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The Boundaries between Collective Agreements and Statutory Legislation in the Gig Economy

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I. The Regulatory Dilemma in Digital Platform Work: Statutory Legislation, Collective Agreements or Case Law?

The aim of this chapter is to analyse the interactions between different sources of regulation in digital platform work, between collective agreements, statutory legislation, case law and other sources of regulation, from a comparative point of view. How have the boundaries between regulatory sources changed due to the expansion of digital platform work? Is there a common trend to be highlighted or in each national legal system have the traditional regulatory patterns been followed? Particularly, how has collective bargaining, as a regulatory source, changed its relationship with other regulatory sources like statutory legislation and case law? One of the possible perspectives is to consider if statutory legislation can still be defined as an auxiliary source of regulation for collective actors, and if collective agreements can be still conceived as residual regulatory sources. Another perspective is to evaluate if collective agreements should be considered as the preferable regulatory sources and whether statutory legislation should limit its role to the definition of fundamental rights.

Notwithstanding the fragmented framework emerging from the comparative analysis on the regulatory trends in European Union (EU) Member States as far as digital platform work is concerned, we can anticipate the major common trends: the first is the legislators' aphasia; the second is the judicial activism on classification of platform workers; the third is the attempt of collective bargaining of expanding its traditional scope of application beyond subordination. These three common trends (with some exceptions) are important signals of the regulatory force of collective agreements in digital platform work, notwithstanding the obstacles due to the isolation of workers, the lack of unionisation and the reduction of

unions' representation.[1] This first analysis will surely be reviewed after the adoption of the recent proposal of a Directive on improving working conditions in Platform work,[2] since the Directive will necessarily produce more legal regulation at national level.

Another phenomenon, which is worth highlighting, is the appearance of complementary regulatory sources, beyond statutory legislation, collective agreements and case law, in the form of codes of conduct, unions' charters or city charters involving non-traditional institutions and actors. Anticipating our concluding remarks we can say that the rich and composite net of regulatory sources which is emerging, is nothing but the result of the complexity and ever-changing nature of the phenomenon of digital platform work and the role of AI needing to be regulated.

The comparative research[3] shows that labour law in different legal systems has developed through a fruitful relationship and interdependence between statutory law and other residual law-making powers like collective agreements, to which the regulatory functions have been delegated, in order either to resolve complex interests conflicts or to respond to flexibility needs. On the other hand in some legal systems, characterised by a legal abstentionism, statutory legislation has traditionally been considered as the residual regulatory power in regulating the employment relationship. The British 'collective laissez-faire' in which the regulation has traditionally proceeded autonomously of the state,[4] but also the tradition of Nordic countries to consider statutory legislation as the residual regulatory source in the employment relationship[5] can be considered the most relevant examples. Nevertheless, in many legal systems collective agreements have always been considered as resources for the regulatory needs, and also at supranational level, as in the EU, collective bargaining is considered a fundamental resource, notwithstanding its limits,[6] due to their degree of effectiveness, flexibility and adaptability.

The traditional complexity and plurality of labour law sources, the interaction of law, collective agreements, case law in national legal systems, have been influenced in many ways by the enactment of European legislation and by the presence of collective actors also at European level. In other words, the system

[1] Kurt Vandaele, *Will trade unions survive in the platform economy? Emerging patterns of platform workers' collective voice and representation in Europe* (ETUI 2018) 15.

[2] EU Commission, 'Proposal for a Directive on Improving Working Conditions in Platform Work' (Brussels, 9 December 2021) COM(2021) 762 final.

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

[4] Ruth Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?' (2009) 72 *MLR* 220.

[5] See Jonas Malmberg, 'The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions' (2002) 43 *Scandinavian Studies in Law* 190.

[6] As underlined by the seminal work of Antonio Lo Faro, *Funzioni e finzioni della contrattazione collettiva comunitaria. La contrattazione collettiva come risorsa dell'ordinamento giuridico comunitario* (Giuffrè 1999).

of labour law sources aimed at regulating socio and economic phenomena, has reached a higher level of complexity, due to national and supranational interference. Surprisingly, the complexity of the regulatory mechanisms and the complex interactions in the multilevel layers of regulation have left unregulated many aspects of the working relationship either due to its transnational features, or to the difficulties in finding the employer, that is the subject responsible for the fundamental obligations, or again due to the nature of the work performed using digital platforms. Whether it is just a lack of effectiveness of the existing apparatus of labour law rules or a true regulatory void, in the case of work performed by digital platforms, we must admit that there is a need for regulation and that the regulatory dilemma is to define which regulatory source would be more suitable or which combination of sources (and at what level) would be more acceptable.

In this complex picture of layers of regulatory sources, especially in a multilevel system of legal sources, we should not forget the regulatory role of case law.

