

EU Labour and Employment Law. Interpretation by the Court of Justice (ECJ)

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y Seguridad Social

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EU LABOUR AND EMPLOYMENT LAW.
INTERPRETATION BY THE COURT OF JUSTICE

COLECCIÓN DE DERECHO DEL TRABAJO Y SEGURIDAD SOCIAL

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CHAPTER 17

THE PROTECTION OF THE PERSONS PERFORMING PLATFORM WORK (DIRECTIVE 2024/2831 ON IMPROVING WORKING CONDITIONS IN PLATFORM WORK)

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Over the last few years, the European Union has made progress in regulating the digital market. The adoption of the final text of the Directive 2024/2831 on improving working conditions in platform work reflects the commitment of the European Union to the social protection of digital platform workers and of the algorithmic management of the workforce. One of the most important measures in the Platform Work Directive is the introduction of a presumption of the employment status of digital platform workers, based on the existence

of facts indicating control and direction by the platforms. In addition, employees and self-employed platform workers would also be granted individual and collective rights of transparency and algorithmic management, such as the right to supervision or the right to human review of automated decisions. Throughout this chapter,¹ the provisions of these Directive will be analysed in detail. This study will explain the true legal nature and effectiveness of the presumption and its implications for the Member States in its transposition, as well as the improvements that the algorithmic management rights can introduce with respect to the General Data Protection Regulation.

I. INTRODUCTION: THE COMMITMENT OF THE EUROPEAN UNION TO PLATFORM WORK

Social protection for digital platform workers has been a topic of debate in the European Union (hereinafter EU) since 2015, in a renewed impetus by the institutions to move towards a Social Europe. The European Commission Communications ‘A Digital Single Market Strategy for Europe’,² ‘Online Platforms and the Digital Single Market Opportunities and Challenges for Europe’³ and ‘A European Agenda for the Collaborative Economy’⁴ paved the way in the study of the legal-labour side of a phenomenon which, disguised as a digital exchange of goods and services, lured the traditional distinction between professional and non-professional service providers and between self-employed and employed workers.

The rise of digital platform work⁵ has also led to a rise of legal disputes in Member States, due to outsourcing and fraudulent recruitment of workers. Even though more than ninety percent of digital platforms operating in the EU employ self-employed workers,⁶ the European Commission was aware that there were more than a hundred court and administrative rulings that have qualified digital platform workers as employees, as it noted in its Communica-

¹ This contribution is part of the results of the research project PID2021-1222540B-100 ‘*La incidencia del Derecho de la Unión Europea en las futuras reformas laborales*’, funded by the Spanish Ministry of Science and Innovation and the European Regional Development Fund.

² COM/2015/0192 final.

³ COM/2016/0288 final.

⁴ COM/2016/0356 final.

⁵ Digital platforms increased their revenues by a factor of five between 2016 and 2020, serving up to 28 million citizens. See DE GROEN, W., KILHOFFER, Z., WESTFHOFF, L., POSTICA, D. and SHAMSAKHR, F., *Digital Labour Platforms in the EU: Mapping and Business Models*, Publications Office of the European Union (Luxemburg, 2021), pp. 37-54.

⁶ *Cfr.* DE GROEN, W., KILHOFFER, Z., WESTFHOFF, L., POSTICA, D. and SHAMSAKHR, F., *op. cit.*, p. 8.

tion ‘Better Working Conditions for a Stronger Social Europe: harnessing the full benefits of digitalisation for the future of work’.⁷ Moreover, this was not only a national legal problem. The categorisation of platform workers as self-employed or employees had implications for the application of EU social law, as the Court of Justice of the European Union (hereinafter ECJ) had the opportunity to show in the *Yodel* case. In its order of 22 April 2020,⁸ the ECJ held that a delivery driver for a digital platform was excluded from the scope of Directive 2003/88/EC.⁹ In its view, the autonomy and flexibility which characterised the relationship of the driver with the platform prevented him to be classified as an employee within the meaning of the Directive.

The heterogeneity of offline and online digital platforms made clear that case law could not accommodate a type of work that was intentionally evolving rapidly in its characteristics and that, consequently, regulation was needed.¹⁰ This demand was further increased after the approval of Directive 2019/1152.¹¹ Although the initial version of this Directive did offer a solution for platform workers by harmonising the concept of worker in the EU, in the end the regulation did not expressly include such workers in its personal scope of application. Some Member States such as Spain,¹² Portugal¹³ or Belgium¹⁴ already have specific rules for digital platform workers, but these were only partial solutions to a phenomenon that required a supranational response.

The European Parliament in its Resolution of 16 September 2021 ‘On fair working conditions, rights and social protection for platform workers. New forms of employment linked to digital development’¹⁵ stressed the need for specific and legislative intervention to provide platform workers with the same level of social protection as other comparable workers. These demands were a step forward in the construction a renewed Social Europe, culminating with the adoption of the final compromise text of the Directive 2024/2831 on

⁷ COM/2021/761 final.

⁸ C-692/19 (EU:C:2020:288).

⁹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

¹⁰ See RATTI, L., “A Long Road Towards the Regulation of Platform Work in the EU”, in *Collective Bargaining and the Gig Economy. A Traditional Tool for New Business Models*, MIRANDA BOTO, J. M^a. and BRAMESHUBER, E. (eds.), Hart (Oxford, 2022), p. 41.

¹¹ 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.

¹² *Ley 12/2021, de 28 de septiembre, por la que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales.*

¹³ *Lei 13/2023, de 3 de abril, no âmbito da agenda do trabalho digno.*

¹⁴ *Loi du 3 octobre 2022 fixant les dispositions relatives au travail.*

¹⁵ 2019/2186(INI).

improving working conditions in platform work (hereinafter Platform Work Directive).¹⁶

The drafting and approving of the Platform Work Directive took three years and was not a linear process. From the European Commission's activation of the consultation procedure [Art. 154 of the Treaty on the Functioning of the EU (hereinafter TFEU)] in February 2021, which ruled out the possibility of concluding an agreement between the European social partners,¹⁷ to the temporary blocking in the Council¹⁸ and the European Parliament's final approval in April 2024,¹⁹ the regulation went through moments of deadlock that forced substantial changes to some measures contained in the Commission's first proposal.²⁰ These amendments, as will be seen below, were the result of a negotiation process in which the Member States and the institutions of the EU looked after their political positions and the respect of the principles of subsidiarity and proportionality (Art. 5 TFEU). Its final adoption, despite the changes, reflects the fact that the Directive was a firm commitment of the EU.

II. MATERIAL AND PERSONAL SCOPE OF APPLICATION

Following the formalisation of the European Pillar of Social Rights Action Plan, the EU was not only faced with the challenge of the lack of clarity on the employment status of platform workers. This was compounded by the algorithmic management of working conditions by the platforms and the cross-border nature of the services offered.²¹ These challenges posed by the

¹⁶ Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work.

¹⁷ While Business Europe defended the autonomy of the Member States and advocated specific regulation at national level, ETUC welcomed the proposal for specific regulation, insisting that no intermediate categories between self-employed and employed workers should be created to cover platform workers. See BUSINESSEUROPE, *Consultation Response to the First phase social partner consultation on possible action addressing the challenges related to working conditions in platform work* [available online at: https://www.buinessurope.eu/sites/buseur/files/media/position_papers/social/2021-04-06_platform_work_-_final_response_1st-phase_consultation_.pdf]; and ETUC, *Reply to the First Phase Consultation of Social Partners under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work* [available online at: <https://www.etuc.org/en/document/etuc-reply-first-phase-consultation-social-partners-under-article-154-tfeu-possible-0>].

