

# Access of Platform Workers to Collective Rights – the Fall of the Binary Divide?

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## Abstract

The paper addresses the issue of self-employed platform workers' access to collective labour rights from the perspective of international law (ILO) and supranational European law (EU and Council of Europe). In this regard, the paper addresses the right to collective bargaining, the right to strike and the collective right to information and consultation. The main finding is that at the current stage, the relevant international and European legal framework is not providing access of self-employed platform workers to all examined collective labour rights. In light of the analysed legal developments the binary divide “has fallen” (for those self-employed platform workers who fulfil the 2022 Guidelines criteria) regarding access to collective bargaining. Therefore, as argued in the paper, also access to the right to strike should be ensured for the latter platform workers due to the purposeful interconnectedness and inseparability of both rights. Nonetheless, the binary divide is remaining “firm” regarding access to collective information and consultation rights. The latter remain accessible (including considering the Platform Work Directive proposal) only to platform workers with a subordinate “worker” status. However, as argued in the paper, the possibility to drop the binary divide (at least regarding certain matters) also in relation to collective information and consultation rights (in the context of platform work) should be seriously considered.

## Keywords

Platform Work; Collective Labour Rights; Platform Workers; Self-Employed; Collective Bargaining; Right to Strike; Information and Consultation Rights; Antitrust Law; Platform Work Directive.

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## Introduction

The wide-ranging technological developments have transformed the world of work. Particularly notable in this context is the emergence of the so-called digital labour platforms.<sup>1</sup> The core of the employment issue stems from the fact that digital labour platforms do not generally employ their platform workers<sup>2</sup> as workers (employees) under an employment contract. It follows that platform work is a form of work that is generally performed by self-employed (independent contractors)<sup>3</sup> outside the employment relationship.<sup>4</sup>

As a result, the access of platform workers to fundamental collective labour rights (as a particularly important part of labour law protection<sup>5</sup>) is questionable, since the existence of worker

- <sup>1</sup> See TODOLÍ-SIGNES, A. The End of the Subordinate Worker? The On-Demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers. *International Journal of Comparative Labour Law and Industrial Relations* [online]. 2017, Vol. 33, no. 2, pp. 241–268, p. 243 [cit. 8. 3. 2024]. ISSN 1875-838X. DOI: <https://doi.org/10.54648/ijcl2017011>; DE STEFANO, V. The rise of the “just-in-time workforce”: on-demand work, crowdwork and labour protection in the “gig-economy”. *International Labour Office: Conditions of Work and Employment* [online]. 2016, Series No. 71 [cit. 8. 3. 2024]. Available at: [https://www.wilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_443267.pdf](https://www.wilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf); IOANNIS, L., COUNTOURIS, N., DE STEFANO, V. Re-Thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market. *European Labour Law Journal* [online]. 2019, Vol. 10, no. 3, pp. 291–333, p. 311 [cit. 8. 3. 2024]. ISSN 2399-5556. DOI: <https://doi.org/10.1177/2031952519872322>. The latter give the example of the ride-hailing platform Uber, which uses technology to connect customers (transport clients) with the people who do the work (platform workers). For more on how the Uber platform works, see TODOLÍ-SIGNES, 2017, op. cit., pp. 253–254.
- <sup>2</sup> In the context of this paper, unless otherwise specifically highlighted, the term “platform workers” will be used to refer to all persons performing “platform work” regardless of their employment status. Moreover, the terms “platform work” and “digital labour platform” will be understood as defined (see Article 2, para. 1) in the *Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work* [online]. COM (2021) 762 final (2021) [cit. 8. 3. 2024]. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52021PC0762> (hereinafter “2021 Platform Work Directive proposal”). For more on the definitions see *ibid.*, since they will not be further elaborated upon in the context of this paper.
- <sup>3</sup> In the context of this paper, we will uniformly use the terms “worker” and “self-employed” as terminology to distinguish between different employment statuses (worker v. self-employed). Therefore, the term “self-employed platform workers” covers all persons performing platform work outside the employment relationship.
- <sup>4</sup> For more on the platform’s work organisation see ALOISI, A., DE STEFANO, V. *Your boss is an algorithm: artificial intelligence, platform work and labour*. Oxford: Hart Publishing, 2022. ISBN 9781509953189. DOI: <https://doi.org/10.5040/9781509953219>; FUSCO, F. Rethinking the Allocation Criteria of the Labour Law Rights and Protections: A Risk-Based Approach. *European Labour Law Journal* [online]. 2020, Vol. 11, no. 2, pp. 131–141, pp. 132–133 [cit. 8. 3. 2024]. ISSN 2399-5556. DOI: <https://doi.org/10.1177/2031952520905152>; PRASSL, J. *Humans As a Service: The Promise and Perils of Work in the Gig Economy*. Oxford: Oxford University Press, 2018, p. 4. ISBN 9780198797012. DOI: <https://doi.org/10.1093/oso/9780198797012.001.0001>; TODOLÍ-SIGNES, 2016, op. cit., p. 243; DE STEFANO, 2016, op. cit., p. 13; DAVIDOV, G. The Status of Uber Drivers: A Purposive Approach. *Spanish Labour Law and Employment Relations Journal* [online]. 2017, Vol. 6, no. 1–2 [cit. 8. 3. 2024]. ISSN 2255-2081. DOI: <https://doi.org/10.20318/sllrj.2017.3921>
- <sup>5</sup> Kresal argues that all of these collective labour rights are a correction of power inequalities between workers and employers (or between labour and capital), and thus allow the realisation of other workers’ rights. Without access to collective labour rights, workers would simply be weak individuals competing with each other for individual jobs. This is even more true for platform workers (KRESAL, B. Collective Bargaining for Platform Workers and the European Social Charter. In: MIRANDA BOTO, J. M., BRAMESHUBER, E. (eds.). *Collective bargaining and the gig economy: a traditional tool for new business models*. Oxford: Hart Publishing, 2022, p. 62. ISBN 9781509956197. DOI: <https://doi.org/10.5040/9781509956227.ch-004>).

