Chapter 11
Automated work and workers' rights: platform work and AI work management systems

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1. Introduction

This chapter discusses the risks to and opportunities for workers stemming from the recent legislative initiatives of the EU in the area of platform work and the use of automated decision-making (ADM) systems, including those using artificial intelligence. In doing this, it points to the solutions envisaged by the co-legislators having regard to the proposal for a directive on improving working conditions in platform work (PWD),[1] looking especially at the report of the European Parliament Employment and Social Affairs Committee.[2] It discusses the coexistence of privacy and data protection on the one hand with labour and social protection, and health and safety objectives, on the other. In relation to both sets of objectives, the PWD must ensure effective oversight and redress for workers. The chapter also considers the regulation of AI work management systems provided by the proposal for an Artificial Intelligence Act (AI Act)[3] in the light of Parliament's draft compromise amendments,[4] identifying some gaps in workers' protection and recommending possible solutions which, at least partly, address this gap.

Automated decision-making is currently applied to work organisation and management in almost every workplace. Personal data is used to enhance the algorithmic systems of work patterns and control ('algorithmic management') (Baiocco and Fernández

1. Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work, COM(2021) 762 final.
2. Report on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work (COM(2021)0762 – C9-0454/2021 – 2021/0414(COD)), Committee on Employment and Social Affairs, Rapporteur: Elisabetta Gualmini, adopted on 21 December 2022. The European Parliament approved its negotiating position on the PWD on 2 February 2023.
3. Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts, COM(2021) 206 final.
4. Draft compromise amendments on the draft report proposal for a regulation of the European Parliament and of the Council on harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, 16 May 2023, available at: https://artificialintelligenceact.eu/wp-content/uploads/2023/05/AIA-%E2%80%93-IMCO-LIBE-Draft-Compromise-Amendments-16-May-2023.pdf

Macías 2022),[5] to allocate tasks and working time, to establish wages (Dubal 2023a) and to evaluate workers' performance. ADM is thus ubiquitous in working life. This 'datafication' of work is described by some authors as 'techno-normative' control (Griesbach et al. 2019), often based on the 'gamblification' of platform work (Dubal 2023b).[6] The automation of work is indeed grounded on a human workers 'data cycle', described in the following terms: in the first stage, information from workplace and workers is gathered and analysed in real time to create representations of work; in the second stage the information is assessed in accordance with a set of objectives and aligned to standards of performance; in the third stage, interventions are made to seek to change workers' behaviour to ensure standards of performance are met (Gilbert and Thomas 2021).

One of the sectors where algorithmic management is commonly used is platform work, notably in the transport and logistics sectors (Hassel and Özkiziltan 2023). Hence, these two aspects (platformisation and algorithmic management) are almost symbiotic. Interestingly, platform work, as crowdwork,[7] is not only subject to algorithmic management but is also used to train artificial intelligence systems.

2. Automated decision-making in the proposed directive on platform work

This section examines the PWD with an emphasis on the report of the European Parliament (the EP Report), which states that:

> Algorithm-based technologies, including automated monitoring and decision-making systems, have enabled the emergence and growth of digital labour platforms but can produce power imbalances and opacity about decision-making, as well as technology enabled surveillance which could exacerbate discriminatory practices and entail risks for privacy, workers' health and safety and human dignity

5. The Joint Research Centre policy brief provides a description of algorithmic management and of its effects: 'Algorithmic management depends on the collection, transmission and processing of data on the workers and on the economic process. Therefore, algorithmic management relies on several enabling digital technologies that allow for intensive data collection and processing. However, algorithmic management is not linked to a specific technology, but it is better understood as a particular combined use of technologies which are widely available in the digital era' (Baiocco and Fernández Macías 2022: 2). The JRC report goes on to state: 'Algorithmic management can contribute to fissured employment relations. Employment relations can be deteriorated, by resorting to precarious forms of contracts, such as short term or zero hours contracts, especially for more replaceable workers. Also, employment relations can be shifted to market transactions, when the organisation, rather than hiring, 'buys' services from externals (either individual workers or other organisations) for non-core functions. In both cases, labour and social protection can be affected. Ultimately, algorithmic management can undermine labour standards, as it has been argued already in the case of digital labour platforms.' Furthermore, 'Likewise, algorithmic management can have important implications for occupational health and safety, because it intervenes on risk factors that may lead to physical and psychosocial disorders or diseases, such as anxiety, stress, sleep deprivation, depression, musculoskeletal pains, cardiovascular diseases' (Baiocco and Fernández Macías 2022: 4-5).

