD) plays the lion's share, incidentally, due to the fact the various rules are provided through a choice of different regulatory instruments, of which communications have generally no legal significance: while the intent is consistent – the Guidelines would help a clearer (and fairer) interpretation of Article 101 TFEU, which has often lead the Court of Justice to consider genuine self-employed as undertakings under EU competition law therefore their collective agreement as in breach of said Article 101[20] – the medium appears not as impactful.

The proposed Directive, however, does not stop at ensuring a correct employment status but, in line with Principle 5 of the 2017 European Pillar of Social Rights,[21] aims also to promote transparency, fairness and accountability in the algorithmic management of platform work: to these purposes, some provisions consider the collective scope of platform work and the choice seems all the more judicious as digital transparency and fairness can be realistically challenged and gained only at the collective level, by the skills and strength of representative unions.[22]

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Law Journal, 51(2), 2022, 478 ff. and M. Barbieri, *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma*, in Labour & Law Issues, 7(2), 2021, C.1 ff.; T. Treu, *La digitalizzazione del lavoro: proposte europee e piste di ricerca*, in Federalismi.it, 2022, n. 9, 196-197 stresses how, apart from raising a few objections to the use of a Directive in this matter, the proposal may be "of dubious effectiveness in giving greater certainty to those concerned".

19 As it's set in the EU legislative procedure, the Commission proposal went on to be discussed between EU Parliament and Council; while the Parliament set to improve its text with the Draft European Parliament Legislative Resolution (PR – PE731.497v01-00) of June 2022, the Council, under the Czech presidency, seemed to move into the opposite direction, by suggesting some amendments – including raising the threshold to trigger the presumption to a three out of seven criteria (from the original two out of five) – which would have weakened its content. Having rejected such suggestions, finally, in December 2022, the European Parliament's Employment Committee adopted a set of revisions, later approved in January 2023, that finally enables the Parliament to begin negotiations with the Council and the Commission on the final text.

20 See the ECJ judgements in Case C-67/96, A*lbany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* and C-413/13, FNV *Kunsten Informatie en Media*.

21 According to which, "regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions and access to social protection".

22 For further observations, see J. Adams-Prassl, *The Challenges of Management by Algorithm: Exploring Individual and Collective Aspects*, in E. Menegatti, T. Gyulavári

It is useful to list and analyse these provisions, but not before having made a distinction between them, as they provide:

a) (genuine) collective rights,
b) collective enforcement of individual rights,
c) freedom of organisation.

It is a classification akin to a series of concentric rings, where the strongest core of protection gradually widens into the next circle to become more nuanced.

Articles 9 and 12 are at the centre of this scheme, awarding information and consultation rights, in a way that can be now considered common for the European legislation.

According to Article 9, platform workers' representatives (as well as national labour authorities) shall be made available, upon their request, information and be ensured consultation on "decisions likely to lead to the introduction of or substantial changes in the use of automated monitoring and decision-making systems"; the expression is to be read in conjunction with Article 6(1), which defines the automated monitoring systems as those "which are used to monitor, supervise or evaluate the work performance of platform workers through electronic means" and the automated decision-making systems as those "used to take or support decisions that significantly affect those platform workers' working conditions, in particular their access to work assignments, their earnings, their occupational safety and health, their working time, their promotion and their contractual status, including the restriction, suspension or termination of their account". In other words, the information and consultation right encompasses the duty to disclose the adopted (or soon-to-be adopted) work technologies, extracting the algorithm out of what is often considered a 'black box',[23] the code-based schemes which rule platform work. Given the highly technical nature of the information, Article 9(3) enables platform workers' representatives to be "assisted by an expert of their choice" to better understand the digital control, and imposes the expert's ex-

(eds.), *Decent Work in the Digital Age. European and Comparative Perspectives*, Bloomsbury, 2022, 231 ff. On the PWD provisions, see C. Spinelli, *La trasparenza delle decisioni algoritmiche nella proposta di Direttiva UE sul lavoro tramite piattaforma*, in Lavoro Diritti Europa, 2022, n. 2.

[23] The expression has been famously used by F. Pasquale, *The Black Box Society. The Secret Algorithms That Controls Money and Information*, Harvard University Press, 2016.

penses on the platform, provided that it has more than 500 workers and the expenses are proportionate.