status is a well-established condition for this access.<sup>6</sup> Moreover, as already richly discussed in literature the persons performing work as “self-employed” outside the employment relationship are in general considered “undertakings” for competition law purposes under Article 101 of the Treaty on the Functioning of the EU (TFEU). Therefore, their right to collective bargaining is at risk of being subject to competition law restrictions.<sup>7</sup> The issue is thus no longer simply a distinction between workers and the self-employed, but also between different categories of self-employed – “genuinely independent” and “dependent contractors/self-employed” (who may be entitled to a certain degree of labour law protection).<sup>8</sup>

The purpose of the present paper is, therefore, to contribute to the existing scientific debate on the question of self-employed platform workers’ access to collective labour rights from the perspective of international (ILO) and supranational European law (EU and Council of Europe). The contribution of the present article to legal scholarship is mainly visible through the fact that, firstly, unlike most of the existing literature (which focuses on the right to collective bargaining<sup>9</sup>), we will address platform workers’ access to a broader range of collective labour rights – namely the right to collective bargaining, the right to strike<sup>10</sup>, and the collective right to information and consultation. And secondly, in the context of our analysis, we will pay particular attention to the latest developments at the European level,

<sup>6</sup> See, *inter alia*, GYULAVÁRI, T. Collective Rights of Platform Workers: The Role of EU Law. *Maastricht Journal of European and Comparative Law* [online]. 2020, Vol. 27, no. 4, pp. 406–424 [cit. 8. 3. 2024]. ISSN 2399-5548. DOI: <https://doi.org/10.1177/1023263X20932070>; OECD. Facing the future of work: How to make the most of collective bargaining. In: *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work*. Paris: OECD Publishing, 2019, pp. 238–239. ISBN 9789264639744. DOI: <https://doi.org/10.1787/1fd-2da34-en>; and SENČUR PEČEK, D., FRANCA, V. From student work to false self-employment: how to combat precarious work in Slovenia? In: KENNER, J., FLORCZAK, I., OTTO, M. (eds.). *Precarious Work: The Challenge for Labour Law in Europe*. Northampton: Edward Elgar Publishing, 2019, pp. 128–131. ISBN 9781788973250. DOI: <https://doi.org/10.4337/9781788973267.00015>

<sup>7</sup> See, *inter alia*, IOANNIS, COUNTOURIS, DE STEFANO, 2019, op. cit.; GYULAVÁRI, 2020, op. cit.; DOHERTY, M., FRANCA, V. Solving the ‘Gig-saw’? Collective Rights and Platform Work. *Industrial Law Journal* [online]. 2020, Vol. 49, no. 3, pp. 352–376 [cit. 8. 3. 2024]. ISSN 1464-3669. DOI: <https://doi.org/10.1093/indlaw/dwz026>; See BIASI, M. ‘We will all laugh at gilded butterflies’. The shadow of anti-trust law on the collective negotiation of fair fees for self-employed workers. *European Labour Law Journal* [online]. 2018, Vol. 9, no. 4, pp. 291–333, p. 354 [cit. 8. 3. 2024]. ISSN 2399-5556. DOI: <https://doi.org/10.1177/2031952518810640>