It is well known that one of the myths of the legal thought of the nineteenth century, at least in civil law countries, is the completeness of law, composed of abstract legal norms applied through a rational and logical process. The idea that legal orders are rational and logical systems where both judges and scholars when applying the legal norm to the single case perform a quasi-scientific activity composed of logical processes, has been deeply influenced by Friedrich von Savigny, founder of the so-called German Historical School, convinced that legal orders are characterised by an intrinsic rationality and, in these systems, the judge in applying and interpreting the law, using logic and a quasi-scientific method, is simply reconstructing the intrinsic meaning of the law already in existence from the beginning. These theories are expressed in other terms by the Montesquieu principles of the separation of powers (legislative, executive and judiciary) and definitely reinforce the idea that the judge is nothing but the mouth of the law (*la bouche de la loi*).[7]

Also, Kelsen states that every legal system is inherently complete in the sense that there is no legal question for which it provides no answer, no legal problem for which it has no solution.[8] These theses are nonetheless considered rather dubious[9] and not corresponding to the reality of legal orders suffering from their inherent incompleteness[10] or their difficulties in regulating social and economic phenomena whose complexity produce, as a result, from one side the loss of effectiveness

[7] Charles de Secondat de Montesquieu, *De l'esprit des lois* (1748), available at: www.ecole-alsacienne.org/CDI/pdf/1400/14055_MONT.pdf.

[8] Hans Kelsen, *Pure Theory of Law* (University of California Press 1967).

[9] Eugenio Bulygin et al, *Essays in Legal Philosophy* (Oxford University Press 2015).

[10] For a discussion on the incompleteness of law in the different families of legal orders, see Katharina Pistor and Chenggang Xu, *Incomplete Law: A Conceptual and Analytical Framework – And its Application to the Evolution of Financial Market Regulation* (2003) 35 *New York University Journal of International Law & Politics* 931.

of legal norms, and from the other the risk of colonisation of reality, which is an effect of the juridification of social spheres.[11]

No legal scholar, today, would describe a legal system as complete or the judge role as being '*la bouche de la loi*', or would define the legal interpretation as a merely logical and scientific operation, denying any creative function of the case law. On the contrary, case law, driven by a judicial activism, has also proven to be a regulatory resource in civil law legal systems. This judicial activism has been particularly intense in digital platform work litigation on workers' classification and, from this point of view, case law has been shown to be an essential source of regulation in the absence of other sources.

II. The Aphasia of Legislators in Regulating Digital Platform Work

Starting from the general regulatory crisis of the law in the welfare states as highlighted by Habermas,[12] we would like to analyse the reasons for the general aphasia of the law on digital platform work, making some hypotheses about the reasons why national legislators are reluctant to intervene in this issue.

One of the reasons could be the complexity and the rapid pace of change in digital platform work. It suffices to mention the discussion about the role of algorithms in shaping the working relationship, which implies, when the boss is an algorithm,[13] the wider discussion on the problem of identifying models of liability of autonomous software agents, considered as mathematically formalised information flows, capable of autonomous actions and entailing a massive loss of control for human actors. One of the major challenges that labour law sources have to face in regulating digital platform work is precisely the massive presence in the employment relationship of automated decision processes by algorithms, which need enormous quantities of data and are changing the structure of labour markets.[14] Particularly when the working activity is performed entirely online, the working activity consists in the production by the worker of a huge amount of data processed by a server and used by the employer to organise the whole production system. But even for the other category of digital platform, in which services are performed in the real world, the working activity consists in the production by the worker of a huge amount of data, used by the platform's algorithms to exercise

[11] Jürgen Habermas, 'Law as Medium and Law as Institution' in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (De Gruyter 2020).

[12] ibid.

[13] Jeremias Adams-Prassl, 'What If Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work' (2019) 41 *Comparative Labor Law & Policy Journal* 123.

[14] See Christophe Degryse, *Digitalisation of the economy and its impact on labour markets* (ETUI 2016).

the organisation, direction and control of managerial prerogatives, exactly as is happening in the manufacturing sector.

When the working activity consists of producing data, the first difficulty is to deal with the issue of data's intangibility and to define data's location: 'the problem is not that data is located nowhere, but that it may be located anywhere, and at least parts of it may be located nearly everywhere'.[15] Most of the time the dispersion of data is a security choice made by enterprises that could choose, instead of storing each data on a single machine or set of machines, to distribute all data across many computers in different locations and replicate the data over multiple systems, to avoid a single point of failure. When the working activity is performed entirely online, the difficulty of defining data location implies, among others, the question of defining the applicable labour law rule, on the basis of the place where the work is performed, in cases where the employment relationships have transnational features. Undoubtedly, the datafication processes in the employment relationship raise unprecedent questions which still remain unsolved by the law, for example, how to evaluate, and possibly remunerate, data production when this is not the object of the exchange in the employment relationship. Let us think about the case of digital platform work, that the EU Commission defines as an 'on-location labour platform' referring to a digital labour platform which only or mostly intermediates services performed in the physical world, for example, ride-hailing, food delivery, household tasks like cleaning, plumbing, caring:[16] in all these cases the remuneration which the parties to the contract have agreed upon, is for the service performed in the physical world (the food delivery or the ride-hailing) and not for the huge amount of data produced by the worker via an app, which are essential for the same organisation of the production activity. In this case other regulatory sources, like collective agreements, are better suited to regulate the issue of data remuneration to reduce the exposure of workers to unprecedent risks, due to the datafication processes which reinforce the imbalance of powers inside the digital working place.[17]