¹⁸ During the Belgian presidency of the EU Council, the proposal remained at an impasse for several months due to France voting against and Germany, Greece and Estonia abstaining.

¹⁹ The approval was the result of 554 votes in favour, 56 against and 24 abstentions.

²⁰ COM/2021/762 final [available online at: <https://data.consilium.europa.eu/doc/document/ST-14450-2021-INIT/en/pdf>].

²¹ See *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), pp. 5-13

platform economy became the goals to be achieved by the Platform Work Directive. As the title of this Directive itself indicates, it pursues a general objective of improving the working conditions and social rights of platform workers, from which three specific objectives are derived [Art. 1(1)]: introducing measures to facilitate the correct determination of the employment status of persons performing platform work (1), promoting transparency, fairness, human oversight, safety and accountability in algorithmic management in platform work (2); and improving transparency in platform work, including in cross-border situations.

The Platform Work Directive does not aim to regulate every working condition of persons providing services through platforms, but to pursue the correct qualification of these persons and to reduce algorithmic asymmetry between them and the platforms. For this reason, in addition to the labour-related measures (Chapter II), there are other measures aimed at the protection of personal data and algorithmic transparency (Chapter III and IV).

1. Platform workers and persons performing platform work

Following a logical reasoning, one might think that the material rights of algorithmic management in Chapters III and IV would only be granted to platform professionals who have been qualified as employees in accordance with the mechanisms of Chapter II. However, a careful reading of the Platform Work Directive leads to a different answer. Art. 1(2) delimit the scope of application of algorithmic management rights and, when it comes to determining who the rightsholders are, this provision does not recognise the rights simply to platform workers, but to ‘persons performing platform work’, defined, according to Article 2(1)(c), as all persons ‘performing platform work, irrespective of the nature of the contractual relationship or its designation by the parties involved’, that is, those persons who do not have an employment contract or an employment relationship. Such persons are expressly distinguished from ‘platform workers’, defined as any person performing platform work who has an employment contract or is deemed to have an employment relationship [Art. 2(1)(d)].

The Platform Work Directive admits the coexistence of different contracting regimes in the business model of digital platforms. Consequently, certain rights linked to data protection and algorithmic management are recognised, as will be seen later, for employees, self-employed workers and even

workers in an intermediate category in accordance with national law,²² as they are all affected by the same risks of automated systems.²³

Coverage of self-employed workers is not new in the EU, as they have already been included in the anti-discrimination directives.²⁴ Moreover, the European Commission's Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons²⁵ also clarify that collective agreements concluded for self-employed persons are exempted from the prohibition of Art. 101 TFEU.²⁶ However, such coverage of self-employed workers required the Platform Work Directive to have a dual competence base. A directive based solely on Art. 153(1)(b) TFEU would prevent algorithmic management rights from being extended to self-employed workers, because, according to its wording and its genesis, this legal basis seems to be limited to regulations applicable to employees, despite some specific examples to the contrary.²⁷ Consequently, the Platform Work Directive is also based on Art. 16(2) TFEU, empowering the adoption of rules on the protection of personal data. Such basis, little known until now, will condition for sure the interpretation of the nature of the algorithmic management rights. Unlike in the case of the anti-discrimination directives, where the ECJ extended certain employment-type rights to self-employed workers in a situation of vulnerability

²² This would be the case, for example, of TRADEs in Spanish law (Art. 11 of *Ley 20/2007, de 11 de julio, del Estatuto del Trabajo autónomo*) or of coordinated and continuous collaboration in Italian law (Arts. 61 to 69 bis of *Decreto Legislativo 10 settembre 2003, n. 276. Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui all' legge 14 febbraio 2003, n.30*).

²³ Recital 54: "A number of persons performing platform work are self-employed persons. The impact of automated monitoring systems and automated decision-making systems used by digital labour platforms on the protection of the personal data of self-employed persons and their earning opportunities is similar to that of platform workers".

²⁴ Self-employed workers fall within the scope of certain measures of Directives 2000/43/EC [Art. 3(1)], 2000/78/EC [Art. 3(1)] and 2006/54/EC (Art. 6). See KRAUSER, K., "Recognition of Economically-dependent Workers within EU Law – In Search for a Unicorn?", in *Economically-dependent Workers. Employment in a Decent Economy – International, European and Comparative Law Perspective*, SCHUBERT, C. (ed.), C.H. Beck (Munich, 2022), pp. 260-262.

²⁵ 2022/C 374/02.

²⁶ See BRAMESHUBER, E., "(A Fundamental Right to) Collective Bargaining for Economically Dependent, Employee-Like Workers", in *Collective Bargaining and the Gig Economy. A Traditional Tool for New Business Models*, MIRANDA BOTO, J. M^a. and BRAMESHUBER, E. (eds.), Hart (Oxford, 2022), pp. 245-249.

²⁷ There are already some instruments that have been adopted under the competence title of Art. 153 TFEU and deal with self-employed workers, such as the Directive 2017/159/EU implementing the Agreement concerning the implementation of the Work in Fishing Convention of the ILO (1), the Directive 2002/15/EC on the organization of the working time of persons performing mobile road transport activities (2) and the Council Recommendation of 8 November 2019 on access to social protection for employed and self-employed workers (3).

comparable to that of employees,²⁸ the recognition of algorithmic management rights for platform self-employed workers is not based on an inequality vis-à-vis the platform in relation to ‘employment’ conditions, but in relation to the protection of their personal data. The Platform Work Directive groups platforms providers as persons entitled to data protection rights, irrespective of their employment status.

2. Digital labour platform

Regarding the platform as the counterpart of the contractual or employment relationship, the Platform Work Directive defines it as any natural or legal person who provides a service that fulfils four requirements: it is provided, at least in part, at a distance through electronic means, such a website or a mobile application (1); it is provided at the request of a recipient of the service (2); it involves, as a necessary and essential component, the organisation of work performed by individuals in return for payment, irrespective of whether that work is performed online or in a certain location (3); and it involves the use of automated monitoring or decision-making systems (4).²⁹ This definition is twofold in nature:

1) It is restrictive, because it excludes platforms providing digital intermediation services from the scope of the Platform Work Directive, that is, the platforms that exclusively provide the means for connecting consumers who demand a service with professionals who are willing to provide it (advertising offers, aggregating and displaying available services providers, etc). It thus focuses on platforms providing and underlying commercial service for the organisation of which they must exercise some control over the work performed. Such a position is consistent with the Member States case law, which has shown which platforms are the centre of judicial and labour disputes. In fact, the clearest inspiration for the definition of digital labour platform in the Platform Work Directive is to be found in the case law of the ECJ and the criteria for delimiting the legal nature of platforms in the *Elite Taxi*³⁰ and *Uber France*³¹ cases.

²⁸ Judgment of 12 January 2023, *J.K. and TP, SA*, C-356/21 (EU:C:2023:9)..

²⁹ The latter requirement was not present in the initial version of the proposal and was added by the European Parliament during the procedure.

³⁰ Judgment of 20 December 2017, *Asociación Profesional Élite Taxi*, C-434/15 (EU:C:2017:981).

³¹ Judgment of 10 April 2018, *Uber France*, C-320/16 (EU:C:2018:221).

Consequently, it should be examined on a case-by-case basis whether the digital platform goes beyond its task of organising the service on the market to also organise the work of the professional. Making this assessment will not always be an easy task, due to the platforms' intention to avoid their role as employers and obliged subjects. As appointed by the Platform Work Directive, organising work performed by individuals should imply at a minimum a significant role in matching the demand for the service with the supply of work by the individual, which constitutes a necessary and essential and not merely a minor and purely ancillary component.³² It will be necessary to rely on indications or concrete elements, for example the additional functions the platform performs (payment processing, customer support, geolocation systems, etc.).