<sup>8</sup> For example, Rodríguez Rodríguez, states that the “vulnerable self-employed workers” should be entitled to access collective labour rights – trade union association and collective bargaining (RODRÍGUEZ RODRÍGUEZ, E. The Right to Collective Bargaining of the Self-Employed at New Digital Economy. *Hungarian Labour Law E-Journal* [online]. 2020, no. 2, pp. 40–51, p. 50 [cit. 8. 3. 2024]. ISSN 2064-6526. Available at: [https://hlj.hu/letolt/2020\\_2\\_a/04\\_Rodriguez\\_hlj\\_uj\\_2020\\_2.pdf](https://hlj.hu/letolt/2020_2_a/04_Rodriguez_hlj_uj_2020_2.pdf). Likewise see KRESAL, B. Slovenia. In: WAAS, B., HIEBL, C. (eds.). *Collective bargaining for self-employed workers in Europe: approaches to reconcile competition law and labour rights*. Alphen aan den Rijn: Wolters Kluwer, 2021, p. 221. ISBN 978940352373; and DAVIDOV, G. *A Purposive Approach to Labour Law*. Oxford: Oxford University Press, 2016, pp. 252–253. ISBN 9780198824244. DOI: <https://doi.org/10.1093/acprof:oso/9780198759034.001.0001>, who writes on “dependent contractors” and the limited scope of labour law protection.

<sup>9</sup> See FREEDLAND, M., COUNTOURIS, N. Some Reflections on the ‘Personal Scope’ of Collective Labour Law. *Industrial Law Journal* [online]. 2017, Vol. 46, no. 1, pp. 52–71 [cit. 8. 3. 2024]. ISSN 1464-3669. DOI: <https://doi.org/10.1093/indlaw/dww041>; GYULAVÁRI, 2020, op. cit.; IOANNIS, COUNTOURIS, DE STEFANO, 2019, op. cit.; DOHERTY, FRANCA, 2020, op. cit.

<sup>10</sup> In the context of this paper, we will not make a further distinction between “industrial action” and “the right to strike”. We will refer only to “the right to strike” throughout the paper.

as reflected in the recent adoption of the European Commission: Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons, of 29 September 2022 (hereinafter “2022 Guidelines”)<sup>11</sup> and the 2021 Platform Work Directive proposal.

Importantly, regarding the paper’s scope limitations: the scope will be limited to the examination of the relevant international (ILO) and supranational European law aspects (EU law, ECtHR judgments, and the European Committee of Social Rights (hereinafter “ECSR”) decisions). Legal solutions under national law will not be subject to analysis. Moreover, the problem of employment status determination (worker v. self-employed) of platform workers (which has been already richly discussed in the literature<sup>12</sup>) will not be addressed. The focus will be solely on the question of self-employed platform workers’ access to collective labour rights (meaning the personal scope of collective labour rights in the context of platform work). The paper will also exclude an analysis of the practical obstacles to the actual exercise of the collective labour rights of platform workers, which is particularly problematic in the context of platform work.<sup>13</sup>

The article will be structured in the manner that we will address the access of self-employed platform workers to each of the collective labour rights under discussion in a separate section. Firstly, we will examine the access to the right to collective bargaining, secondly to the right to strike, and thirdly to the collective right to information and consultation. Each chapter will also include the author’s analysis and conclusions (proposals) on the issue of access of self-employed platform workers to the collective labour rights discussed in that chapter. As a consequence, the paper will not have a separate “analysis chapter” at the end,

<sup>11</sup> EUROPEAN COMMISSION. *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* [online]. 29 September 2022, OJ C 374, pp. 2–13 [cit. 8. 3. 2024]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022XC0930%2802%29>

<sup>12</sup> See, *inter alia*, ALOISI, A. Platform work in Europe: Lessons learned, legal developments and challenges ahead. *European Labour Law Journal* [online]. 2022, Vol. 13, no. 1, pp. 4–29 [cit. 8. 3. 2024]. ISSN 2399-5556. DOI: <https://doi.org/10.1177/20319525211062557>; DAVIDOV, G., ALON-SHENKER, P. The ABC Test: A New Model for Employment Status Determination? *Industrial Law Journal* [online]. 2022, Vol. 51, no. 2, pp. 235–276 [cit. 8. 3. 2024]. ISSN 1464-3669. DOI: <https://doi.org/10.1093/indlaw/dwac004>; DAVIDOV, 2016, op. cit.; DE STEFANO, V. et al. Platform work and the employment relationship. *ILO Working Paper* [online]. 2021, no. 27, p. 31 [cit. 8. 3. 2024]. ISSN 2708-3446. Available at: [https://www.ilo.org/global/publications/working-papers/WCMS\\_777866/lang--en/index.htm](https://www.ilo.org/global/publications/working-papers/WCMS_777866/lang--en/index.htm); HENDRICKX, F. Regulating New Ways of Working: From the New ‘Wow’ to the New ‘How’. *European Labour Law Journal* [online]. 2018, Vol. 9, no. 2, pp. 195–205, p. 201 [cit. 8. 3. 2024]. ISSN 2399-5556. DOI: <https://doi.org/10.1177/2031952518781449>; ALES, E. Subordination at Risk (of Autonomisation): Evidences and Solutions from Three European Countries. *Italian Labour Law e-Journal* [online]. 2019, Vol. 12, no. 1, pp. 65–70 [cit. 8. 3. 2024]. ISSN 1561-8048. DOI: <https://doi.org/10.6092/issn.1561-8048/9697>