As Teubner explains: 'algorithms from the digital world, robots, software agents with a high level of intelligence and the ability to learn … generate new kinds of undreamt dangers for humans'.[18] Contract law and liability law are engaged in defining a new legal status for the autonomous digital information systems, because of the increasing number of 'accidents' occurring without anyone being responsible for them. The solution of giving autonomous software agents an independent legal status and recognising them with artificial personhood, even if

[15] Kristen E Eichensehr, 'Data Extraterritoriality' (2017) 95 *Texas Law Review* 145.

[16] Commission, 'First Phase Consultation of Social Partners Under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work' (Consultation Document) C(2021) 1127 final, 5.

[17] Emanuele Dagnino and Ilaria Armaroli, 'A Seat at the Table: Negotiating Data Processing in the Workplace: A National Case Study and Comparative Insights' (2019) 41 *Comparative Labor Law & Policy Journal* 173.

[18] Gunther Teubner, 'Digital Personhood? The Status of Autonomous Software Agents in Private Law' (2018) *Ancilla Iuris* 107, 108.

under certain conditions, is a way of avoiding liability gaps that will expand in the future. The lack of consensus on these issues and the lack of responsibility is also linked to the fact that legal doctrine uses traditional conceptual instruments when referring to the new digital subjects.[19]

Besides that we should always be aware that machines do not act in their own interests but in the interests of humans or organisations, especially enterprises, but in the future we cannot exclude that algorithms will act in their self-interest.[20] Accordingly, the interactions of digital and human actions will be more frequent than the action of algorithms in isolation. With the increasing use of artificial intelligence and the development of artificial neural networks, one could also ask the question whether defining a new legal status for the autonomous digital information systems 'is a sufficient legal response to highly sophisticated machine learning techniques employed in decision making that successfully emulate or even enhance human cognitive abilities?'[21]

We have tried to sketch some of the problems raised by the introduction of digital technologies and algorithms in general and in particular in employment relationships. Is it really a new social and economic phenomenon needing new regulation? Or does the existing set of rules in each legal system simply need a process of adaptation?

If the use of digital technologies in workplaces is a new phenomenon, the first question to be tackled is whether legal orders, and especially statutory labour law sources, are per se flexible enough to regulate it. One could argue, as a matter of fact, that the existing set of rules simply needs a process of adaptation or, on the contrary, that due to the radical changes introduced by digital technologies in workplaces it is essential to adopt new legal sources. When asking whether new legislation is needed or not, we should also ask what are the residual law-making powers to which the regulatory function could be delegated in order to complete the process of regulation or to avoid some of the pitfalls of new legislation? No less important, among the set of questions that should be investigated, is the one relating to the relationship between the different sources of regulation – law, collective agreements, case law and the individual contract of employment – and how the digitalisation and the introduction of AI in the workplace could alter these relationships or if other sources of regulation could emerge.

III. Can We Still Speak about Auxiliary Legislation?

When comparative labour lawyers have to depict a comparative analysis of the relationships between statutory legislation and collective bargaining it is crucial

[19] ibid, 112.
[20] ibid, 114.
[21] Argyro Karanasiou and Dimitris A Pinotsis, 'Towards a Legal Definition of Machine Intelligence: The Argument for Artificial Personhood in the Age of Deep Learning' [2017] *ICAL* 119.

not to forget the lessons of Hugo Sinzheimer, Otto Kahn-Freund and Gino Giugni. Sinzheimer's idea of an economic constitution (*Wirtschaftverfassung*) meant robust state intervention to help collective subjects (unions and employers' associations) to regulate the economy, trying to overcome the imbalance between capital and labour.[22] Following Sinzheimer's ideas, Otto Kahn-Freund believed that one of the most important functions of labour law legislation was

> seeking to promote collective bargaining, to ensure the observance of collective agreements, to define and to delineate the freedom of organisation and the freedom to strike, and the right to promote union interests at the level of the plant or enterprise.[23]

He called such legislation 'auxiliary' in contrast to 'regulatory' legislation, although sometimes its effect could be to restrain rather than to advance collective bargaining. The same view was shared by Gino Giugni who actively contributed to the enactment of the Workers' Statute (Statuto dei lavoratori) a clear example of legislation having an auxiliary function aimed at creating the conditions for autonomous regulatory activities by collective actors.[24] Although these ideas have been declining in different ways in many EU legal orders it should be investigated how, in the case of digital platform work, the statutory legislation has in some cases ceased to perform an auxiliary function for collective actors and collective agreements and, on the contrary, has been an obstacle.