2) It is broad, since it covers all digital platforms, both online and offline, regardless of the sector in which they operate and despite the differences that may exist between them in relation to the way work is organised and controlled and the place of establishment of the companies. In relation to the latter aspect, according to Art. 1(3), the Platform Work Directive shall apply and bind the platforms whenever the persons performing platform work provide services in the EU, regardless of whether the place of establishment of the platform is in the EU or not and irrespective of the applicable law.

This *lex loci laboris* criterion will not have a particular impact on employees since their employment contract would already be governed by the law of the Member State in which they provide the services [Art. 8(2) of Rome I Regulation]. However, it may be of relevance for self-employed workers providing services in the EU, since the Platform Work Directive will be applied even if the self-employed and the platform have agreed that the law of a non-Member State will apply to their contractual obligations. Through this provision, the Platform Work Directive partially amends the applicable law criteria of the Arts. 3 and 4 of Rome I Regulation, while limiting the freedom of establishment.

3. Intermediaries

The Platform Work Directive foresees the possibility for digital platform work to be provided not only through a two-way relationship, but also through

³² Recital 20.

a three-way or even a four-way relationship. According to Art. 2(1)(e), the work organised through a digital labour platform can be provided on the basis of a contractual relationship between the individual and the digital labour platform or an intermediary. Intermediary means, for the purposes of the Platform Work Directive, a natural or legal person that establishes a contractual relationship with the digital labour platform and with the person performing platform work (a) or is in a subcontracting chain between the digital labour platform and the person performing platform work (b), with the aim of making platform work available to or through the digital labour platform to which it relates. Consequently, the rights provided for in the Platform Work Directive apply to persons who are assigned to a digital platform by their employer or their principal undertaking, including the temporary work agencies,³³ in order to provide services through that platform, and to persons who provide services through a digital platform whose recipient is another digital platform or a distinct business entity within the same group of undertakings.³⁴

These provisions relating to the intermediary were absent in the initial version of the proposal. They were introduced into legislative procedure at the initiative of the European Parliament following the example of the Portuguese law,³⁵ since there were more and more frequent cases of subcontracting in which a company was interposed between the digital platform and the persons performing platform work.

The extension of the Platform Work Directive's scope in favour of persons performing platform work through intermediaries is based on the idea that such persons are exposed to the same risks of misclassification and algorithmic management as persons performing platform work directly for the platform. For this reason, and to avoid diffuse responsibilities between platforms and intermediaries, the Directive also calls on Member States to ensure that persons performing platform work through a contractual relationship with an intermediary have the same level of protection as persons performing platform work through a direct contractual relationship with the platform. To this end, the Directive requires Member States to take appropriate measures, such as joint and several liability schemes (Art. 3).

³³ Recital 26: 'Where a party is found to be an employer and fulfils the conditions of being a temporary work agency in accordance with Directive 2008/104/EC, the obligations under that Directive are to apply'.

³⁴ Recital 24.

³⁵ Art. 12.º-A(6) of *Código do Trabalho*: '*caso o prestador de atividade alegue que é trabalhador subordinado do intermediário da plataforma digital, aplica-se igualmente, com as necessárias adaptações, a presunção (...) cabendo ao tribunal determinar quem é a entidade empregadora*'.

III. MEASURES FOR THE DETERMINATION OF EMPLOYMENT STATUS

The Platform Work Directive sets out two measures aimed at addressing the problems of qualification of platform workers: the principle of the primacy of facts (Art. 4) and the qualification measures, including the presumption of employment (Art. 5).

1. Primacy of facts

The principle of primacy of facts has a long tradition in EU law. The ECJ has insisted on this issue in several of its rulings on the EU concept of worker. Indeed, it has repeatedly called for the assessment of the real elements of the relationship and the fictitious or simulated spheres of autonomy of the bogus self-employed.³⁶ The express recognition of this principle in digital platform work is intended to leave aside the intentional and unilateral drafting of contracts by the stronger party, that is, the digital platform.³⁷ Therefore, Art. 4(1) of the Platform Work Directive provides that the qualification process should take into account the facts relating to the actual performance and not the contractual agreement between the parties, including in this regard ‘the use of algorithms automated monitoring or automated decision-making systems in the organisation of platform work’. From a comparative perspective, this principle could contribute to the standardisation of qualification processes between Member States, as it would particularly affect legal systems that give precedence to the free disposition of the parties.³⁸

2. The legal presumption of employment: control and direction

Throughout the process of drafting the Platform Work Directive, reports and consultations assessed the suitability of introducing a presumption of em-

³⁶ For example, judgments of 13 January 2004, *Allonby*, case C-256/01 (EU:C:2004:18) and 4 December 2014, *FNV Kunsten*, C-413/13 (EU:C:2014:2411).

³⁷ Recital 27: ‘The principle of primacy of facts (...) is particularly relevant in the case of platform work, where contractual conditions are often unilaterally determined by one party’.

³⁸ The judgments of the Central Arbitration Committee of 14 November 2017 and of the High Court of Justice Queen’s Bench Division (Administrative Court) of 5 December 2018 stand out in this regard. In this judgments, Deliveroo’s delivery drivers were denied workers status on the basis, inter alia, of the autonomy granted to them in the contracts concluded with the company to organise the work. The Belgian *Loi-Programme* of 27 December 2006 also stands out, as it includes the will of the parties expressed in their contracts or agreements among the general employment criteria (Art. 333, section 1).

ployment for the correct qualification of persons performing platform work.³⁹ However, the legal configuration of this presumption, as a strong or moderate presumption, was also discussed during the procedure. It was discussed whether the presumption should directly imply the employment nature of any relationship between the worker and the platform, as the European Parliament's proposal advocated,⁴⁰ or whether it was necessary for the worker to provide some kind of evidence to trigger it, as the Commission initially suggested. In the end, the Platform Work Directive opted for the second option, introducing a moderate presumption. Art. 5(1) of the Platform Work Directive provides that the contractual relationship between a digital platform and a person performing digital platform work shall be legally presumed to be an employment relationship if one requirement is met: that there are facts indicating that the platform exercises control and direction over that person.

This emphasis on the subordination of the worker to the platform is a consequence of Member States' case law on digital platform work. Despite the lack of a common concept of employee in the Member States, most of the judicial pronouncements insisted on direction and control, i.e. subordination, from an indirect perspective, with the integration of the worker into an external organisation prevailing.⁴¹ This last point is shared, moreover, by the case law of the ECJ on the EU concept of employee, which is based on a strict view of the subordination of the worker to the employer's power of management.

In contrast to the initial proposal, the final version of the Platform Work Directive does not specify what such criteria or indications of control and direction may be. It only specifies that they must be established 'in accordance with national law, collective agreements or practice in force in the Member States, with consideration to the case-law of the Court of Justice'. The general presumption of employment is thus built on two steps. The proof of the adequate indications would be sufficient to understand that there is direction of control by the platform; direction or control which, in turn, would allow it to

³⁹ The impact reports revealed that between 1.72 and 4.1 million persons performing platform work in the EU could be re-qualified as employees as result of the presumption. *Cfr.* BARCEVICIUS, E., GINEIKYTÉ-KANCLERÉ, V., KLIMAVIČIŪTĒ, L. and RAMOS MARTÍN, N., *Study to support the impact assessment of an EU initiative to improve the working conditions in platform work. Final Report*, Publications Office of the European Union (Luxembourg, 2021), p. 149.