<sup>13</sup> Regarding practical obstacles see, *inter alia*: JOHNSTON, H., LAND-KAZLAUSKAS, C. Organizing on-demand: Representation, voice, and collective bargaining in the gig economy. *Conditions of work and employment series* [online]. 2018, no. 94, p. 33 [cit. 8. 3. 2024]. ISSN 2226-8952. Available at: <https://www.ilo.org/media/412401/download>; HAIPETER, T., IUDICONE, F. New Social Initiatives on Cloud – and Gigwork – Germany and Italy Compared. *Hungarian Labour Law E-Journal* [online]. 2020, no. 2, pp. 17–40, pp. 28–30 [cit. 8. 3. 2024]. ISSN 2064-6526. Available at: [https://hlj.hu/letolt/2020\\_2\\_a/03\\_ThHaipeter\\_FIudicone\\_hlj\\_uj\\_2020\\_2.pdf](https://hlj.hu/letolt/2020_2_a/03_ThHaipeter_FIudicone_hlj_uj_2020_2.pdf); HASTIE, B. Platform Workers and Collective Labour Action in the Modern Economy. *University of New Brunswick Law Journal*. Fredericton: University of New Brunswick, 2020, Vol. 71, pp. 40–60, p. 46. ISSN 0077-8141.

as the latter will be done on an ongoing basis. Methodologically, the paper will be based on the analysis of the relevant scientific literature, and legal sources (mostly ILO, EU, ECtHR and ECSR documents and cases).

## 1 Access of Platform Workers to the Right to Collective Bargaining

As mentioned in the introduction, platform workers' access to the right to collective bargaining (from the perspective of the European legal framework) has already been extensively discussed and analysed in the literature. Therefore, together with the presentation of the relevant 2022 Guidelines provisions only an indicative overview of the main points (relevant within the European legal framework) will be made.

In short, the ILO has a universal approach to the right to freedom of association (Freedom of Association and Protection of the Right to Organise Convention, 1948, no. 87) and collective bargaining (Right to Organise and Collective Bargaining Convention, 1949, no. 98) – covering all workers without distinction whatsoever<sup>14</sup> (including self-employed workers).<sup>15</sup> Nonetheless, at the national and European level this approach is narrowed down due to competition law restrictions. According to a binary divide “self-employed workers” are considered as undertakings from a competition law perspective – therefore their collective agreements being prohibited.

The ECSR approach to reconcile the scope of competition law restrictions impacting self-employed workers access to the right to collective bargaining (Article 6 ESC) is illustrated in the case *ICTU vs. Ireland*.<sup>16</sup> There the ECSR addressed the issue of the protection of the right to collective bargaining (Article 6 ESC) for self-employed workers (freelance journalists etc.) in the light of competition law restrictions.<sup>17</sup> In summary, the ECSR emphasised that: “in establishing the type of collective bargaining that is protected by the Charter, it is not sufficient to rely on distinctions between worker and self-employed”<sup>18</sup>, the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining.”<sup>19</sup> Consequently, it follows (as stated by ECSR) that self-employed workers who have no substantial influence on the content of their contractual conditions (if they were to bargain individually) must be given the right to bargain collectively.<sup>20</sup>

<sup>14</sup> GYULAVÁRI, 2020, op. cit., p. 409; DOHERTY, FRANCA, 2020, op. cit., p. 359.

<sup>15</sup> The right of self-employed workers (truck drivers) to freedom of association and collective bargaining was expressly confirmed, *inter alia*, in Committee on Freedom of Association, Report No 363, March 2012, Case No 2602 (Republic of Korea).

<sup>16</sup> Case OF 12. 12. 2018, *Irish Congress of Trade Unions (ICTU) vs. Ireland*, no. 123/2016. For more on the substance of the case see DOHERTY, FRANCA, 2020, op. cit., pp. 359–363.

<sup>17</sup> On the substance of the case see DOHERTY, FRANCA, 2020, op. cit., pp. 359–363.