6. Dubal (2023b) refers to gamification as wage manipulation, the 'gamblification' of wages and labour management via algorithmic wage discrimination.

7. The EP Report introduces, in recital 17c, a definition of crowdwork as 'the organizing of outsourcing or allocation of tasks potentially provided to a large pool of customers or employers, through online platforms.' It also specifies that digital labour platforms organising crowdwork should fall within the scope of the PWD.

> and may lead to adverse consequences for working conditions and the exploitation of workers. (Recital 4, as amended)

The PWD aims at addressing the increasing power and information asymmetry between the digital employer and the worker.[8] Other key issues addressed by the PWD which are generally outside the focus of this chapter, are: the correct determination of the employment status of the person carrying out platform work; and ensuring collective bargaining and workers' representatives role in the context of platform work. Having regard to the first issue, the PWD establishes, under Article 4, a legal presumption of an employment relationship. Moreover, it lays down measures aiming at ensuring the effective implementation of this, including strengthening controls and cooperation between different national authorities as well as – according to the amendments proposed in the EP Report – measures to avoid the circumvention of the safeguards established under the PWD in relation to subcontracting.[9] Concerning the second issue, the PWD provides among others that digital labour platforms should not only ensure human oversight of automated decision-making but also evaluate its impact on working conditions, health and safety, and fundamental rights and freedoms including dignity, together with workers' representatives. Notably, the EP Report introduces a new Article (10a) on collective bargaining in platform work, which encompasses bargaining on the features of automated monitoring and decision-making systems to improve working conditions.

In order to tackle the issue of the incorrect determination of employment status, but also to remedy the power and information asymmetry between the platform and the worker, the EP Report provides the obligation for Member States to determine a national target for the number of inspections to be carried out and to ensure adequate powers for the appropriate authorities to carry out these inspections, including the provision of sufficient staff with the skills and qualifications required.[10]

One important aspect of algorithmic management is the processing of personal data related to workers. Right from the initial step of workers' identification, in relation to which the EP Report specifies that employers should always provide workers with identification methods less intrusive than biometric identification,[11] up to the monitoring of workers' performance, personal data related to identifiable persons is processed. The issue of increased levels of worker surveillance (see Ponce Del Castillo and Molè, and Gould; both in this volume) is also a focus of the PWD, and this has also been reported in the media as a worrying trend (Barbaro 2022). The issue of workplace surveillance is connected to the problem of the definition of the so-called 'data perimeter', understood as the types of personal data that should not be processed by the employer due, for instance, to the risk of damaging the dignity of the worker. The processing of personal data in the context of the PWD falls under the scope of the

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8. See recital 8, as amended by the EP Report: 'persons performing platform work subject to such algorithmic management often do not have information on how the algorithms work, which personal data are being used and how their behaviour affects decisions taken by automated systems.'

9. See Article 12b, Subcontracting liability; as well as recital 26, as amended by the EP Report.

10. See Article 4(3)(d), as amended by the EP Report.

11. See Article 6(5) point d a (new).

General Data Protection Regulation (GDPR).[12] In this regard, it is worth remarking that the GDPR does not preclude the establishment of specific, context-related, safeguards for the persons concerned. This reasoning is even more applicable in the workplace since Article 88 GDPR expressly lays down the possibility for Member States to provide more specific rules to ensure the protection of workers' rights and freedoms in respect of the processing of their personal data.

Article 6(5) of the proposed PWD provides that digital labour platforms must not process any personal data concerning platform workers that are not intrinsically connected to and strictly necessary for the performance of the contract between the worker and the platform. It also specifies certain categories of personal data which must not be processed, namely: (a) any personal data on the emotional or the psychological state of the worker; (b) any personal data relating to the health of the worker, except in cases referred to in Article 9(2), points (b) to (j), of the GDPR; (c) any personal data in relation to private conversations, including exchanges with workers' representatives; and (d) any personal data in relation to the time when the worker is not offering or performing platform work.