It is worth mentioning that Directive 2002/14/EC is explicitly referenced, and therefore the PWD enshrines a 'qualitative' notion of information and consultation,[24] as the data transmission must enable representatives to acquaint themselves with the platform's decisions and the algorithmic system, to conduct an adequate study and prepare for consultation, and to exchange views and establish a dialogue with the platform, "with a view to reaching an agreement on decisions within the scope of the employer's powers".[25] While Article 9 applies to all digital labour platforms – representing a step forward from the 2002 Directive's scope, limited only to undertakings employing at least 50 employees (or to establishments employing at least 20 employees, according to the choice made by the Member State) – its potential is, however, held back by two elements: on the one hand, Recital 33 states that "digital labour platforms should not be required to disclose the detailed functioning of their automated monitoring and decision-making systems, including algorithms, or other detailed data that contains commercial secrets or is protected by intellectual property rights", hinting that the right to information and consultation is not entirely unconditional and a "total disclosure" could be difficult to achieve; on the other hand, the wording of the provision remains generic when setting, if not the actual arrangements, at least a regular time interval that platforms should comply to when allowing for workers' representatives participation, so that it's up to each Member State's legislation to set effective and enforceable rights.

A second, and more precise, rule is set in Article 12, which requires digital labour platforms to give access to relevant information such "the number of persons performing platform work through the digital labour platform concerned on a regular basis and their contractual or employment status" and "the general terms and conditions applicable to those contractual relationships". The information should be provided every 6 months (12 months for micro, small or medium-sized com-

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[24] Article 2, points (f) and (g), of Directive 2002/14/EC.

[25] Article 4(4)(e) of Directive 2002/14/EC. The Directive Proposal on platform work also extends the 2002 Directive provisions on the Members States duty to establish the practical arrangements for exercising the right to information and consultation at the appropriate level (Article 4, paragraph 1), to award adequate protection and guarantees to those involved in the information and consultation procedure (Article 7), and the protection of confidential information (Article 6).

panies), and every time terms and condition are unilaterally modified, to "representatives of persons performing platform work", as well as labour, social protection and other relevant authorities, and may be also subject to a request for clarification to which platforms are obliged to respond. Although, as it's been noted,[26] the provision is overall less protective than the draft AI Act[27] and the 2018 EU General Data Protection Regulation, and is mainly drafted to warrant transparency for the benefit of national authorities, it is still relevant as it gives workers' representatives the chance to better investigate the platform's work organization (numbers and status of workers on a regular basis) and the link between the algorithmic management and workers' contractual terms and conditions.

Beyond these norms, the PWD allows for some individual rights to be exercised also in a collective form. In particular, as the EU Commission identifies in Article 6(1) automated monitoring and decision-making automated systems and specifies, through a comprehensive catalogue, which relevant information is to be provided in writing to platform workers[28] (and, thanks to Article 10, also to those performing platform work who do not have an employment contract or are not in an employment relationship position), Article 6(4) sets the possibility for such information to be made available to platform workers' representatives, upon their request. Similarly, when it comes to enforcing workers' rights, Article 14 guarantees that judicial and administrative procedures can be also engaged by their representatives "on behalf or in support",

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[26] A. Ponce Del Castillo, D. Naranjo, *Regulating algorithmic management. An assessment of the EC's draft Directive on improving working conditions in platform work*, ETUI Policy Briefs, 2022, n. 8.

[27] Proposal For a Regulation of The European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act), COM/2021/206 final.

[28] As stated in Article 6(2) the information shall concern: "(a) as regards automated monitoring systems: (i) the fact that such systems are in use or are in the process of being introduced; (ii) the categories of actions monitored, supervised or evaluated by such systems, including evaluation by the recipient of the service; (b) as regards automated decision-making systems: (i) the fact that such systems are in use or are in the process of being introduced; (ii) the categories of decisions that are taken or supported by such systems; (iii) the main parameters that such systems take into account and the relative importance of those main parameters in the automated decision-making, including the way in which the platform worker's personal data or behaviour influence the decisions; (iv) the grounds for decisions to restrict, suspend or terminate the platform worker's account, to refuse the remuneration for work performed by the platform worker, on the platform worker's contractual status or any decision with similar effects".

for a single person[29] or for more than one in what appears to be a (quasi) class action,[30] as long as having the approval of the person(s) involved. Here, especially, the Directive shows its conceptual weakness, as the collective representation of the interests of platform workers is presented as 'ancillary' to the individual protection: the prospect is almost inevitable given that, as it's been remarked, platform workers' rights are carved out of the regulatory framework of personal data protection, pertaining to every *person*;[31] to this purpose, the workers' representatives involvement does not bring a different (collective) interest but helps the compliance and control over algorithmic management rules.