<sup>18</sup> Notably, this position reflects also the ILO's universal approach to the principle of freedom of association – covering workers and employers “without distinction whatsoever” (see DOHERTY, FRANCA, 2020, op. cit., p. 359; and GYULAVÁRI, 2020, op. cit., p. 409).

<sup>19</sup> *ICTU vs. Ireland*, para. 38.

<sup>20</sup> *Ibid.*, para. 111.



Moreover, ECSR gave some further guidance on the question of which self-employed workers are covered by the right to collective bargaining under Article 6 ESC: “Without finding it necessary to determine whether the particular categories self-employed workers in question were ‘false self-employed’ or ‘fully dependent self-employed workers’, the Committee considers it evident that they cannot predominantly be characterized as genuine independent self-employed meeting all or most of criteria such as having several clients, having the authority to hire staff, and having the authority to make important strategic decisions about how to run the business. The self-employed workers concerned here are obviously not in a position to influence their conditions of pay once they have been denied the right to bargain collectively.”<sup>21</sup>

In the context of EU law, the CJEU has excluded certain restrictions on competition arising from collective bargaining from the scope of Article 101 TFEU – in the context of taking into account the social objectives of the EU (“the *Albany* exception”).<sup>22</sup> Moreover, the criteria set out by the CJEU in *Kunsten* are also relevant for understanding the personal scope of this exclusion.<sup>23</sup>

### 1.1 The 2022 Guidelines and the Right to Collective Bargaining for Platform Workers

The 2022 Guidelines set out principles for assessing (under Article 101 TFEU) the agreements concluded as a result of collective negotiations between solo self-employed persons and one or several undertakings, concerning the working conditions of solo self-employed persons. For the purposes of the 2022 Guidelines a “solo self-employed person” means “a person who does not have an employment contract or who is not in an employment relationship, and who relies primarily on his or her own personal labour for the provision of the services concerned.”<sup>24</sup>

Furthermore, according to 2022 Guidelines working conditions of solo self-employed persons include matters such as “remuneration, rewards and bonuses, working time and working patterns, holiday, leave, physical spaces where work takes place, health and safety, insurance and social security, and conditions under which solo self-employed persons are entitled to cease providing their services or under which the counterparty is entitled to cease using their services.”<sup>25</sup>

<sup>21</sup> *ICTU vs. Ireland*, para. 99.

<sup>22</sup> See cases of 21. 9. 1999, *Albany International BV*, C-67/96, ECLI:EU:C:1999:430 (hereinafter “*Albany*”); and of 4. 12. 2014, *FNV Kunsten Informatie en Media*, C-413/13 ECLI:EU:C:2014:2215 (hereinafter “*Kunsten*”).

<sup>23</sup> For more on the criteria developed in the case *Kunsten* see 2022 Guidelines, para. 7. For a further detailed analysis see, *inter alia*: DASKALOVA, V. The Competition Law Framework and Collective Bargaining Agreements for Self-Employed: Analysing Restrictions and Mapping Exemption Opportunities. In: WAAS, B., HIEBL, C. (eds.). *Collective bargaining for self-employed workers in Europe: approaches to reconcile competition law and labour rights*. Alphen aan den Rijn: Wolters Kluwer, 2021, pp. 27–33. ISBN 978940352373.

<sup>24</sup> 2022 Guidelines, op. cit., paras 1–2. Moreover, the 2022 Guidelines additionally explain the “solo self-employed person” concept in para. 18: “Solo self-employed persons may use certain goods or assets in order to provide their services. For example, a cleaner uses cleaning accessories and a musician plays a musical instrument. In these instances, the goods are used as an ancillary means to provide the final service, and solo self-employed persons would thus be considered to rely on their personal labour. By contrast, these Guidelines do not apply to situations where the economic activity of the solo self-employed person consists merely in the sharing or exploitation of goods or assets, or the resale of goods/services. For example, where a solo self-employed person rents out accommodation or resells automotive parts, these activities relate to asset exploitation and the resale of goods, rather than the provision of personal labour.”

<sup>25</sup> *Ibid.*, para. 15.