The EP Report prohibits the processing of personal data inferring the emotional and psychological state of the worker; personal data revealing racial or ethnic origin, migration status, political opinions, religious or philosophical beliefs, disability or state of health, including chronic disease or HIV status, or trade union membership; genetic and biometric data for the purpose of uniquely identifying a person; and data concerning a person's sex life or sexual orientation.[13]

This is welcome since it counters the trend of increased, continuous and invasive surveillance at the workplace and aims at fulfilling the requirements of necessity and proportionality concerning the processing of personal data in a 'horizontal' (business to citizen) dimension;[14] and, ultimately, to preserve the worker's dignity, specifying these requirements in a way that is easy to operationalise.

The PWD, as amended, also requires continuous assessment of automated decision-making: digital labour platforms, with the involvement of workers' representatives, must carry out an assessment, regularly and at least annually, of the impact of the individual decisions taken or supported by automated monitoring and decision-making systems on working conditions, health and safety, and fundamental rights.[15] Moreover, digital labour platforms must provide for the human oversight of all decisions affecting working conditions.[16] The EP Report introduces, in addition to this broader assessment,

12. 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 (General Data Protection Regulation), OJ L 119, 4 May 2016, pp. 1-88.

13. Article 6(5), point c a (new).

14. As opposed to the 'vertical' (state to citizen) dimension, in relation to which necessity and proportionality of the processing of personal data have been assessed by the Court of Justice of the European Union in several judgments.

15. Article 7(1), as amended by the EP Report.

16. Article 7(1) (new), as introduced by the EP Report.

an obligation for digital labour platforms to perform a data protection impact assessment (DPIA), here also with the involvement of those affected by the processing of personal data.[17]

When it comes to automated decision-making in the context of platform work, similarly to cases of algorithmic decision-making in other regulated activities, such as ADM for online content recommendation[18] or for consumer credit decisions,[19] considerations related to the protection of privacy and personal data coexist with aspects related to compliance with sectoral law (concerning platform work: health and safety, non-discrimination and working time, among others) which fall within the oversight of labour inspectorates. It is therefore essential to consider both sets of – mutually reinforcing – objectives.

From a data protection perspective, the GDPR provides important safeguards for workers since it empowers them, as subjects of the processing of personal data, concerning the right to access their personal data, and to rectify and have these erased, as well as the right to data portability and to be informed about the processing of personal data.

Moreover, Article 22 GDPR provides that, where ADM and profiling is allowed, the data controller (in this case, the digital labour platform) must implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, including at least the right to obtain human intervention, to express his or her point of view and to contest the decision.[20] According to Article 13(2)(f) and 14(2)(g) of the GDPR, the controller must provide the data subject with information on the existence of automated decision-making, including profiling, and meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject. In this regard, the provisions of the GDPR on ADM and profiling are functional to allowing the data subject some control over the decision-making processes that significantly affect him or her (Bygrave 2020).

Meanwhile, from a sectoral law perspective, transparency on ADM is key to the control of the impact on platform workers' working conditions and of the compliance of such systems with national law or practice, including with regard to the role of data protection authorities (DPAs), and applicable collective agreements. At the same time, the auditing of the functioning of ADM can provide useful information on the degree of autonomy of the worker, potentially misclassified as independent.

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17. Article 6(5a) (new).

18. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27 October 2022, pp. 1-102.

19. Proposal for a directive of the European Parliament and of the Council on consumer credits, COM/2021/347 final.

20. See Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679, adopted on 3 October 2017, and as last revised and adopted on 6 February 2018, available at: https://ec.europa.eu/newsroom/article29/items/612053

The rationale underpinning the provisions of sectoral law (in this case, the PWD) on ADM transparency is strengthened as a result of the EP Report.[21] Digital labour platforms must provide the platform worker with a written statement of the reasons for any decision supported by an automated decision-making system to restrict access to work assignments or to restrict, suspend or terminate a platform worker's account; any decision to refuse remuneration for work provided by the platform worker; any decision on the platform worker's contractual status; and any decision producing an effect on the agreed terms of the employment relationship or which has similar effects. This statement of reasons has the function of allowing the worker and the administrative or judicial authorities to have control over the compliance of a decision supported by ADM with national law or practice and applicable collective agreements.

When it comes to the interface between the GDPR and sectoral law regulating the activity in which ADM is being used, the policy objective of the GDPR can contribute to ensure compliance with the rules-of-the-art applicable to the business activity where ADM is deployed, but it is not sufficient (Matsumi and Solove 2023; Abraha 2023; Kelly-Lyth and Thomas 2023).[22]

The correct allocation of competences between the sectoral authorities and the GDPR supervisory authorities, in this case the DPAs and the labour authorities, is neither obvious nor easy. Nonetheless, it is a key aspect of the regulatory framework. Regarding ADM and work management regulated under the PWD, there are significant limits to DPAs' possible scope of action.