We should underline that changes in the auxiliary function of statutory legislation produce important effects on the boundaries between the two sources of regulation (statutory legislation and collective agreements) and in that regard Kahn-Freund highlighted the fact that 'cultural, economic, geographic, historical and political factors determine the borderline of legislation and collective bargaining … and their significance and mutual relation sometimes change very rapidly'. The case of digital platform work seems really to fit with Kahn-Freund's analysis since it is a phenomenon whose fast pace is capable of modifying the borderline and the mutual relations between legislation and collective bargaining. Nonetheless, it would not be sufficient to use the case of digital platform work to explain how the boundaries between statutory legislation and collective agreement have changed. Other phenomena have anticipated such changes. The scheme of auxiliary legislation described by Kahn-Freund has taken different forms in national legal orders due to differences in industrial relations systems, but even in those systems where the traditional auxiliary function of legislation was mature, deep changes occurred because of dramatic events like the economic and financial crisis of 2008.

When we talk about 'auxiliary legislation' the legislation's function, as Kahn-Freund reminds us, is not to settle wages, hours or other conditions of

[22] See Ruth Dukes, 'Hugo Sinzheimer and the Constitutional Function of Labour Law' in Guy Davidov and Brian Langile (eds), *The Idea of Labour Law* (Oxford University Press 2011) 62.

[23] Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law*, 3rd edn (Stevens & Sons 1983) 53.

[24] Gino Giugni, *Diritto Sindacale* (Cacucci 2014).

employment, but to 'make rules for their settlement, chiefly by the collective parties themselves, and for the enforcement of the terms they have settled. It establishes "rules of the game"'. The description of the legislation's function as regulating 'the rules of the game' that other self-regulatory mechanisms should perform, is also at the core of the reflexive and procedural theories of law,[25] in which statutory legislation's function is a procedural one, aiming at defining actors and procedures that should be followed by collective actors and collective bargaining. As Barnard and Deakin say,

> the preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment, in particular by supporting mechanisms of group representation and participation, rather than to intervene by imposing particular distributive outcomes. This type of approach finds a concrete manifestation in legislation which seeks, in various ways, to devolve rule-making powers to self-regulatory processes.[26]

The regulatory crisis of modern legal systems, due to a more and more complex societal framework, expressed by the pluralisation of regulatory sources as a reaction to complexity by autonomous social spheres, can either be seen as a resource or as a menace to legal systems. The question we would like to raise is whether and how the traditional auxiliary function of legislation has changed in regulating digital platform work. Digital platform work is an expression of wider phenomena, like globalisation and digital innovation involving society as a whole, which put into question the same capacity of legislation to regulate these phenomena either for the limited scope of application of national legislation when we deal with a transnational dimension, or for the speed and changing nature of the phenomena.

Describing the role of statutory legislation regulating digital platform work in EU Member States and in some overseas countries we should, first, highlight the common trend of a scarce intervention of statutory legislation on the issue. We will see in the next paragraph some examples of statutory legislation in EU Member States, but it is important to underline the fact that the limited activism of legislators has finally produced serious obstacles to other regulatory sources like collective agreements. Can we still consider the law is performing an auxiliary function for collective agreements in regulating digital platform work? Which obstacles to collective bargaining could come from the law?

When we analyse how statutory legislation could hinder collective bargaining in digital platform work, one of the most relevant obstacles is represented by the question of classification of digital platform workers. Digital platform workers

[25] Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239; Ralf Rogowski and Ton Wilthagen, *Reflexive Labour Law* (Kluwer 1994).

[26] Catherine Barnard and Simon Deakin, 'Market access and regulatory competition' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single Market: Unpacking the Premises* (Hart Publishing 2002) 219–20.

classified as independent workers could be excluded from collective bargaining rights by competition legal rules. In a certain number of EU Member States, collective agreements can be concluded by unions representing employees only (Denmark, Austria, France, Belgium, Hungary) whereas in other EU Member States unions also representing economically dependent independent contractors, can conclude collective agreements (Germany, the Netherlands, Italy). In this case at national[27] or European level[28] the claim of a violation of competition rules by collective agreements signed by unions representing independent contractors, is a indeed a relevant obstacle for regulating digital platform work through collective agreements. Although it should be said that the same EU institutions have taken another direction on the issue of collective bargaining of independent contractors, adopting initiatives aimed at overcoming the obstacle of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) which prohibits agreements between undertakings that restrict competition[29] in order to guarantee protections to the gig economy workers.

Another way in which statutory legislation can represent a hurdle for collective bargaining in digital platform work is the introduction of representativeness thresholds for the validity of collective agreements. One example is the collective agreement signed on 17 September 2020, between Assodelivery (an Italian employers' association of digital platforms delivering food) and the UGL (Union) regulating working conditions of independent couriers. The Bologna Tribunal[30] has considered the collective agreement not valid since it has been signed by a union not a representative at national level, as required by Law no 128/2019 regulating the couriers' status and their basic labour law rights. Measuring representativeness for digital platform workers could risk, in this case, excluding digital platform workers, from the scope of application of collective agreements and from collective representation.[31]

IV. Is New Legislation Needed? Different Approaches of Statutory Legislation on Digital Platform Work

All legal orders face the same dilemmas in regulating digital platform work: from one side, legislation seems to be an instrument incapable of following the rapid changes of economic reality; from the other side, collective agreements

[27] See the Danish case of the collective agreements signed between the platform Hilfr and the United Federation of Danish Workers (3F) in 2018 considered as conflicting with competition law by the Danish Competition Authority (2020).