The 2022 Guidelines provide that collective agreements concluded by solo self-employed persons who are in a situation comparable to that of workers shall be deemed not to fall within the scope of Article 101 TFEU.<sup>26</sup> In light of this starting point, the European Commission – taking into account developments in the EU and national labour markets (in terms of legislation and case law) – has, for the context of 2022 Guidelines, identified the categories of solo self-employed persons that it considers to be in a situation comparable to that of workers.<sup>27</sup>

For the context of our paper (focusing on platform workers), the most important category is “solo self-employed persons working through digital labour platforms”.<sup>28</sup> As noted by the Commission, the emergence of the platform economy (the provision of work through digital work platforms) has meant that many self-employed people find themselves in a situation comparable to that of workers when carrying out this work. The self-employed may depend on digital platforms, in particular, to reach clients, and often face “take it or leave it” job offers – with little or no possibility to negotiate their working conditions, including their remuneration. Digital labour platforms “are usually able to unilaterally impose the terms and conditions of the relationship, without previously informing or consulting solo self-employed persons”.<sup>29</sup> Moreover, as noted by the Commission, developments at the national level (case law and legislative changes) also show that the situation of these self-employed persons is comparable to that of workers.<sup>30</sup> Thus, the Commission concludes that “collective agreements between solo self-employed persons and digital labour platforms relating to working conditions fall outside the scope of Article 101 TFEU”.<sup>31</sup>

## 1.2 Analysis

In conclusion, the 2022 Guidelines are clear and concise from the perspective of platform workers. The 2022 Guidelines reflect the ECSR approach to the protection of the right to collective bargaining (Article 6 ESC) for self-employed workers in light of competition law restrictions. According to the 2022 Guidelines solo self-employed platform workers are (as a special category due to identified vulnerabilities) excluded from the competition law restrictions (since they are considered to be in “a situation comparable to that of workers”). In sum, the 2022 Guidelines define this category as solo self-employed persons working through a digital labour platform who rely primarily on their own personal labour for the provision of the services concerned.<sup>32</sup> Besides the latter, the 2022 Guidelines do not set out any additional conditions to be met by solo self-employed platform workers.<sup>33</sup>

<sup>26</sup> 2022 Guidelines, op. cit., para. 20.

<sup>27</sup> Ibid., para. 22.

<sup>28</sup> As explained in the 2022 Guidelines the term “digital labour platform” is defined in accordance with the 2021 Platform Work Directive proposal. For more on this definition see 2022 Guidelines paras 2, 30; and 2021 Platform Work Directive proposal.

<sup>29</sup> 2022 Guidelines, op. cit., para. 28.

<sup>30</sup> Ibid., para. 29.

<sup>31</sup> Ibid., para. 31.

<sup>32</sup> See *ibid.*, paras. 2 and 28–31.

<sup>33</sup> Consequently, a proper interpretation of the terms “solo self-employed person” and “digital work platform” will be crucial – since platform workers’ access to collective bargaining is based on the understanding of these two concepts.

## 2 Access of Platform Workers to the Right to Strike

Next, after addressing the question of obstacles to the personal scope of the right to collective bargaining, it is crucial to address the question of the personal scope of the right to strike. This is a fundamental collective labour right which, in the light of the voluntary nature of collective bargaining, serves as an important means for workers to “force” their counterparty to enter into new collective agreements and to respect existing ones.<sup>34</sup>

On the level of the ILO the right to strike is not expressly recognised as a universal right (like freedom of association and collective bargaining). Nonetheless, as it follows from the position of the ILO Committee on Freedom of Association: the right to strike is “*an intrinsic corollary to the right to organize protected by Convention No. 87*”.<sup>35</sup> Therefore, according to the latter, the right to strike is a fundamental right deriving from (forming an integral part of) the right to organise under ILO Convention No. 87.<sup>36</sup> However, this position was never expressly neither confirmed nor denied also in connection to self-employed workers.<sup>37</sup>

Moreover, there are several authorities (academic and institutional) advocating the purposive approach to the interpretation of collective labour rights (freedom of association, right to strike, right to collective bargaining), which are interpreted as “inextricably intertwined and interrelated”. Nonetheless, also in all of these cases (unless otherwise indicated) only the right to strike of workers in an employment relationship was concerned.

On the doctrinal level, *Davidov* points out that these rights are linked in the light of the purposive interpretation of labour law. In the light of current circumstances in the world of work, the freedom to organise is meaningless if workers do not have a guaranteed right

<sup>34</sup> COLLINS, H., LESTER, G., MANTOUVALOU, V. Introduction, Does Labour Law Need Philosophical Foundations? In: HUGH, C., GILLIAN, L., MANTOUVALOU, V. (eds.). *Philosophical Foundations of Labour Law*. Oxford: Oxford University Press, 2018, p. 8. ISBN 9780198825272. DOI: <https://doi.org/10.1093/oso/9780198825272.001.0001>; DORSSEMONT, F., ROCCA, M. Article 28 – Right of Collective Bargaining and Action. In: DORSSEMONT, F. et al. (eds.). *The Charter of Fundamental Rights of the European Union and the Employment Relation*. Oxford: Hart Publishing, 2019, p. 470. ISBN 9781509922659. DOI: <https://doi.org/10.5040/9781509922680.ch-022>

<sup>35</sup> INTERNATIONAL LABOUR ORGANISATION. *Freedom of association – Compilation of decisions of the Committee on Freedom of Association*. 6. ed. Geneva: ILO, 2018, p. 143, para. 754. ISBN 9789221312062. Available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_632659.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf) [cit. 8. 3. 2024]. For more see all the ILO references listed in *ibid*.