Lastly, a broader, but less incisive, right is enshrined in Article 15, which requires Member States to ensure the creation of unmonitored, in-platform communication channels for labour organizing; the provision, building up on the freedom of association, as recognized by ILO Convention n. 87 to all workers and not exclusively to employees, aims to foster voicing mechanisms, but raises a few doubts on the chance of finding actual implementation, not only due to the lack of related sanctions, but even more on the practical side, due to the feasibility of creating solidarity and counterpower channels within the same platform.[32]

## 4. Falling at the hurdles: an evaluation of the proposed Directive's collective protection of platform workers

Without diminishing the importance of the drafted initiative – for example, in the legal standing of representatives of all persons performing platform work (and not only of employees) – and being fully aware of the possibility that the final wording of the Directive may

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29 Art. 14(1).

30 Art. 14(2).

31 P. Tullini, *La Direttiva Piattaforme e i diritti del lavoro digitale*, in Labour & Law Issues, 8(1), 2022, R.52.

32 The provision could, however, prove useful for the collective organizing of a digital and globally dispersed workforce such as crowdworkers, whose triadic relationship with platforms and requestors/requestors makes less clear who could the employer be, and whose working conditions are based on individualized transactions, increasing the level of competitiveness. On these aspects, see N. Potocka-Sionek, *Crowdwork and Global Supply Chains: Regulating Digital Piecework*, in C. Stylogiannis, I. Durri, M. Wouters, V. De Stefano (eds.), *A Research Agenda for the Gig Economy and Society*, Edward Elgar, 2022, 215 ff. and G.A. Recchia, *The collective representation of platform workers: struggles, achievements and opportunities*, in A. Lofaro (ed.), *New Technology and Labour Law*, Giappichelli, 2023, 161 ff.

differ, and in no small amount, from that of the Commission's proposal, as well as from the one approved by the Parliament which allows for the start of the interinstitutional negotiations, it is useful still to highlight some critical issues of a set of rules, as aptly noted, less incisive in offering a coherent protection.[33]

A first problem is in the lexicon of collective protection: the term 'trade unions' appears in the Recitals but is replaced in the Articles by 'workers' representatives' or the long-winded 'representatives of persons performing platform work'. It's been argued that the choice may open to the inclusion of (other) non-institutional or grassroots initiatives and forms of representation, which have played and still play a significant role in the platform economy's highly fragmented context;[34] however, the far too ambiguous formula may lead to a narrower national interpretation and implementation, and remains to be seen whether it represents a broadening or a softening of the collective representation. It surely signals a conceptual approach which sees the 'collective' more like as a *sum* rather than a *combination* of individuals.

A second drawback is to be found in the continuing relevance of the work classification for the purposes of determining the relevant protective schemes. In other words, platform workers' status *still* matters.[35] Despite the ambition "to set new minimum standards in working conditions to address the challenges arising from platform work"[36] and the explicit intention to apply "the provisions on algorithmic management which are related to the processing of personal data […] also […] to genuine self-employed and other persons performing platform work in the Union who do not have an employment relationship"[37], the

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33 L. Ratti, *A Long Road Towards the Regulation of Platform Work in the EU*, in J.M. Miranda Boto, E. Brameshuber (eds.), *Collective Bargaining and the Gig Economy. A Traditional Tool for New Business Models*, Hart, 2022, 52.

34 A. Aloisi, N. Potocka-Sionek, *De-gigging the labour market? An analysis of the 'algorithmic management' provisions in the proposed Platform Work Directive*, in Italian Labour Law e-Journal, 15(1), 2022, 41.

35 Article 2 of PWD distinguishes between 'person performing platform work' as "any individual performing platform work, irrespective of the contractual designation of the relationship between that individual and the digital labour platform by the parties involved" and 'platform worker' as "any person performing platform work who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in the Member States with consideration to the case-law of the Court of Justice".