[28] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411.

[29] See Commission, 'Collective bargaining agreements for self-employed – scope of application of EU competition rules' (Inception Impact Assessment) Ares(2021)102652.

[30] Tribunale di Bologna, 30 June 2021.

[31] Vandaele (n 1).

seem to suffer serious problems of the representativeness of the category of workers to which they should apply. The case law at first seemed to be the only regulatory source capable of answering the needs of protection for the digital platforms labour force, guaranteeing them recognition of labour rights and visibility.[32]

Whether new legislation is needed or not, it should be decided on the basis of an analysis of the advantages and pitfalls of legal regulation and at the same time we should also ask which are the residual law-making powers that could avoid some of the pitfalls of new legislation on digital platform work (in particular collective agreements and case law). At the same time, it should be decided what model of legislation should be implemented: the alternatives seems to be on the one hand, to adopt specific statutory legislation for work performed via app or digital platforms, detailed and tailored to the cases to be regulated. In this case, at least two main risks should be highlighted: the necessity of frequent updating of this legislation, due to the rapid changes in the issues regulated, and the risk of hyper regulation that could end up in the colonisation of the reality as preconised by Habermas. On the other hand, the model of legislation that should be implemented should be based on general principles, defining basic labour and social security rights to be recognised for platform workers, and leaving the residual regulatory space to collective agreements.

Any model of legislation – based on general principles, defining basic labour and social security rights to be recognised for platform workers – should first deal with the question, surely still unresolved and quite new not only for labour lawyers but also for private law lawyers and constitutional lawyers – of the legal responsibility of digital agents.[33] This issue is also particularly important with a view to reconstructing the parties of a collective agreement for digital platform workers. The basic idea would be to first anchor legal responsibility for digital agents to the capacity of taking decisions: there is a necessary connection between the capacity of taking autonomous or semi-autonomous decisions and responsibility.[34] Digital agents, like digital platforms, 'do not act as self-interested action units, but always in interaction with people for whose pursuit of interests they are used',[35] and from the economic point of view their relations with the enterprise using them could be reconstructed as a principal–agent relationship in which the agent is dependent but autonomous.[36] But if we come to the

[32] Valerio De Stefano, 'The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork and Labour Protection in the "Gig-Economy"' (2016) 37 *Comparative Labor Law & Policy Journal* 471, 480.

[33] Teubner, 'Digital Personhood?' (n 18) 109.

[34] European Parliament, 'European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics' (16 February 2017) P8_TA(2017)0051.

[35] Teubner, 'Digital Personhood?' (n 18) 114.

[36] Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305, 306.

fundamental questions of who is the employer[37] and who is responsible for the decisions taken autonomously by the algorithms of the platform, at least we should admit that these digital subjects take decisions, affecting workers independently from their classification, that should be controlled or negotiated by collective agents. The main idea that we would like to discuss is then that at least a new general principle in new statutory legislation should be introduced, legitimising digital collective agents to negotiate with the algorithms.

Some theoretical approaches seem to prefer legislative abstentionism on digital platform work, with a different set of justifications. The first is that digital platform workers have to be considered like all non-standard workers in general;[38] this means that the existing labour laws can be applied to digital platform workers by a simple process of adaptation. Another approach advances the idea that the gig economy is nothing new and is just a modern form of 'Taylorism',[39] whereas others think that more traditional schemes like agency work can be applied to digital platform work.[40] In all those cases it seems that many scholars propose to respond to the questions raised by digital technologies with traditional conceptual instruments, no new legislation is needed and the existing set of legal rules simply needs a process of adaptation.

Although case law in all legal systems was trapped between legal categories often inadequate to adapt to the new forms of work, the theoretical approach adopted by some Supreme Courts was on the one hand to classify digital platform workers as employees in order to guarantee the protections of labour law.[41] With the same aim of guaranteeing the labour law protections, other Supreme Courts have tried to overcome the binary division between independent work and subordination affirming that, there is no sense in asking if these forms of working relationship in an economic reality which is continuously and rapidly being modified, can be classified as subordinate work or that of an independent contractor, whereas it is better from a prevention perspective (to avoid the abuses of bogus self-employment) and from a remedial perspective (to guarantee an equivalent protection of subordinate work to economically dependent workers) to go beyond the categories of subordinate and independent work (the Italian Supreme Court in this case has classified them as hetero-organised workers).[42]

It seems, nonetheless, that there are reasons for adopting new legislation on digital platform work, seen as a new phenomenon needing new regulation.

[37] Jeremias Adams-Prassl and Martin Risak, 'Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37 *Comparative Labor Law & Policy Journal* 604.

[38] De Stefano (n 32) 480.

[39] Phoebe V Moore, *The Quantified Self in Precarity: Work, Technology and What Counts* (Routledge 2018) 211.