<sup>36</sup> BAVARO, V., PIETROGIOVANNI, V. A hypothesis on the economic nature of labour law: The collective labour freedoms. *European Labour Law Journal* [online]. 2018, Vol. 9, no. 3, pp. 263–286, p. 264 [cit. 8. 3. 2024]. ISSN 2399-5556. DOI: <https://doi.org/10.1177/2031952518799761>; DORSSEMONT, F. The Right to Take Collective Action under Article 11 ECHR. In: DORSSEMONT, F., LÖRCHER, K., SCHÖMANN, I. (eds.). *The European Convention on Human Rights and the Employment Relation*. Oxford: Hart Publishing, 2013, p. 334. ISBN 9781849463386.

<sup>37</sup> As summarised by the committee: “*the right to strike is an intrinsic corollary of the right of association protected by Convention No. 87. This right is not, however, absolute and may be restricted in exceptional circumstances or even prohibited for certain categories of workers, in particular certain public servants or for essential services in the strict sense of the term, on condition that compensatory guarantees are provided for*” (INTERNATIONAL LABOUR ORGANISATION. *Freedom of Association and Collective Bargaining, International Labour Conference 81st Session*. Geneva: ILO, 1994, p. 77, para. 179. ISSN 0074-6681. Available at: [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1994-81-4B\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(1994-81-4B).pdf) [cit. 8. 3. 2024].



to collective bargaining, which is equally meaningless if workers do not have the right to strike.<sup>38</sup> Thus, *Davidov* argues that developments and changes in collective labour law are based on the idea that the rights to collective bargaining and to strike are derived from the freedom of association. The protection of the right to collective bargaining and the right to strike is necessary to ensure the full effect of the worker's right to organise. The latter right has no meaning if workers do not have the right to bargain collectively and to strike. Similarly, the right to collective bargaining is less meaningful if workers do not have the right to strike.<sup>39</sup>

Similarly, *Kresal* (in the context of the ESC) argues that the rights to collective bargaining, to strike and to organise under the ESC are strongly intertwined and mutually inseparable collective labour rights. “Without collective representation and trade union activities, collective bargaining and the right to strike, workers would merely be weak individuals competing with each other for jobs/gigs by offering their labour under the conditions in which fair remuneration and the overall concept of decent work is seriously threatened or even impossible. And this is equally or even more true for platform workers”.<sup>40</sup>

Furthermore, the purposive link between the rights to freedom of association, collective bargaining and the right to strike is also evident in the case law of the ECtHR. The core of the argumentation stems from the derivation of the right to collective bargaining and the right to strike from Article 11 of the ECHR, which refers only to “Freedom of assembly and association”.<sup>41</sup> In the case of *Demir and Baykara vs. Turkey*,<sup>42</sup> the ECtHR recognised (taking into account ILO Conventions Nos 87 and 98) the right to collective bargaining as an essential element of the right to freedom of trade union association, and therefore protected under Article 11 ECHR.<sup>43</sup> Next, in the case of *Enerji Yapi-Yol Sen vs. Turkey*<sup>44</sup> ECtHR emphasised that Article 11 of the ECHR requires that legislation must allow trade unions (to the extent not contrary to Article 11) to fight to protect the interests of their members. The right to strike – which allows trade union demands to be heard – is an important tool for trade union members to protect their interests. The ECtHR also notes that the right to strike is recognised as a fundamental right by ILO committees, as an inseparable corollary of the right to freedom of association under ILO Convention No 87. Similarly, the ESC recognises the right to strike as a means of ensuring the effective exercise of the right to collective bargaining.<sup>45</sup> This position was confirmed also in the case *Hrvatski Liječnici*

<sup>38</sup> DAVIDOV, 2016, op. cit., p. 216.

<sup>39</sup> DAVIDOV, G. Judicial Development of Collective Labour Rights – Contextually. *Canadian Labour & Employment Law Journal*. 2010, Vol. 15, pp. 235–249, pp. 246–247 [cit. 8. 3. 2024]. ISSN 1196-7889. Available at: [https://clcw.queenslaw.ca/sites/clcwwww/files/CLELJ-Articles/07-Davidov\\_clelj\\_15\(2\).pdf](https://clcw.queenslaw.ca/sites/clcwwww/files/CLELJ-Articles/07-Davidov_clelj_15(2).pdf)

<sup>40</sup> KRESAL, 2022, op. cit., pp. 61–62. Important to note that she expressly connects this issue also to platform workers (who are often denied employee employment status).