These limits become particularly evident with reference to the specific provisions of the PWD: a DPA – competent for the enforcement of privacy and data protection violations – cannot assess the overall impact of ADM on workers' working conditions, for instance whether these comply with maximum working time or minimum wages, or occupational safety and health standards; nor can DPAs order businesses to replace or correct ADM to assert the exact decision, work patterns, etc. Furthermore, a DPA cannot issue decisions on access to work assignments, workers' earnings or their occupational safety and health, working time, promotion or their contractual status, including the restriction, suspension or termination of their account for work-related reasons. Finally a DPA cannot even fully assess the grounds for decisions to restrict,

21. Article 8(1) subparagraph 2.

22. On the conditions and limits of GDPR as a safeguard in algorithmic decision-making, see Matsumi and Solove (2023). More specifically, in relation to algorithmic work management, Halefom Abraha comments thus: 'The enforcement of data protection rules at work falls under the regulatory remits of DPAs, who are not labour experts. Multiple reports show that DPAs are under-resourced and understaffed. Compounding the lack of resources and expertise is the lack of interest on the part of DPAs to prioritise data protection in the employment context' (Abraha 2023: p. 186). Aislinn Kelly-Lyth and Anna Thomas provide specifications on the interplay between algorithmic risk and impact assessments (ARIAs) and DPIA: 'Although data protection can operate as a gateway to access other rights and freedoms relevant to algorithmic management, the data protection regime rests on assumed human ability to control and manage information (human 'sovereignty' over data), an idea that has been challenged by the latest wave of algorithmic management tools. Further, there will be some situations in which tools used to inform the managerial prerogative do not require a DPIA simply because they do not process personal data. For example, where non-personal (anonymised) data on supply chain efficiency leads to an entire team being relocated, there may be no DPIA obligation on the employer – even though the team move is an exercise of the managerial prerogative with impacts on workers.' (Kelly-Lyth and Anna Thomas (2023: p. 248).

suspend or terminate a worker's account, or to refuse remuneration for work done by the worker, or on the worker's contractual status and, therefore, it cannot review such decisions and rectify them.

Moreover, a DPA is not in a position to monitor that the person charged by the employer with responsibility as a data controller has the necessary competence, training and authority to monitor the overall and granular impact of ADM on working conditions. Neither can it ensure that the employer provides the worker with a written statement of the reasons for any decisions taken or supported by an automated decision-making system in these areas and which is fully meaningful and respondent to labour law obligations (Dubal 2023b; Fink and Finck 2022).[23]

In contrast, the EP Report aims to enhance cooperation between DPAs and other competent authorities. In Article 7, paragraph 3 a (new), the text specifies that, when an impact assessment (on working conditions, health and safety and fundamental rights, to be submitted to DPAs and labour authorities as well as to workers' representatives), is found to be non-compliant with Article 7(1), the health and safety, data protection, labour and other competent authorities shall take coordinated measures to enforce those provisions.

The EP Report also introduces provisions on cooperation between labour, social protection and tax authorities in cross-border cases.[24] Taking into account these considerations on the limits of DPAs' scope of action, the EP Report appropriately adds the wording 'together with national labour authorities' in Article 19(1) on the supervision of the compliance by digital labour platforms with the provisions of Article 6, 7(1) and (3), 8, 10 and 15 of the PWD. According to recital 48, since ADM in the context of platform work raises issues of data protection as well as labour and social protection law, DPAs and the relevant labour and social protection authorities should cooperate, including at cross-border level, in the enforcement of the PWD, including by exchanging relevant information with each other.