⁴⁰ Report of the Committee on Employment and Social Affairs of 23 December 2022 on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work [P9_A(2022)0301] [available online at: [https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2022/0301/P9_A\(2022\)0301_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2022/0301/P9_A(2022)0301_EN.pdf)].

⁴¹ For a comparative analysis, see HIESSI, C., "Case law on the classification of platform workers: Cross-European comparative analysis and tentative conclusions [online]", *Forthcoming Comparative Labour Law & Policy Journal*, pp. 5-69.

be understood (presumed) that there is an employment relationship. The facts indicating the control and direction would exempt the worker from providing all the factual elements of the employment relationship.⁴²

Member States have the autonomy to decide how to active the presumption measure. Art. 5(2) leaves them free to construct the presumption in a ‘effective and rebuttable’ manner. It only requires that the presumption simplifies the procedure for the benefit of platform workers and does not impose greater evidentiary burdens on them. Thus, Member States will have to choose whether to include or not such criteria or indications of control and direction in legislation (or collective agreements). Both options will have their advantages and disadvantages. Establishing and detailing the criteria in the legislation, as Portugal did,⁴³ eases the burden of proof on employees,⁴⁴ but is not without risk, as platforms can adapt their terms and conditions and thereby disable the presumption.⁴⁵ Opting for a formulation as broad as the one now included in the Platform Work Directive, so that the courts are the ones to establish the criteria, can encompass direct and indirect forms of subordination and, specially, the ways in which the organisation of work on platforms evolves, as the notion of control and direction is abstract and dynamic.⁴⁶ However, this option

⁴² For example, according to the definition of employee in Art. 1.1 of the Spanish *Estatuto de los Trabajadores* (*Real Decreto Legislativo 2/2015, de 23 de octubre*), the worker would have to prove, along with the subordination, that he/she is providing work in the employ of another (also know as *ajenidad*).

⁴³ Art. 12.º-A.1 of *Código do Trabalho*: ‘*Presume-se a existência de contrato de trabalho quando, na relação entre o prestador de atividade e a plataforma digital se verificarem algumas das seguintes características: a) A plataforma digital fixa a retribuição para o trabalho efetuado na plataforma ou estabelece limites máximos e mínimos para aquela; b) A plataforma digital exerce o poder de direção e determina regras específicas, nomeadamente quanto à forma de apresentação do prestador de atividade, à sua conduta perante o utilizador do serviço ou à prestação da atividade; c) A plataforma digital controla e supervisiona a prestação da atividade, incluindo em tempo real, ou verifica a qualidade da atividade prestada, nomeadamente através de meios electrónicos ou de gestão algorítmica; d) A plataforma digital restringe a autonomia do prestador de atividade quanto à organização do trabalho, especialmente quanto à escolha do horário de trabalho ou dos períodos de ausência, à possibilidade de aceitar ou recusar tarefas, à utilização de subcontratados ou substitutos, através da aplicação de sanções, à escolha dos clientes ou de prestar atividade a terceiros via plataforma; e) A plataforma digital exerce poderes laborais sobre o prestador de atividade, nomeadamente o poder disciplinar, incluindo a exclusão de futuras atividades na plataforma através de desativação da conta; f) Os equipamentos e instrumentos de trabalho utilizados pertencem à plataforma digital ou são por estes explorados através de contrato de locação’.*

⁴⁴ BRAMESHUBER, E. and HÖLLWARTH, J., “Die EU-Plattformarbeitsrichtlinie”, *Arbeits- und SozialrechtsKartei*, vol. 28, no. 5, 2024, pp. 173-174.

⁴⁵ This was acknowledged in recital 7 of the Commission’s initial proposal: ‘National case law has resulted in diverse outcomes and digital labour platforms have adapted their business model in various ways, thus increasing the lack of legal certainty over the employment status’.

⁴⁶ See ALOISI, A. and POTOCKA-SIONEK, N., “De-gigging the labour market? An analysis of the ‘algorithmic management’ provisions in the proposed Platform Work Directive”, *Italian Labour Law e-Journal*, vol. 15, no. 1, 2022, p. 42.

could oblige workers to prove their own status as employees, thereby eliminating the procedural advantages attributed to the legal figure of the presumption.

The presumption designed is a hybrid measure. It has implications from a material perspective, because it is related to the concept of employment relationship, and from a procedural perspective, because it is a mechanism that fixes the judicially relevant facts. However, the competence to define the concept of employee and the procedural autonomy of the Member States mean that the final text of the Platform Work Directives does not change the concept of employment relationship or significantly alter the burden of proof.

Art. 5(3) provides that the presumption must be applied in all relevant and administrative or judicial proceedings where the correct determination of employment status of the person performing platform work is at issue. Furthermore, according to Art. 5(5), Member States should provide for the possibility for procedures to determine employment status to be initiated *ex officio* by competent national authorities, such as the labour inspectorate, when they consider that a person performing platform work has been incorrectly classified. This includes not only the specific procedures available to Member States to determine the employment status of a relationship, but all those processes in which such status is a procedural step prior to the examination of other issues of the employment relationship (dismissal, pay, etc.). Proceedings relating to tax, criminal and social security matters are excluded from the above rule, and it is left to the Member State to decide whether to apply the presumption in them in accordance with national law. The social security exclusion, based on the EU's regulatory powers, may lead to a protection deficit, as the protective action of the social security systems in many Member States requires registration as an employee.

It is foreseeable that this measure of the Platform Work Directive will have important implications for those Member States whose legal systems do not have a figure similar to the presumption of employment.⁴⁷ However, it should be noted that the presumption will not simply solve problems of misclassification of all persons performing platform work. There are two issues that prevent this:

1) The effectiveness of the presumption will depend on each Member State's national definition of employee and on how the courts interpret this

⁴⁷ Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Romania, Slovakia and Sweden. The Member States with general presumptions of employment are Belgium, Croatia, Estonia, France, Greece, Malta, the Netherlands, Portugal, Slovenia and Spain. See KULLMAN, M., "Platformisation of Work: an EU Perspective on Introducing a Legal Presumption", *European Labour Law Journal*, vol. 13, no. 1, 2022, pp. 1-15.

concept. It is more likely that the persons performing platform work will qualify as employee if the Member State's law has a broad definition of the concept of employee or employment relationship. Conversely, the more restrictive the definition of employee, the less likely is that the presumption will be triggered, because platforms may exercise indirect organisational power that does not always fit the judicial understanding of the subordination. Thus, while the Portuguese presumption has allowed workers on well-known digital platforms to be judicially classified as employees,⁴⁸ the Belgian presumption has had little impact on the reclassification of workers.⁴⁹

It might be thought that the possible restriction on the national definition on employee is limited by the case law of the ECJ, which the Art. 5(1) says must be taking into account when defining the criteria for control and direction. If it is understood that the Platform Work Directive refers to the case law of the ECJ on the community concept of employee, some pronouncements may favour a flexible understanding of the elements defining an employment relationship.⁵⁰ However, the only pronouncement concerning digital platform work⁵¹ could serve to maintain the strict understanding of subordination and employment relationship. Such reference to the case law of the ECJ can also be understood as including pronouncements concerning the concept of undertaking in the field of the competition law, which, interpreted in the opposite sense, can serve to conceptualise the concept of employee in situations where the subordination is not so much personal as organisational or economic.

2) The persons performing offline platform work will be most successful in triggering the presumption, because they are subject to more 'visible' control and direction (geolocation, express order, customer evaluations, etc.). Online platforms workers will find it more difficult to obtain evidence of the elements of subordination, as some criteria are compatible with the coordination that exists in the relationships between the self-employed and the undertaking.