36 Recital 13.

37 Recital 16.

right to information and consultation enshrined in Article 9 is granted only to representatives of those in employment contracts/employment relationship.[38] Which is to say that only those who can be recognized as 'workers', albeit in the wider scope offered by the legal presumption mechanism, can be granted collective – and hence, actually effective – access to transparent information about the platforms' black boxes and their impact on their working conditions.

Quite significantly, the draft of the European Parliament legislative resolution on the proposed Directive of May 2022[39] tried and overcome the resistance to the recognition of collective rights outside the area of subordination, suggesting an amendment of Article 10 (which lists the rights laid pertaining to the protection of natural persons in relation to the processing of personal data in the context of algorithmic management outside an employment contract or employment relationship) so to include also self-employed workers in the collective aspects of protection; however, the motion seems to have been dropped from the Report finally passed in December 2021 by the Committee on Employment and Social Affairs (A9-0301/2022) and later voted by the European Parliament.

Two more points can be pointed out in the collective involvement in the digital transparency. The PWD, for one thing, ends up offering a narrow space of protection. As the inspiration for the Directive can be traced to Spain's *Ley Riders*, it should be remarked how the Spanish legislator has provided the *comité de empresa* (works council) with the right to be informed of the criteria, rules and instructions on which the algorithms or artificial intelligence systems that affect decision-making are based on, and which may affect working conditions, accessing to and maintaining the employment (including profiling).[40] Unlike what set in Article 9 (and Article 6, at an individual level) of the proposed Directive, the national provision acknowledges that algorithmic manage-

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38 V. De Stefano, *The EU Commission's proposal for a Directive on Platform Work: an overview*, in Italian Labour Law e-Journal, 15(1), 2022, 7 argues that "excluding persons performing platform work outside the framework of employment relationships from the collective aspects of that protection, namely the information and consultation duties vis-à-vis workers' representatives, seems to be entirely insufficient for adequately tackling the challenges of algorithmic management in platform work".

39 Available at https://www.europarl.europa.eu/doceo/document/EMPL-PR-731497_EN.pdf.

40 See Article 64(4), *Estatuto de los Trabajadores*, as amended by *Ley* 12/2021.

ment and surveillance is not in use only on platforms and is not implemented through exclusively automated means. In addition, the scope of the collective protection appears in the Directive draft to be quite modest: awarding a right to be informed and consulted is in line with a contemporary idea of social dialogue, *i.e.* allowing (even the hardest-hitting) company's decisions to be accepted by the counterparts. What about the chance of demanding changes or, at least, challenging, the algorithmic management? The various texts of the proposed Directive do not tackle the issue,[41] while such right may instead represent a good example of participatory practices, pushing the protections beyond the recognition of the simple, and only individual, right to review (and possibly rectify) algorithmic decisions, enshrined in Articles 8(2) and (3).[42]

Overall, notwithstanding the prospect of enabling of collective organisation and representation in the platform economy, the proposal falls short of securing two crucial collective protections: the right to be recognized as workers' representatives - the fact that workers' representative are mentioned does not mean that they are entitled to be introduced in every platform - and the right to bargaining, as information and consultation are not as strong means for fair and decent working conditions.

## 5. Which collective rights can the proposed Directive deliver to the Italian legal system?

As a conclusion of this overview, it is possible to analyse the proposed Directive from the perspective of the Italian legal system and guess which impact it may have at the national level and which implementation it may require.

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41 At the time of writing, the Parliament draft's Article 9(1) offers only small changes ("Without prejudice to the rights and obligations under Directive 2002/14/EC, Member States shall ensure information *and effective* consultation of platform workers and workers' representatives or, where there are no such representatives, of the platform workers concerned by digital labour platforms, on decisions likely to lead to the introduction of or substantial changes *affecting working conditions and health and safety* in the use of automated monitoring and decision-making systems referred to in Article 6(1), or *changes in the allocation or organisation of work* in accordance with this Article").

42 On this issue, see A. Alaimo, *Lavoro e piattaforme tra subordinazione e autonomia: la modulazione delle tutele nella proposta della Commissione europea*, in Diritto delle relazioni Industriali, 32(2), 2022, 652.