[40] Michele Faioli, 'La gig economy è un processo di matchmaking nel mercato del lavoro' (2017) 2 *Rivista Giuridica del Lavoro e della previdenza sociale* 111.

[41] See the French Cour de cassation, 4 March 2020, no 374 *Uber*; and the Spanish Tribunal Supremo, 25 September 2020, no 805/2020 *Glovo*.

[42] See the Italian Corte di cassazione 24 January 2020, n. 1163/2020, Foodora, paras 25–27.

An interesting case is the Spanish Real Decreto-ley 9/2021 (11 May 2021) modifying the Estatuto de los trabajadores in order to guarantee labour rights to people delivering food in the framework of digital platform work. Where is the novelty? In the introduction of the Real Decreto-Ley it is said: 'La aplicación de estos medios tecnológicos ha introducido elementos novedosos en las relaciones laborales'. The novelty is indicated in the 'métodos de cálculo matemáticos o algoritmo'. It is precisely the introduction of algorithms in the employment relationship which represents the innovation needing a new regulation for the Spanish legislator. We should not underestimate that the regulatory choice in this case is justified by the need for guaranteeing labour protections to digital platform workers (in particular those delivering food) like the right to be informed about the functioning of algorithms which take decisions affecting workers.

Other rationales can be found in the (few) cases of activation by national legislators adopting new statutory legislation on digital platform work. One of the most important is the need to overcome the uncertainties of case law in applying traditional labour law categories, in litigation on digital platform workers' classification. How to overcome the famous question of District Judge Vince Chabria, describing the difficulty a jury will face in discerning whether drivers for the service Lyft are employees or independent contractors ('handed a square peg and asked to choose between two round holes').[43] One technique could be the introduction, through statutory legislation, of legal presumptions on digital platform workers' status, in order to avoid misclassification of digital platform workers.[44] Interestingly, the Real Decreto-ley 9/2021 introduced in the Spanish system a legal presumption of subordination for digital platform workers in the food delivery sector. A similar legal presumption of subordination for digital platform workers in the transport service sector has been introduced in Portugal by Lei no 45/2018 on transport services through digital platforms (article 10, paragraph 10, Lei no 45/2018).

The same kind of technique is used by the California Bill (AB5) approved by the California Assembly in 2019,[45] which introduced a severe ABC test to ascertain the status of independent contractors. Although it does not introduce a legal presumption, this piece of legislation tries to limit the relevance of free will in classifying workers, with relevant consequences for digital platform workers often misclassified as independent contractors.

Also the Italian case of Law no 128 of 2 November 2019 can be considered an attempt through legislation to reduce the misclassification risks for digital platform workers: although it does not introduce a legal presumption of subordination, this statutory legislation applies to digital platform workers delivering food the same labour law protection as employees if they are classified as

[43] *Cotter v Lyft, Inc* 13-cv-04065-VC (ND Cal, 2015).

[44] Miriam A Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 *Comparative Labor Law & Policy Journal* 577.

[45] California Assembly Bill AB-5 of 19 September 2019 codifying the *Dynamex Operations West, Inc v Superior Court*, 4 Cal 5th 903 (2018).

hetero-organised workers (an intermediate category of independent workers considered as economically dependent because of their insertion in an organised activity). The same Law no 128 of 2019 (amending D Lgs 81/2015 article 47 bis ff) also recognises, at the same time, basic labour law protections for genuinely independent couriers. Among them are: a written contract containing a right to be informed of their rights, interests and security; a minimum wage set by collective agreements signed by most of the representative unions and employers associations at sectoral level; 10 per cent compensation for night working, working on public holidays; a non-discrimination right in access to and exclusion from the digital platform; personal data protection; insurance for accidents at work and professional illnesses.

This kind of legislation should, in principle, reduce the misclassification litigation, but what is more important is that it also goes towards the definition of a set of basic labour law rights for independent workers in digital platform work and, what is more relevant, can function as a trigger for collective bargaining; either because it delegates explicitly the regulatory function to collective agreements for independent couriers (as in the Italian case) or because through the legal presumption of subordination it automatically legitimates collective bargaining.

The choice of granting basic rights, especially collective rights, also to independent digital platform workers, seems to be the direction taken by the French legislation: the Loi d'orientation des mobilités of 24 December 2019, introduced in the French Labour Code the principle of the social responsibility of digital platforms (articles L.7341-1–L.7342-11 Labour Code), and article 60 of Law No 2016-1088 of 8 August 2016 (Regarding Labour, Modernising Labour Relations, and Securing Career Tracks) introduced a separate category of the self-employed working for online platforms, granting them the right to constitute and to join a trade union and an obligation to providing vocational training for independent digital platform workers. It should be verified, anyway, if the right to constitute a trade union and to join it is sufficient to guarantee the right to collective bargaining, or if the competition law rules will, once again, be an obstacle.

V. Should Residual Law-Making Power be Left to Collective Bargaining?

The rather scarce, but significant, interventions of statutory legislation leave open the question of which source of regulation should fill the regulatory gaps in digital platform work.