A similar situation applies to persons performing offline or online platform work through intermediaries. If they want to trigger the presumption to

⁴⁸ For example, judgment of *Tribunal Judicial da Comarca de Lisboa* of 1 February 2024 (reference 432525619). In any case, it should be noted that this judgment has been annulled by the *Juízo do Trabalho de Lisboa* because the company was incorrectly cited.

⁴⁹ See FRANKE, M., PULIGNANO, V. and MARÀ, C., "Workers' contention over unpaid labour time and food delivery and domestic work platforms in Belgium", *Work in the Global Economy*, vol. 3, no. 1, 2024, pp. 11-12.

⁵⁰ See, inter alia, judgments of 13 January 2004, *Allonby*, C-256/01 (EU:C:2004:18) and 1 March 2012, *O'Brien*, C-393/10 (EU:C:2012:110).

⁵¹ Order of 22 April 2020, *Yodel*, *cit.*

be declared as employees of the platform, they will also have to prove that the control or direction does not come from the intermediary, but from the platform. Art. 4(3) seems to allude to this by providing that the party or parties assuming the employer's obligations must be clearly identified when the existence of an employment relationship is established.

3. The rebuttal of the presumption

Art. 5(1) stipulates that if the platform intends to rebut the presumption, it must prove that 'the contractual relationship in question is not an employment relationship as defined by law, collective agreements or practice in force in the Member States, with consideration to the case-law of the Court of Justice'. Consequently, the presumption does not imply an immediate qualification of the persons performing platform work. The platform's possibility of rebuttal would mean nothing more than the platform's counterargument to the workers' proof, so that the proof of control and direction would not be followed by the presumption of employment. Thus, even if the presumed employee were to prove the existence of indications of control and direction, the digital platform could bring other elements to the process that would prove that he or she is a self-employed worker, as has happened in some proceedings in Portugal.⁵² The wording of Art. 5(1), resulting from the autonomy of the Member States and the fear of adopting a European concept of an employee, could end up legitimising the subordination of self-employed workers.

IV. PROTECTING PERSONS PERFORMING PLATFORM WORK FROM ALGORITHMIC MANAGEMENT

Algorithmic management of digital platforms not only poses on risk the core institution of labour law, i.e. the employment contract. It may also significantly affect other rights attached to workers. The Platform Work Directive takes as its premise that the infrastructures of digital platforms raise questions

⁵² The *Juízo do Trabalho de Portimão* in its ruling of 5 April 2024 denied the status of employees to 27 Glovo workers who provided evidence to active the Portuguese presumption of employment. According to the court, the workers were not subordinate to the platform since, among other arguments, they could refuse to carry out a service because if they did not agree with the price offered by the platform. Nor was it considered proven that the platform controlled the provision of work and imposed working hours on the workers, as they could work for other platforms.

about the data protection rights of persons performing platform work and that these questions cannot be resolved through the General Data Protection Regulation⁵³ (hereinafter GDPR), because the latter does not consider the employment perspective.⁵⁴

The most extensive part of the Platform Work Directive (Chapter III) is devoted to measures related to algorithmic management with the aim of protect persons performing platform work from two automated systems used by digital platforms. On the one hand, automated monitoring systems, defined as the systems that ‘are used for or which support monitoring, supervising or evaluating, by electronic means, the work performance of persons performing platform work or the activities carried out within the work environment, including by collecting personal data’ [Art. 2(1)(h)]. On the other hand, automated decision-making systems, defined as the systems that ‘are used to take or support, by electronic means, decisions that significantly affect persons performing platform work, including the working conditions of platform workers’ [Art. 2(1)(i)]. As will be seen below, the Directive attaches great importance to the latter type of systems, insofar as they can determine aspects of relevance for persons performing platform work and platform workers: access to and organisation of work assignments, earnings, safety and health, working time, access to training, promotion or its equivalent, and their contractual status, including the restriction, suspension or termination of their account.

1. Limitations and preventive measures in automated systems

To prevent irregular algorithmic decisions, the Platform Work Directive imposes two obligations on the platform in the construction or design of automated systems:

1) Restrictions on the processing of personal data. From the start of the recruitment or selection procedure and throughout the contractual relationship [Art. 7(2)], digital platforms shall not collect data through automated monitoring and decisions-making systems or through other types of automated sys-

⁵³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

⁵⁴ Recital 38: ‘While Regulation (EU) 2016/679 establishes the general framework for the protection of natural persons with regard to the processing of personal data, it is necessary to lay down specific rules addressing the concerns that are related to the processing of personal data by means of automated monitoring systems or automated decision-making systems in the context of platform work’.

tems supporting or taking decisions that affect person performing platform work when that person is not offering or performing platform work [Art. 7(1) (c) and (3)]. Nor should they process data that are intimately linked to the privacy of the persons performing platform work, such as his or her emotional or psychological state [Art. 7(1)(a)], private conversations, including exchanges with other workers and their representatives [Art. 7(1)(b)], as well as data to predict the exercise of fundamental rights, including the right of association, the right of collective bargaining and action or the right to information and consultation [Art. 7(1)(d)] or to infer racial or ethnic origin, migration status, political options, religious or philosophical beliefs, disability, state of health, trade union membership, sex life or sexual orientation [Art. 7(1)(e)]. This list of prohibited data also includes biometric data in so far as their processing is for the purpose of establishing the identity of the persons performing platform work [Art. 7(1)(f)]. This imply that digital platforms will be able to use biometric data of persons performing platform work to authenticate their identity, e.g. visual recognition systems to access the account and record the working time, provided that the basis required by Art. 9(2) GDPR is met.⁵⁵

2) Restrictions on the effects of automated decisions. Art. 12(3) insist on the most direct care of the platform worker, obliging platforms not to construct or use automated monitoring or decision-making systems in any manner that puts undue pressure on platform workers or put their physical and mental health at risk. Unlike the previous obligation on types of data, this obligation only applies to platforms in respect of employees, excluding self-employed workers from the scope of protection even though they are exposed to comparable risk. This exclusion is due to scope of the measure, i.e. safety and health at work, which, in the EU's view, can only cover employees.⁵⁶

The above constructive measures, if properly implemented, could provide a firewall to unlawful or unfair algorithmic decisions. However, it is well known that many algorithms evolve and deliver results different from those for which they were initially programmed. For this reason, the Platform Work Directive

⁵⁵ In Recital 41, the Platform Work Directive builds on the distinction made between identification and authentication in Art. 3 of Regulation 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. Thus, it provides that digital platforms cannot use biometric data to identify workers, i.e. to establish the identity of the worker by matching the biometric data of the worker with the stored biometric data of a number of persons in a data base. However, they can use the same biometric data for authentication purposes, i.e. to verify the identity of the worker by comparing his or her biometric data with the data previously provided by the same worker.

⁵⁶ Recital 54: 'The rights pertaining to health and safety at work (...) which are specific to workers pursuant to Union law, should not apply to persons performing platform work who do not have an employment relationship'.

adopts a *human in command* approach. The platforms have two obligations to supervise automated systems under Art. 10. On the one hand, digital platforms must ensure sufficient human resources to effectively oversight decisions relating to persons performing platform work that have been taken or supported by automated systems [Art. 10(2)]. This measure is intended to provide persons performing platform work, i.e. employees and self-employed workers, with a human manager or supervisor who has the competence, training and authority to review automated decisions (on his or her own initiative or at the person performing platform work's request) and, if necessary, to override the decision. On the other hand, digital platforms must periodically, and at least every two years, carry out an evaluation of the effects or the impact on persons performing platform work of each decisions taken or supported by automated systems [Art. 10(1)]. This obligation includes not only the evaluation of the most relevant decisions such as sanction or suspension, but also more routine decisions such as the allocation of task. The purpose of this measure is the protection of working conditions and equal treatment at work. Thus, if after the evaluation a high risk of discrimination or violation of persons performing platform work's rights is detected, the platform must take appropriate measures to correct it, including the modification or interruption of the automated systems [Art. 10(3)].