As it's been already pointed out, the collective protection of platform work still depends on the classification of the labour relationship. Therefore, the analysis would have at first to determine whether the introduction of a legal presumption might alter the 'perimeters' of the current Italian divide between employment and self-employment. Since such review goes beyond the scope of this contribution, it will suffice to say that the PWD impact would be negligible on this point: the criteria listed to support the legal presumption are similar to the subordination 'indexes' which in our legal system lead the jurisprudence to ascertain - and not to assume - the existence of a subordinate employment relationship.[43]

We can therefore maintain the standpoint of the possible platform workers' classification in the current Italian regulatory framework in relation to relevant collective rights; three categories are possible:

a) employees, as enshrined by Article 2094 of the Civil Code; full recognition of freedom of association, right to collective bargaining and to strike is acknowledged, with a set of trade union prerogatives in workplaces with more than 15 employees, including a trade union representation structure;[44]
b) hetero-organized collaborators, according to Article 2 of Legislative Decree no. 81/2015 (as amended in 2019), which awards employment protections to "workers whose predominantly personal performance is organized by the client even by means of digital platforms"; full recognition of freedom of association and the right to strike therefore is recognized, but trade union rights are, however, highly debated and collective bargaining concerns peculiar «economic and regulatory standards, by reason of the particular production and organizational needs of the relevant sector»,
c) solo self-employed, as recognized by Article 409 Code of Civil Procedure and/or Article 47-*bis* ff. of Legislative Decree no. 81/2015 (only in the case of self-employed riders); in this case, it is more apt to talk about collective *freedoms* rather than rights.

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[43] For a more detailed review, see A. Donini, *Alcune riflessioni sulla presunzione di subordinazione della Direttiva Piattaforme*, in Labour & Law Issues, 8(1), 2022, R.39 ff.

[44] An example is provided by the company-level collective agreement of Just EatTakeAway.com Express Italy Srl of 29 March 2021, on which see G.A. Recchia, *L'Accordo integrativo aziendale Just Eat Takeaway: quando la* gig economy *(ri)trova la subordinazione e il sindacato*, in Rivista giuridica del lavoro, 72(3), 2021, 449 ff.

In this scenario, the PWD would positively impact on the employees' collective protection as it would expand the procedural standards for information and consultation rights referred to in Legislative Decree no. 25/2007 (currently set on a 50 employees' threshold). It has to be remarked how, well before the proposal reached any important stage of its discussion, in May 2022 a draft Government Bill on digital work tried to follow the example of the Spanish legislator by providing information and consultation rights for trade union representatives and workers' elected representatives (and in their absence, for the territorial offices of the comparatively most representative trade unions at the national level) in the event of the introduction or modification of automated decision-making or monitoring systems in the employment relationship (Article 5), sanctioning the failure to comply as anti-union conduct pursuant to Article 28 of the Workers' Statute. The proposed intervention, however, failed to materialise in an Act and the subsequent Parliament elections of September 2022, as well as the appointment of a right-wing Government, has resulted in a less labour-friendly approach to platform work.[45]

A first result has however been scored. As the proposed Directive expands on the right to transparency and information beyond the scope of Directive 2019/1152 on transparent and predictable working conditions in the European Union, the Legislative Decree no. 104/2022, implementing the 2019 Directive, has amended Legislative Decree no. 152/1997 and introduced a specific provision (Article 1-*bis*) which awards for the right to be informed on automated monitoring and decision-making systems, regardless of employment status, to be given "directly or through trade union representatives at company or territorial level". The rule clearly pre-empts the PWD transposition on this topic.[46]

Beyond that, little else can be added; as the proposed Directive is unlikely to provide more substantial collective rights for platform workers, no domino effect can be expected in the national legal system. Only the Guidelines on collective bargaining rights for (solo) self-employed workers might strengthen the chances for trade unions

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[45] Such shift has found evidence in the negotiation of a compromise text under the Czech Presidency of the EU Council, where the Italian Government seemed to side with the more conservative countries; see https://www.euractiv.com/section/sharing-economy/news/czech-presidency-makes-new-attempt-on-platform-workers-directive.

[46] For further remarks, see A. Zilli, *La trasparenza nel lavoro subordinato. Principi e tecniche di tutela*, Pacini, 2022, 143 ff.

and workers' organizations to sign collective bargaining agreements concerning platform workers not recognized as employees (or hetero-organized workers) without risking being targeted as a breach of competition law.

The promotion of a legal recognition of the 'collective power' of platform work remains timid; who, how and to which effect will 'negotiate the algorithm' remains to be seen. In the light of the proposed Directive's goal of "improving working conditions in platform work", Otto Kahn-Freund would have probably frowned.

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