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23. As Dubal comments: 'For example, through a GDPR data request, Worker Info Exchange succeeded in gaining access to data collected by Amazon, as well as a guidance document from Amazon Flex. Nevertheless, this knowledge has not ended digitalized variable pay or control for DSPs in Europe. In other words, firm transparency or a worker right to algorithmic explainability — while crucial to understanding the logic of existing practices — does not by itself shift the power dynamics that enable algorithmic wage discrimination. Nor does it do much to mitigate the culture of labor gamblification described in Part II that is becoming endemic to the on-demand economy – and to more conventional workplaces' (Dubal 2023b: 47). Relying on 'GDPR only' (namely, providing DPAs with exclusive competence in the area of ADM for work management) would be detrimental to the effective protection of labour, social protection, health and safety rights provided to workers under the EU acquis: it might render the enforcement of these rights and safeguards more difficult in practice. Moreover, it is also clear that, in the absence of specific provisions on supervision by DPAs in the proposal for PWD, the GDPR applies in any case to all processing of personal data in the context of the PWD. Having regard to the use of AI systems for ADM, Fink and Finck observe: 'it is paradoxical that discussions around the explainability of AI have focused almost exclusively on data protection law, neglecting not only obligations in administrative law, but also other areas of EU law where similar obligations exist, such as public procurement law, consumer protection law, and financial regulation. The acknowledgement that explanation obligations already exist in other areas of EU law is important more generally, especially in the context of claims that EU data protection law should 'introduce' explanation requirements. Only then can the interplay between general and sectoral requirements, as well as the advantages of one versus the other, be properly evaluated' (Fink and Finck 2022: 389).

24. Article 12 a (new).

Furthermore, the new recital 48a specifies that platform workers should have meaningful access to reporting and redress mechanisms with the relevant national authority, be it the DPA or the labour inspectorate. They should also be able to report possible infringements of the PWD and have the right to be heard and to be informed about the outcome of their complaint, in addition to the right to a timely decision.

These amendments are key to addressing the limits of the legislation in terms of the supervision by DPAs (Article 19 of the PWD proposal) as well as the right to redress (Article 13) and the procedures on behalf or in support of workers engaged in platform work (Article 14). These provisions would, however, jeopardise the enforcement of the PWD and workers' rights if they were adopted in such a way that establishes the exclusive competence of DPAs as supervisory authorities and of the GDPR in terms of the right of redress and to representative actions under the PWD. The amendments in the EP Report on concurrent supervision (i.e. cooperation between the authorities as regards oversight) and the cumulative applicability of GDPR and labour law forms of redress are steps in the right direction since they would address these specific gaps. However, these aspects should be further specified and clarified in the enacting terms of the PWD.[25]

3. The AI Act as regulation: CE marking for AI work management systems

The proposed AI Act regulates as 'high risk'[26] certain artificial intelligence systems for work management. Listed among high-risk AI systems in Annex III, point 4, is:

> Employment, workers management and access to self-employment: (a) AI systems intended to be used for recruitment or selection of natural persons, notably for advertising vacancies, screening or filtering applications, evaluating candidates in the course of interviews or tests; (b) AI intended to be used for making decisions on promotion and termination of work-related contractual relationships, for task allocation and for monitoring and evaluating performance and behavior of persons in such relationships.

25. Having regard to the proposal for PWD, Aída Ponce Del Castillo and Diego Naranjo note: 'For instance, the obligations established by Articles 6, 7(1) and (3), 8 and 10 fall under the competence of national DPAs, but we believe they should fall under the competence of labour authorities' (Ponce Del Castillo and Naranjo 2022: 6).

26. Briefly, the AI Act distinguishes four categories of different risk levels regarding AI systems: (a) unacceptable risk; (b) high risk; (c) limited or minimal risk; (d) low risk. Systems with unacceptable risk and hence prohibited, are, except for specific purposes and where accompanied by prior authorisation: AI systems using subliminal techniques or exploiting vulnerabilities causing physical or psychological harm; for social scoring; and real-time remote biometric identification systems in publicly available spaces for the purpose of law enforcement. High-risk AI systems are included as two sub-categories of AI systems: first, AI systems that are safety components of products already covered by certain Union health and safety harmonisation legislation (such as toys, machinery, lifts or medical devices); second, 'stand-alone' AI systems ('AI for services') specified in Annex III for use in eight areas: biometric identification and categorisation of natural persons; the management and operation of critical infrastructure; educational and vocational training; employment, worker management and access to self-employment; access to and enjoyment of essential private services and public services and benefits; law enforcement; migration, asylum and border control management; and the administration of justice and the democratic process.

The essential requirements that the AI Act establishes for high-risk systems relate in particular to training, validation and the testing of data sets; record-keeping; providing information to the users of AI systems, including on the intended purpose and level of accuracy; human oversight; robustness; and security.