2. Algorithmic information rights

Full protection of persons performing platform work require that they are fully aware of the processing of their personal data by automated systems and its impact. Articles 9 and 11 of the Platform Work Directive aim to improve the asymmetry of information between the platform and the persons performing platform work by recognising the right to information and the right to human review for employees and self-employed workers. In fact, they can be considered as one of the flagship articles of the Platform Work Directive, significantly improving the rights that persons performing platform work would be entitled to under Arts. 13, 15 and 22 of GDPR.

The right to information of persons performing platform work, i.e. employees and self-employed workers, in Art. 9 is constructed based on the two types of automated systems of digital platforms (monitoring and decision-making).

Firstly, it includes a general obligation common to both systems, stipulating that digital platforms should inform persons performing platform work of the use of automated monitoring or decisions-making systems and the types of

decisions supported or taken by such systems, including the decisions that do not affect persons performing platform work in any manner [Art. 9(1)(c)]. This last provision would make it possible to overcome the doubts that arise when applying the guarantees provided for in Art. 22 GDPR, which requires that the automated decisions significantly affect the person who is the subject of it.

Secondly, it breaks down specific information obligations for each of the systems. In the area of automated monitoring systems, the platform would be obliged to inform persons performing platform work about the categories of data and actions monitored, supervised or evaluated, including evaluation by the recipient of the service⁵⁷, the aim of the monitoring and how the systems is to achieve it and the recipients or categories of recipients of the personal data processed by such systems [Art. 9(1)(a)]. In the area of the automated decision-making systems, the platform would be obliged to inform persons performing platform work on three connected points: the categories of decisions that are taken or supported by such systems (1), the categories of data and main parameters that such systems take into account and the relative importance of each of them, including how the persons performing platform work's personal data or behaviour may influence it (2); and the grounds for any decisions on the persons performing platform work's contractual status or any decisions of equivalent or detrimental effect, including the decisions to restrict, suspend or terminate the account and to refuse the payment for work (3) [Art. 9(1)(b)].

All such information must be provided in a concise, transparent, intelligible and easily accessible form by means of a written document using clear and plain language to explain the characteristics of automated systems affecting persons performing platform work' working conditions. This document, which may be electronic, must be made available to the person performing platform work at any time on request, at the latest on the first working day following the introduction or modification of the systems affecting his or her working conditions and before the start of recruitment or selection procedure [Arts. 9(2), 9(3) and 9(4)]. Information about changes or modifications to the automated system ensures that persons performing platform work are, to some extent, protected from constant adaptation of working conditions through algorithms. However, in such cases, the platforms should not rely on compliance

⁵⁷ On the need to anonymise customer evaluations of digital platform workers in application of the GDPR, see judgments of the Amsterdam Court of Appeal (Civil Chamber) of 4 April 2023 (Nos. 200.295.747/01 and 200.295.806/01).

with the right to information to circumvent the procedures for substantial changes in working conditions.

3. Accountability and human review of automated systems

Of the two automated systems used by digital platforms, it is the automated decision-making system that has the greatest impact, because digital platforms manage human resources through it in an intrusive way, without workers having direct contact with a supervisor. The information provided to persons performing platform work on such systems under Art. 9 would be provided *ex ante*. However, once the automated systems were in operation, they could take or suggest decisions that contradict this prior information. These dysfunctions are addressed in Art. 11 through three measures, which would be recognised for employees and self-employed platform workers:

1) Right to *ex post* explanation and information. Art. 11(1) provides that persons performing platform work have the right to obtain an explanation from the platform in relation to any decision taken or supported by an automated decision-making system. In contrast to previous versions of the Platform Work Directive, it is no longer necessary for this right to arise that the decisions significantly affect the person performing platform work. However, this circumstance is considered when establishing how the explanation is to be given. Thus, the explanation must always be given in written form when the decision restricts, suspends or terminates the worker's account, refuses the payment for work performed or affects the essential of the employment or the contractual relationship, including the contractual status.

2) Right to human intervention. Under Art. 11(1), digital platforms should designate a contact person with the necessary competence, training and authority to whom persons performing platform work would have access to discuss and clarify the information provided, i.e. the facts, circumstances and reasons for the decision.

3) Right to human review. Persons performing platform work and their representatives, including representatives of self-employed workers, if any, have the right to request the digital platform to review any decision taken or supported by an automated decision-making system. Upon the worker's request, the platform shall provide a reasoned written response without delay, within two weeks at the latest [Art. 11(2)]. If, after the review, the platform detects that the decision violates the worker's rights, it must rectify the deci-

sions within a maximum of two weeks of its adoption. If such rectification is not possible, the platform must offer the worker adequate compensation for the damage sustained. In both cases, the platform must take necessary measures, including, if appropriate, a modification of the automated system or the discontinuance of its use, to prevent such decisions from being repeated in the future [Art. 11(3)].

Art. 11(4) warns that the above rights cannot affect disciplinary and dismissal procedures laid down in national law and practices and collective agreements. Consequently, if a digital platform decides to sanction an employee through a decision adopted or supported by an automated decision-making system, the imposition of such a sanction must follow the procedures established in the applicable national labour law, without such procedures being fulfilled through the rights recognised in Art. 11. The same rule applies when the platform decides to dismiss the employee, with the particularity that the decisions to terminate must not be taken in an automated manner. Art. 10(5) requires that any decisions to restrict, suspend or terminate the contractual relationship or the account of a person performing platform work, or any other decisions causing equivalent detriment, to be taken by a human being. Considering that the Platform Work Directive leaves open the possibility that the dismissal decision taken by the human is supported by an automated decision-making system, it will be necessary to analyse on a case-by-case basis what role is attributed to the human decision-maker. In this regard, the criteria or indications being used by some national data protection agencies and courts to assess whether, for the purposes of the GDPR, a decision ceases to be automated because there is significant human intervention may be useful. These include the organisational environment in which the decision is taken, such as the company's internal policies and procedures,⁵⁸ the chains of approval of decisions and the level of staff training.⁵⁹

In any case, the configuration of the three previous measures also solves many of the interpretative problems of Art. 22 GDPR, not only because the need for decisions to significantly affect workers has been eliminated, but also

⁵⁸ See BARROS VALE, S. and ZANFIR-FORTUNA, G., "Automated decision-making under the GDPR: Practical cases from Courts and Data Protection Authorities", *Future of Privacy Forum* [available online at: <https://fpf.org/wp-content/uploads/2022/05/FPF-ADM-Report-R2-singles.pdf>].

⁵⁹ This criterion was taken into account by the Vienna Data Protection Agency in its decision of 18 December 2020 (No. W256 2235360-1/5E), which concluded that the company had not made an automated decision despite the use of an algorithm assessing the potential of job applicants, because the final decision rested with the company's counsellor, who was specifically trained for this purpose and had at his disposal a number of criteria to verify elements that were not examined by the algorithm (motivation, indebtedness, housing, etc.).

because the scope of application of such rights is extended to decisions ‘supported’ by an automated system. Thus, algorithmic managements rights of the Platform Work Directive include multi-stage systems and all final decisions that are taken by a human decision-maker based on suggestion of automated systems. Notwithstanding the above, it should be noted that the final text of the Platform Work Directive, unlike the provisions of Art. 22 GDPR, does not expressly prohibit digital platforms from profiling or fully automated data processing. Consequently, if there is an automated decisions on a digital platform, Art. 11 of the Platform Work Directive and Art. 22 GDPR would coincide in the recognition of complementary rights of algorithmic management for persons performing platform workers. However, the purpose and extension of the Art. 11 allows to recognise rights which, *a priori*, would be excluded according to certain interpretations of Art. 22 GDPR.⁶⁰

V. SAFETY AND HEALTH OF PLATFORM WORKERS

The obligation to evaluation and monitor automated systems are not only related to algorithmic management and data protection of platform workers. Such monitoring also extends to the effects of automated systems on the safety and health of platform workers. Article 12 obliges digital platforms to evaluate the risks of the automated systems, in particular work-related accidents and psychosocial⁶¹ and ergonomic risks, and the adequacy of the safeguard of the automated systems to prevent such risks in view of the specific characteristics of the work environment [Art. 12(1)(a) and (b)].