Surely legal categories and classification litigation are some of the main threats to unionisation. All legal orders face the same regulatory dilemmas in regulating digital platform work: the law seems to be a regulatory instrument incapable of following the rapid changes in reality and the case law is trapped between legal

categories often inadequate to adapt to the new forms of work. At the same time, collective agreements are regulatory sources flexible enough to answer the regulatory needs and seem the most promising tool 'in an attempt to increase wages, reduce constant surveillance, restrain the pervasive command power, improve working conditions' but the list of hurdles for digital platform workers exercising collective rights and collective bargaining is a long one.[46] How can all these hurdles be eliminated, and which legislation or which collective agreement should be applied to digital platform work having in most cases a transnational dimension? The EU Commission takes as granted the cross-border nature of digital platform work and the fact that digital labour platforms are internet-based and, in many cases, transnational. That is why legislative action at EU level is considered 'the most appropriate means to ensure adequate protection of people working through platforms and avoid fragmentation of the single market'.[47] One of the most important issues to be ascertained is, from this point of view, the redefinition of the scope of application of collective agreements to platform workers classified as self-employed. Notwithstanding the fact that scholars claim wide recognition of the right to collective bargaining for any worker, independently from his or her classification,[48] in some countries the right to collective bargaining is still granted exclusively to employees and, as a consequence, collective agreements signed by unions representing independent workers can conflict with competition law. The same set of questions raised at EU level about the clashes between self-employed collective agreements and competition law is common in legal systems outside the EU.[49]

The picture of national legal and collective sources regulating digital platform work appears very fragmented so far; that is why the EU institutions are worried about the fact that fragmented national regulation of digital platform work might 'have a stifling effect on the employment, competitiveness and innovation potential of platform work' and at the same time, still in the light of market objectives, leaving the issue of digital platform work unregulated at EU level 'can lead to unfair competition' and moreover 'EU-level action to improve working conditions in platform work may help create a more level playing field between digital labour platforms and other forms of business'.[50] Initiatives at EU level, aimed at harmonising the working conditions of digital platform workers, will certainly

[46] Antonio Aloisi, 'Negotiating the digital transformation of work: non-standard workers' voice, collective rights and mobilisation practices in the platform economy' (2019) 3 EUI Working Papers, available at: cadmus.eui.eu/bitstream/handle/1814/63264/MWP_Aloisi_2019_03.pdf?sequence=1, 2.

[47] Commission, 'First Phase Consultation of Social Partners Under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work' (n 16) 26.

[48] Nicola Countouris and Valerio De Stefano, *New Trade Union Strategies for New Forms of Employment* (ETUC 2019).

[49] See the Australian case Tess Hardy and Shae McCrystal, 'Bargaining in a Vacuum? An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses' (2020) 42 *Sydney Law Review* 311.

[50] Commission, 'First Phase Consultation of Social Partners Under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work' (n 16) 26.

reduce the risks on law shopping as far as the social protections granted to digital platform workers are concerned, and the fact that social partners at EU level have signed a framework agreement on digitalisation is an important step in that direction.[51] European initiatives aimed at harmonising the working conditions of digital platform workers would be important but, as the EU Commission admits, the dimension of digital platform is not European, and as some research suggests, if we look at the division of digital gig work, a high percentage of online platform workers is located in non-EU countries where labour costs and working conditions are lower than in EU countries.[52] Therefore, the risks of law shopping in the case of digital platforms are still very high.

It is not only legislation but also case law which plays an important role in sustaining collective bargaining as a regulatory source. Case law auxiliary function can be seen in litigation on the classification of digital platform workers: qualifying digital platform workers as employees certainly enlarges the scope of application of collective agreements. In reality, the auxiliary function of case law can be even more explicit: the Court of Appeal of Turin (in 2019) said that the collective agreement applicable to define the wages of Foodora riders (classified as hetero-organised workers) is the Sectoral Collective Agreement of Transport and Logistic.[53] At supranational level, the judicial attitude towards collective agreement for digital platform workers is manyfold: on the one hand, the Court of Justice of the European Union has declared that when service providers are classified as genuinely self-employed, the collective agreements that their representative organisations conclude would fall within the scope of Article 101 TFEU, with a possible violation of competition law rules, unless they are bogus self-employed.[54] On the other hand, the European Committee of Social Rights in its conclusions on Complaint No 123/2016 *Irish Congress of Trade Unions v Ireland*, recognised the right to collective bargaining for self-employed workers, under Article 6, paragraphs 2 and 4 of the European Social Charter, on the basis of the vulnerability of the self-employed and the necessity to rebalance the imbalance of power inside the working relationship. In relation to the possible conflicts with competition law, the Committee concluded that it

> does not consider that permitting the self-employed workers in question to bargain collectively and conclude collective agreements, including in respect of remuneration, would have an impact on competition in trade that would be significantly different from the impact on such competition of collective agreements concluded solely in respect of dependent workers (employees).[55]

[51] EU Social Partners, *Framework Agreement on Digitalisation* (ETUC, Business Europe, CEEP, SME United 2020), available at: www.etuc.org/system/files/document/file2020-06/Final%2022%2006%2020_Agreement%20on%20Digitalisation%202020.pdf.