Providers[27] of these systems must conduct a conformity assessment, draw up an EU declaration of conformity and affix a CE marking. In the case of 'AI for services', this is a self-assessment control procedure which allows the AI system to be placed on the market and put into service, and then to move freely within the internal market. As observed by some authors (Ebers 2022; Veale and Zuiderveen Borgesius 2021), the AI Act builds on the legal framework for the safety of products.

It is important to note that, as a rule, an AI system which is in conformity with standards – once such standards have been issued – will be considered as being in conformity with the requirements for high-risk AI.[28] However, it is unclear whether and how compliance with such requirements would ensure that the AI work management system is aligned to the EU acquis and to national labour law (protection from dismissal, access to the minimum wage, maximum working hours, health and safety) and with the Charter of

27. A 'provider' of an AI system is defined in the AI Act (Article 3, definition (2)) as 'a natural or legal person, public authority, agency or other body that develops an AI system or that has an AI system developed with a view to placing it on the market or putting it into service under its own name or trademark, whether for payment or free of charge.'

28. Carlo Colombo and Mariolina Eliantonio observe that 'new governance forms, of which standardization constitutes a pre-eminent example, have much to offer and are indeed essential in an era of framework norms. Standardization has proved an effective market integration tool, which has served to overcome technical barriers to trade when political agreement on these issues seems unattainable and it is a system which is able to keep pace with the fast and complex technological and scientific changes of our current society. However, we cannot overlook that this peculiar regulatory structure, operating 'in the shadow of hierarchy', gives rise to a form of complex normativity that combines hard and soft law instruments, together with European and national regulatory levels, in a way that challenges the essence of EU law. It is indeed frequently the case that these governance forms cut across established categories of public law, making their essential nature difficult to capture or distil. Looking back at our point of departure, and attempting an evaluation of the overall legitimacy of the standardization process, we can safely conclude that there is still a long way to go before we can speak of a fully legitimate system. This is because, in the current system, ex post legitimacy is not ensured: standards seem not to be judicially reviewable at EU level, neither directly nor indirectly, by affected persons, thus somewhat weakening the catalyst function that has allowed courts to address the challenges of other instances of new governance mechanisms. James Elliot has, from this perspective, closed a door to this possibility. In addition, the lack of judicial control is not compensated by a sufficient degree of ex ante legitimacy: participation by societal stakeholders only seems to work on paper, while the reality depicts a much more "elitist" system, in which consumer or environmental interests hardly have a voice. Similarly, while the Commission's control over the process seems to resemble a "paper tiger", safeguard measures are not at the disposal of affected persons.' (Colombo and Eliantonio 2017: 340). See also Martin Ebers: 'Conclusions: The proposed rules of the AIA for high-risk systems raise serious concerns. For these systems, the European Commission primarily wants to rely on an ex ante conformity assessment, which is not carried out by external third parties, but by the companies themselves – combined with the presumption of conformity, if the provider follows harmonized standards, which are to be developed by ESOs in accordance with the NLF. However, ESOs are clearly overburdened by this task. The standardization of AI systems is not a matter of purely technical decisions. Rather, a series of ethical and legal decisions must be made, which cannot be outsourced to private SDOs, but which require a political debate involving society as a whole' (Ebers 2022). Moreover, Ebers observes, especially having regard to standards of AI systems for services, that 'it is difficult to separate technical from political aspects. Issues of fairness, the acceptable level of accuracy, transparency of the systems: these are also political aspects. Moreover, standards are closed-access, subject to copyright; and despite the societal impact of standards, civil society and impacted communities cannot easily engage in their drafting. Therefore, on the one hand, standards are of course a factor of legal certainty and progress for industry; on the other hand, they might not always be fit for purpose.' The AI Act itself, according to Ebers, should specify for instance what types of bias are prohibited and how and to what extent they should be mitigated (what is the 'acceptable bias').

Fundamental Rights of the European Union.[29] It is also unclear whether, as an outcome of this certification process, 'the core sphere of privacy', and ultimately workers' dignity, would be adequately protected once the AI system has been placed on the market and put into service.

Moreover, the algorithmic calculation of platform workers' wages based on AI systems that include dynamic pricing, surge pricing and bidding systems which pick up the lowest wage/availability (Griesbach et al. 2019: 5) could, in most cases, be in violation of EU and Member State legislation on adequate minimum wages. Nonetheless, AI work management systems are not assessed in the context of certification in this area under the AI Act. Additionally, it is unclear if and how the requirements for algorithmic work management under the PWD (for instance the prohibition on the processing of data which seeks to infer the emotional and psychological state of the worker) would be taken into account in the declaration of the conformity of AI work management systems since the AI Act does not contain a prohibition of emotion recognition systems.[30]

In addition, the absence of independent, third party audits[31] of the AI work management system is a factor that will not lead to an increase in the level of trust in AI systems by users and workers.