Although this was an obligation that could be deduced from Art. 6 of Directive 89/391/EEC,⁶² Art. 12(1)(c) reminds platforms of the need to introduce appropriate preventive and protective measures, specifying that they must not use automated systems in any manner that puts undue pressure on platform

⁶⁰ See judgments of the Amsterdam *Rechtbank* of 11 March 2021 (cases C/13/692003 and C/13/687315) considering that Uber workers were not entitled to object to the decisions of the ride allocation systems under Art. 22 GDPR because, despite being automated decisions, these did not produce legal effects on them. To the contrary, concluding that automated decisions of the platforms’ service allocation system have a significant effect on workers because they determine the opportunity to work and to be paid, see judgements of the Amsterdam Court of Appeal (Civil Chamber) of 4 April 2023, *cit.*, and decision of the Italian Data Protection Agency of 22 July 2021 (No. 285).

⁶¹ On the most frequent psychosocial risks at work on digital platforms, see FERNÁNDEZ MARTÍNEZ, S., “Los riesgos psicosociales en el trabajo realizado mediante plataformas digitales”, *Iuslabor*, no. 3, 2020, pp. 81-101.

⁶² Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

workers or otherwise endanger their safety and their physical and mental health [Art. 12(3)]. In addition, preventive measures against violence and harassment, including effective reporting channels, must be put in place [Art. 12(5)].

One of the particularities of these safety and health measures is that they are only binding on platforms in respect of platform workers with whom they have an employment contract, but not in respect of self-employed workers, even though both types of workers may be exposed to the same risks.

VI. INFORMATION AND CONSULTATION AND COLLECTIVE RIGHTS IN PLATFORM WORK: REPRESENTATIVES OF EMPLOYEES AND SELF-EMPLOYED WORKERS

The absence of a workplace, the lack of connection between workers and the competitiveness are factors that weaken the collective feeling and the rights of workers' representatives. The Platform Work Directive, with the intention of promoting effective social dialogue, recognises several prerogatives for workers' representatives. It should be noted that the Directive makes a clear distinction between representatives of employees and representatives of self-employed workers. Two types of rights can therefore be distinguished according to their personal scope of application.

1) Rights granted to representatives of employees and to representatives of self-employed workers, which would be: the right to opinion when carrying out the data protection impact assessment of automated systems required by Art. 35(1) GDPR [Art. 8(1)] and to receive the result of such assessment [Art. 8(2)]; the right to receive the same information provided to persons performing platform work under Art. 9(1); the right to receive comprehensive and detailed information about all relevant automated systems and their features at their request, prior to their use or prior to the introduction of changes affecting working conditions, the organisation of work or monitoring work performance [Art. 9(4)]; the right to receive information on the evaluation made under Art. 10.1 on the effects of the decisions of automated systems [Art. 10(4)]; the right to request a review of an automated decisions on behalf of the persons performing platform work [Art. 11(2)]; the right to receive information on the number of persons performing platform work, disaggregated by level of activity and the contractual status, the general terms and conditions applicable to those contractual relationships, the average duration of the activity, the average weekly number of hours worker per person, the average in-

come from activity of persons performing platform work on a regular basis and the intermediaries the digital platform has a contractual relationship with [Art. 17(1)]; and the right to use the communication channel created by the platform, through its digital infrastructure, to enable people performing platform work to communicate with each other privately (Art. 20).

The recognition of such rights for representatives of self-employed workers could be seen as furthering the Commission's commitment to 'personal work' as worthy of protection in collective bargaining.⁶³ However, it should be stressed that the rights conferred on the representatives of self-employed workers are not based on the collective protection of the latter's working conditions. As stated above, the Platform Work Directive is not intended to grant employment-type rights to self-employed worker on digital labour platforms, nor to put them on an equal footing with employees, despite the similarities between them. It only aims to provide them with effective protection as data subjects against algorithmic management. Thus, Art. 15 specifies that representatives of self-employed workers may only exercise such collective rights if they act on behalf of self-employed workers regarding the protection of their personal data.

2) Collective rights granted only to employees' representatives. Art. 13 of the Platform Work Directive reserves information and consultation rights, as measures of an employment nature, for employees' representatives and, in the absence of such representatives, for the employees.⁶⁴ Thus, based on the obligations already provided for in Directive 2002/14/EC,⁶⁵ a new circumstance is introduced on which the platform, as the employer, must inform and consult the employees' representatives: decisions on the introduction or substantial modification of automated monitoring or decisions-making systems [Art. 13 (1) and (2)]. This would be a procedure of exchange of views and dialogue within the meaning of Art. 2(f) and (g) of Directive 2002/14/EC. Accordingly, the employees' representatives or the employees concerned should give an opinion on the platforms' proposal. In the preparation of this opinion, they could be assisted by an expert of their choice due to the technical complexity of the issues to be discussed. The cost of that expert shall be borne by the platform if they are proportionate, and the platform has more than 250 employees in the Member State concerned [Art. 13(3)]. If the decision is to be communicated and consulted directly to the employee, in the absence of rep-

⁶³ Commission' Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02).

⁶⁴ Recital 54.

⁶⁵ 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.

representatives, the platform shall provide them with a written document setting out the information in a transparent, intelligible and easily accessible form, using clear and plain language (Art. 14).

The EU is aware that the variety of digital platforms makes it difficult for these information and consultation rights to be applied in a homogeneous way, bearing in mind, moreover, that representatives will not have the same degree of impact in offline and online digital platforms. In addition, there are two important reasons that can undermine the effectiveness of information and consultation rights. Firstly, the fragmentation of the workforce caused by outsourcing through intermediaries. Secondly, the difficulties in adapting the concepts of undertaking and establishment on which Directive 2002/14/EC is based, specially from a spatial point of view on online platforms.⁶⁶ For this reason, Article 28 of Platform Work Directive legitimates the social partners to maintain, negotiate, conclude and enforce collective agreements establishing different provisions on the right to information and consultation in platform work. Ultimately, such provision is in line with Article 25, which calls on Member States to take appropriate measures to promote the role of social partners and to encourage the exercise of the right to collective bargaining at work on digital platforms.

VII. TRANSPARENCY OBLIGATION OF DIGITAL LABOUR PLATFORMS VIS-À-VIS NATIONAL AUTHORITIES

The Platform Work Directive aims, as one of its objectives, to increase control by authorities over less visible digital platforms, i.e. those that are established in a Member State other than the one in which the person performing platform work provides his or her services. Therefore, digital platforms are obliged to declare the work performed by their employees to the authorities of each Member State in which the work is performed (Art. 16) and to transmit to them every six months (or every year in the case of small or medium-size enterprises) the same information which they are required to make available to representatives under Art. 17(1) of the Directive. This would indirectly address the challenge of the cross-border nature of digital platforms by ensuring that

⁶⁶ See ALOISI, A., RAINONE, S. and COUNTORIS, N., *An unfinished task? Matching the Platform Work Directive with the EU and international 'social acquis'*, ILO Working Paper 101 (Geneva, 2023), pp. 20-21.

they comply with the labour and social security rules of all Member States in which they provide their services.