[52] Vili Lehdonvirta, 'Where are online workers located? The international division of digital gig work' (Oxford Internet Institute 2017), available at: www.oii.ox.ac.uk/blog/where-are-online-workers-located-the-international-division-of-digital-gig-work/.

[53] Court of Appeal of Turin, 4 February 2019, no 26/2019, 23.

[54] *FNV Kunsten* (n 28).

[55] European Committee of Social Rights, *Irish Congress of Trade Unions (ICTU) v Ireland* (8 August 2016) C 123/2016, Case No 1, 100.

In some cases the bargaining activities and collective actions are led by quasi-unions or independent unions like the Independent Workers' Union of Great Britain in the UK Deliveroo case.[56] In this case the High Court did not recognise the right to bargain collectively to Deliveroo riders since they were not classified as workers having access to the fundamental right to bargain collectively recognised by Article 11 of the European Convention on Human Rights. An attempt to find a way out seems to the collective agreement signed by another independent union in the UK, the GMB, which signed a collective agreement with Hermes Parcelnet Ltd recognising the couriers' right to choose a particular status of self-employed plus, giving them the right to holiday pay (pro-rata up to 28 days) and individually negotiated pay rates that allow couriers to earn at least £8.55 per hour over the year.

In other cases, traditional unions incorporate gig workers' collective interests in sectoral collective bargaining, as in Italy where the sectoral collective agreement in the transport and logistics sector (2018/2019), signed between the three main union confederations and the Sectoral Employers' Association, regulate the contract of employment of workers delivering food for the main delivery platforms. The same happens in Spain where the sectoral collective agreement of Hosteleria, signed in 2019, regulates the couriers' delivering food activities.

Whereas in other cases public authorities enter in the arena of collective representation. In Italy, a quasi-union of couriers (delivering food) signed in 2018 with Bologna's mayor, the 'Urban Charter of fundamental couriers' rights' defined minimum and equitable hourly wages (comparable to wages set by sectoral collective agreements); dismissal with due notice; health and security insurance; freedom of association; and protection of privacy. It was agreed that this Charter should be incorporated into other collective agreements signed by the Union and food delivery platforms in Bologna, so it could be an useful fertile ground for collective bargaining.

Surely an attempt to find new forms of collective representation, involving new and old collective actors,[57] is the Frankfurt Paper on Platform-Based Work, signed in 2016, by a number of trade Unions from different EU Member States with the aim of defining industrial relations fundamental principles in the platform based work? The importance of this Paper is not only linked to the contents, but to the variety of actors involved that are platform operators, clients, policymakers, workers and worker organisations. From this point of view the Frankfurt Paper suggests the importance of involving a plurality of actors in order to enlarge the panel of stakeholders that could regulate digital platform work. Nonetheless, following the suggestions of some scholars that digital platforms should be considered

[56] ibid.

[57] Austrian Chambers of Labour (Arbeiterkammer); Austrian Trade Union Federation (ÖGB); Danish Union of Commercial and Clerical Workers (HK); German Metalworkers'Union (IG Metall); International Brotherhood of Teamsters Local 117; Service Employees International Union; Unionen.

as employers,[58] we should examine whether traditional schemes of collective bargaining levels (sector, multi-sector or enterprise level) can still be used. Any possible answer needs to consider the different real situations and the difficulties of building a collective interest and a '*demos*' behind the collective bargaining activity. Often digital platforms operate at national level, thus national level bargaining should be considered as a possible option in order to avoid decentralisation of collective bargaining and trying to reconstruct solidarity between workers.

It seems that, notwithstanding the fact that alternative regulatory sources of digital platform work are emerging, produced by different subjects, in some case in the form of charters, proclaimed either by private subjects, like the digital platforms in the framework of their social responsibility – as in the French case of Art L 7342-9 Code du Travail – or by public institutions like the city of Bologna, cannot be seen as alternative sources to collective agreements, but on the contrary as sources of regulation that could help collective agreements to expand their scope of application.

From this short analysis we can conclude that collective bargaining in digital platform work, notwithstanding the variety of relationships with statutory legislation, still needs the auxiliary function of the law. It seems that the most serious question at stake is a legislative intervention, first at EU level, eliminating the conflicts of collective bargaining for self-employed and competition law rules. As underlined by some scholars,[59] eliminating the preclusion of collective bargaining to the self-employed, especially in digital platform work, implies a paradigm shift that could rebuild a 'sane' relationship between the two main regulatory sources (collective agreement and statutory legislation).

[58] See Jeremias Prassl, *The Concept of the Employer* (Oxford University Press 2015); Prassl and Risak (n 37) 619.

[59] Silvia Rainone and Nicola Countouris, 'Collective bargaining and self-employed workers. The need for a paradigm shift' (2021) 11 *ETUI Policy Brief* 4.