More broadly, as a result of all these factors, the certification of work management systems under the AI Act will not, unless it is integrated with the sectoral law

29. See Article 31, Fair and just working conditions: 1. Every worker has the right to working conditions which respect his or her health, safety and dignity. 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

30. Under the proposed AI Act, emotion recognition systems are not prohibited and are not considered high-risk AI systems per se. They are, however, subject to the transparency obligations under Article 52 according to which users of an emotion recognition system must inform those who are exposed to it about its use.

31. Authors have pointed to the need for external, third party audits in advance of the CE marking of high-risk systems. As Mauritz Kop comments: 'Self-assessment too non-committal (non-binding)? First, it is crucial that certification bodies and notified bodies are independent and that no conflicts of interest arise due to a financial or political interest. In this regard, I wrote elsewhere that the EU should be inspired by the modus operandi of the US FDA. Second, the extent to which companies can achieve compliance with this new AI 'product safety regime' through risk-based self-assessment and self-certification, without third party notified bodies, determines the effect of the Regulation on business practices and thus on the preservation and reinforcement of our values. Internally audited self-assessment is too non-committal given the high risks involved. Therefore, I think it is important that the final version of the EU AI Act subjects all high-risk systems to external, independent third party assessment requirements. Self-regulation in combination with awareness of the risks via (voluntary or mandatory) internal AI impact assessments is not enough to protect our societal values, since companies have completely different incentives for promoting social good and pursuing social welfare, than the state. We need mandatory third party audits for all High-Risk AI Systems.' (Kop 2021: 8). In the absence of a clear definition of 'work management system' in the AI Act, there is also some lack of clarity about what exactly is going to be CE-marked and against which parameters.

requirements,[32] provide the necessary trust in the conformity of the use of such systems with the PWD or with the EU acquis on labour and social protection law.

This 'protection gap' might become more apparent in terms of the outcomes of either an assessment by the digital labour platform (as the user)[33] of the impact of an AI work management system on working conditions, including the health and safety and labour and social protection law requirement introduced under Article 7 paragraph 3 a (new) of the EP Report, or the DPIA to be performed pursuant to Article 6(5a) (new). In this same regard, it is also notable that the EP Report introduces an obligation for the digital labour platform immediately to cease use of a system when the impact assessment to be performed under the PWD finds risks to health and safety or the fundamental rights of workers that cannot be avoided or mitigated.[34]

4. The European Parliament's draft compromise amendments to the AI Act: worker-related changes

The European Parliament's draft compromise amendments introduce recitals and modifications to specific articles that recognise the need to respect workers' rights.

Notably, they provide for the prohibition of emotion recognition systems in the workplace, adding to Article 5 of the proposed AI Act a prohibition of 'the placing on the market, putting into service or use of AI systems to infer emotions of a natural person in the areas of law enforcement, border management, in workplace and education

32. In the AI Act, the certification of AI work management systems does not cover compliance with the labour law acquis nor oversight by labour inspectorates. In contrast, for some financial services, reference to sectoral law and to its oversight (by financial oversight authorities) is provided in the AI Act. As regards financial institutions, the Council compromise text on the AI Act specifies that, for providers that are financial institutions subject to requirements regarding their internal governance, arrangements or processes under Union financial services legislation, the obligation to put in place a quality management system is considered to be fulfilled by complying with the rules on internal governance arrangements or processes pursuant to the relevant Union financial services legislation (Article 17(3)). Moreover, Article 63(4) lays down that, for high-risk AI systems placed on the market, put into service or used by financial institutions regulated by Union legislation on financial services, the appropriate market surveillance authority is the national authority responsible for the financial supervision of those institutions under that legislation in so far as placement on the market, putting into service or the use of the AI system is in direct connection with the provision of those financial services.

33. The 'user' of an AI system is defined in the AI Act (Article 3, definition (4)) as 'any natural or legal person, public authority, agency or other body using an AI system under its authority, except where the AI system is used in the course of a personal non-professional activity.'