VIII. PROCEDURAL IMPLICATIONS OF THE RIGHTS CONFERRED BY THE PLATFORM WORK DIRECTIVE

So far, most of the legal proceedings on digital platform work have concerned the delimitation of the employment relationship, initiated either by the workers themselves, on an individual basis, or by the authorities, following inspections. Once the Platform Work Directive is transposed, it is likely that qualification proceedings will increase in the short and medium terms. However, once market actors adjust, other objects of litigation would emerge, such as those linked to data protection or algorithmic discrimination, and the subjects at the head of such litigation could also change.

Article 19 of the Platform Work Directive recognises representatives of the persons performing platform work, i.e. representatives of employees and self-employed workers, and entities with a legitimate interest the right to initiate proceedings in support of or on behalf of persons performing platform work in accordance with national law. Through this measure, the EU strengthens the role of certain organisation, such as trade unions, as guarantors of the directives.

The Platform Work Directive also ensures that the possible increase in litigation does not lead to a lack of protection for workers. For this reason, Articles 22 and 23 provide for the protection of platform workers, both self-employed and employees, against adverse treatment or consequences for having exercised the rights laid down in the Platform Work Directive or for having lodged a complaint against the digital platform. Adverse treatment expressly includes dismissal or termination of contract, as well as any preparatory acts. Accordingly, persons performing platform work who suspect that they have been dismissed or that their contract has been terminated for exercising their rights can request the digital platform to provide duly substantiated grounds for the termination of the contract in writing and without undue delay [Art. 23(2)]. In addition, the burden of proof in that case is reversed, with the onus being on the platform to prove in the proceeding that the dismissal or termination of the contract was based on reasons unrelated to the person performing platform work's claim [Art. 23(3)].

The exercise of algorithmic management rights gives a whole arsenal of evidence to persons performing platform work and their representatives. With-

out prejudice to the above, Art. 21 of the Platform Work Directive contains another obligation of transparency for platforms, in this case referring to courts or competent authorities. In proceedings concerning the provisions of the Platform Work Directive, these public bodies could order the platform to disclose any relevant evidence which lies in their control [Art. 21(1)], including those containing confidential information where relevant to the proceeding [Art. 21(2)].

Finally, infringements of rights under the Platform Work Directive will give the persons performing platform work a right to redress, including adequate compensation for the prejudice suffered (Art. 18). It will be up to the Member States to provide, in such circumstances, for administrative or criminal penalties.

IX. CONCLUSIONS: A BALANCE BETWEEN PROTECTION AND INNOVATION

The Platform Work Directive is presented as balanced, innovative, protective and consistent with the judicial development of the Member States and the EU itself. Such a degree of coherence denotes an important preliminary work in which the perspective of the social partners and the results of academic research have been considered. However, as is usual for rules that take the form of a directive, most of the success of its measures will depend on transposition by Member States.

The EU's competence limitations, the lack of a specific model and the commitment to a moderate presumption mean that the re-qualification of platform workers will remain in the hands of national judicial bodies and will proceed at different paces. Member States will not only have to reconcile such a presumption with their normative and jurisprudential *acquis* on the concept of employee. They will also have to decide how they transpose the presumption, i.e. whether they choose to maintain a generic presumption, to be developed in case law, or whether they specify in the legislation what are the criteria that trigger the presumption. The second option, which is more favourable for platform workers from a procedural point of view, will be more feasible in those Member States that already have presumptions of employment in their legal system and have a broad concept of employee. The risk lies, then, in those Member States that have a strict concept of 'control and direction' and opt for a transposition of *minimums*, making it difficult for the court to assess and apply the presumption to offline and, especially, online platform workers.

Measures relating to transparency and algorithmic management rights are also exposed to the different points of view of Member States. The Plat-

form Work Directive opens a new era of accountability, but it does so through generic mandates. The monitoring or evaluation duties of the platforms will have to be developed and specified in each Member State, thus bringing into play different appreciations of the burdens imposed on employers, the extent of responsibilities to subcontractors or, finally, the systems of workers' representative legitimacy.

Notwithstanding the above, the fact remains that the Directive adds another piece to the complex mosaic of rules governing data protection of individuals and of workers. The measures contained therein make a decisive contribution to the EU digital transformation and to the implementation of a human approach among the technology that governs the workforce. However, they can create a double layer of protection. Because of the Platform Work Directive, platform workers will have more rights than workers in 'traditional' sectors that do not provide services through platforms but are also algorithmically managed, as the latter will have recourse only to the safeguards of the GDPR, which are not designed for the employment sphere. The focus is undoubtedly on social partners, who could take the algorithmic management measures of the Platform Work Directive as an example to collectively regulate the uses of technology in the workplace. In the meantime, the debate around digital platform work adds new chapters that will shape the future of the labour law in the Member States.

Fide

Fide is a legal-economic think tank, an operational centre of practical knowledge, made possible thanks to the active participation of all sectors of civil society that have something to say on the matter: from senior management in companies to law firms, from university professors to courts of justice, from all levels of government to professionals in different fields related to the world of law and business. All of them have a place, and a privileged place, at Fide.

Asnala

The National Association of Labor Law Specialists has, for over twenty-five years, constituted the principal forum for Spanish labor law professionals, accompanying them both in their access to and subsequent practice of the profession. It stands as the most representative association at the national level, incorporating lawyers as well *graduados sociales*.

Among its core purposes are the advancement of specialization within the field of labor law, through the formalization of cooperation agreements with related legal actors, both domestic and international; the promotion of scholarly training activities and the dissemination of specialized publications; and the enhancement of the professional image, market visibility, and institutional participation of labor law specialists before public authorities, the judiciary, and civil society at large.

Forelab

The “*Foro Español de Laboralistas*” (Spanish Forum of Labour Lawyers) is an independent association, made up of prominent lawyers and jurists in the field of Labour and Employment Law, which fosters specialised knowledge of labour law, providing a meeting place that allows the exchange of professional experiences and the analysis –mostly from a juridical perspective –of the evolution of labour relations in Spain.

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The application of European social law by the Court of Justice of the European Union, whose case law has been of great interest to legal practitioners in the Member States, some of which have been incorporated into legislative reforms of different European states' legal systems and all of them, necessarily, into domestic case law, even reinterpreting it on occasions, underlines the importance of the publication of this book, especially as it is written in English, a language commonly known and used by European jurists. Issues such as the concepts of worker and employer, equality and non-discrimination, collective dismissal, effective judicial protection, temporary employment, social security, the posting of workers, social dialogue, disability, and public procurement, along with many others of equal importance (notably the increase in references for a preliminary ruling from national courts on the application of the Charter of Fundamental Rights of the European Union), have been the subject of decisions by the judges of the ECJ. With this accumulation of new developments, the publication of this work on European Union social law offers clear and indisputable proof that knowledge of the case law of the ECJ is essential for anyone working in the field of labour law and social security and protection, whether in teaching, research, legal defence, administration, jurisdiction, collective bargaining, social dialogue and consultation, or legislation. It is well known that the case law of the ECJ, even when handed down in response to inquiries from courts in other states, has an immediate impact on the interpretation and application of EU legal systems. It is no exaggeration to say that, even at this point in time, its contribution to "Europeanization," to the integration of the Union's legal system into those of the different EU states, is so dense and relevant that it is unmanageable for any operator without knowledge of the Union's social law as interpreted by the ECJ.