34. Article 7, paragraph 2 b (new). These important safeguards would, however, only apply when the AI work management system falls under the scope of the PWD.

institutions.'[35] This would ensure alignment between the provisions of the PWD and of the AI Act on the prohibited use of certain types of data.

Furthermore, the draft compromise amendments require that 'prior to putting into service or use a high-risk AI system at the workplace, deployers shall consult workers representatives with a view to reaching an agreement and inform the affected employees that they will be subject to the system' [sic].[36] This is welcome since it introduces the right for workers' representatives to be 'at the table' when AI management systems are introduced, in line with the amendments proposed in the EP Report on the PWD according to which digital labour platforms, with the involvement of workers' representatives, must conduct an assessment, regularly and at least annually, of the impact of the individual decisions taken or supported by automated monitoring and decision-making systems on working conditions, health and safety, and fundamental rights.[37]

Another welcome amendment to the AI Act specifies that it does not preclude Member States or the Union from maintaining or introducing laws, regulations or administrative provisions which are more favourable to workers in terms of protecting their rights concerning the use of AI systems by employers, or from encouraging or allowing the application of collective agreements which are more favourable to workers.[38]

Finally, recital 61 of the AI Act, as modified by the EP draft compromise amendments, states that, when AI systems are intended to be used in the workplace, harmonised standards should be limited to technical specifications and procedures. Since it seems that standards as developed today are not restricted to technical specifications (see Giogi, this volume), it would be difficult to reconcile this specification with current standard-setting as provided by the proposed AI Act.

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35. Article 5 (dc). See also recital 26c: 'There are serious concerns about the scientific basis of AI systems aiming to detect emotions, physical or physiological features such as facial expressions, movements, pulse frequency or voice. Emotions or expressions of emotions and perceptions thereof vary considerably across cultures and situations, and even within a single individual. Among the key shortcomings of such technologies are the limited reliability (emotion categories are neither reliably expressed through, nor unequivocally associated with, a common set of physical or physiological movements), the lack of specificity (physical or physiological expressions do not perfectly match emotion categories) and the limited generalisability (the effects of context and culture are not sufficiently considered). Reliability issues and, consequently, major risks for abuse may especially arise when deploying the system in real-life situations related to law enforcement, border management, workplace and education institutions. Therefore, the placing on the market, putting into service, or use of AI systems intended to be used in these contexts to detect the emotional state of individuals should be prohibited.'

36. Article 29, 5a.

37. Article 7(1), as amended by the EP Report.

38. Article 2, 5c. See also recital 2d: 'In line with Article 114(2) TFEU, this Regulation complements and should not undermine the rights and interests of employed persons. This Regulation should therefore not affect Community law on social policy and national labour law and practice, that is any legal and contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, including information, consultation and participation. This Regulation should not affect the exercise of fundamental rights as recognized in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor should it affect concertation practices, the right to negotiate, to conclude and enforce collective agreement or to take collective action in accordance with national law and/or practice. It should in any case not prevent the Commission from proposing specific legislation on the rights and freedoms of workers affected by AI systems.' See also recital 36 which, as amended, concludes: 'This Regulation applies without prejudice to Union and Member State competences to provide for more specific rules for the use of AI-systems in the employment context.'

5. Conclusions

The draft directive on platform work, notably as amended by the EP Report, represents a significant advance towards regulating automated work in a way that avoids a 'race to the bottom' regarding working conditions. It provides a legal framework that establishes a level playing field for employers and which respects the EU acquis on labour and social protection and health and safety at work, and enhances the protection of personal data provided by the GDPR. Notably, it clearly defines prohibitions on the processing of certain personal data in the specific context of work.

Although the AI Act, which encompasses the regulation of high-risk AI, including artificial intelligence systems for work management, does not explicitly refer to the requirements outlined in sector-specific labour laws, such as the PWD, there is a clear interface between the AI Act and the PWD. Unless integrated with these requirements, however, the certification of work management systems under the AI Act would not provide trust on the conformity of the use of such systems with the PWD or with the EU acquis on labour and social protection law. This would hardly be considered a success story for the CE marking regime.

At the same time, the EP draft compromise amendments to the proposed AI Act would increase the level of protection for workers, notably stating a prohibition on the use of emotion recognition systems and by providing an obligation on the deployers of AI systems in the workplace to consult workers' representatives. Nevertheless, as is evident, the level of protection for workers, as well as the level of legal certainty and consistency between the PWD and the AI Act, may vary significantly depending on the final text of both legal instruments.

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