<sup>41</sup> See DORSSEMONT, 2013, op. cit., p. 334.

<sup>42</sup> Case of 12. 11. 2008, *Demir and Baykara vs. Turkey*, no. 34503/97, ECLI:CE:ECHR:2008:1112JUD003450397.

<sup>43</sup> Ibid., paras. 147, 152–154.

<sup>44</sup> Case of 21. 4. 2009, *Enerji Yapi-Yol Sen vs. Turkey*, no. 68959/01, ECLI:CE:ECHR:2009:0421JUD006895901.

<sup>45</sup> Ibid., para. 24. See also DORSSEMONT, 2013, op. cit., p. 339.

*Sindikat vs. Croatia*<sup>46</sup>, in which the ECtHR held that there was an unjustifiably long restriction on a trade union's right to strike, as the right to strike constitutes the most powerful instrument for safeguarding the work-related rights of its members. It is precisely through the right to strike that doctors would be able to exert legitimate pressure aimed at securing a higher level of work-related rights.<sup>47</sup>

Finally, within the Council of Europe, the Parliamentary Committee has adopted Resolution 2033 (2015)<sup>48</sup>, which states that the rights to organise, bargain collectively and strike are fundamental rights enshrined in ECHR and ESC.<sup>49</sup> The Resolution explicitly states that the rights to collective bargaining and to strike are essential to ensure that workers and their organisations can operate effectively within the framework of social dialogue to defend their interests concerning wages, working conditions and other social rights.<sup>50</sup>

## 2.1 The 2022 Guidelines and the Right to Strike

At the outset, it is true that within the context of EU law Article 153, para. 5 TFEU explicitly excludes EU competence in the field of social policy to regulate the area of industrial action (the right to strike).<sup>51</sup> However, the personal scope of the right to strike, likewise in the case of collective bargaining, may be subject to competition law restrictions.<sup>52</sup> Consequently, the issue of the right to strike was touched upon in the 2022 Guidelines (explicitly especially in the initial draft version). The Guidelines recognised the connection between the right to strike and competition law restrictions (likewise in the case of collective bargaining).

The first 2021 draft version of the 2022 Guidelines (hereinafter “2021 Draft Guidelines”)<sup>53</sup> explicitly mentioned the right to strike (“right to cease providing the services”) within

<sup>46</sup> Case of 27. 11. 2014, *Hrvatski Liječnički Sindikat vs. Croatia*, no. 36701/09, ECLI:CE:ECHR:2014:1127JUD003670109.

<sup>47</sup> *Ibid.*, para. 59.

<sup>48</sup> Protection of the right to bargain collectively, including the right to strike. *Parliamentary Assembly of the Council of Europe* [online]. Resolution 2033 (2015), 28 January 2015 (6th Sitting) [cit. 8. 3. 2024]. Available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XMI.2HTML-en.asp?fileid=21535&lang=en>

<sup>49</sup> *Ibid.*, para. 1.

<sup>50</sup> *Ibid.*, para. 5.

<sup>51</sup> DORSEMONT, ROCCA, 2019, op. cit., p. 471; GYULAVÁRI, 2020, op. cit., p. 409.

<sup>52</sup> As illustrated by Bogg and Estlund: “Under most national labour laws, only ‘employees’ enjoy a right to strike for shared economic goals; independent contractors do not. Indeed, the line between employees and independent contractors has historically marked the line between legitimate concerted labour activity and presumptively prohibited restraint of trade among competitors. The sharp dichotomy between employees, equipped with a hard-won array of legal rights including a right to engage in collective self-help, and independent contractors, who lack all of those rights, is increasingly troubling as firms become ever more willing and able to meet their labour needs without directly employing workers.” BOGG, A., ESTLUND, C. The Right to Strike and Contestatory Citizenship. In: HUGH, C., GILLIAN, L., MANTOUVALOU, V. (eds.). *Philosophical Foundations of Labour Law*. Oxford: Oxford University Press, 2018, p. 243. ISBN 9780198825272. DOI: <https://doi.org/10.1093/oso/9780198825272.003.0013>

<sup>53</sup> COMMUNICATION FROM THE COMMISSION Approval of the content of a draft for a COMMUNICATION FROM THE COMMISSION Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons. *European Commission* [online]. C/2021/8838 final, 9 December 2021 [cit. 8. 3. 2024]. Available at: [https://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=PI\\_COM%3AC%282021%298838](https://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=PI_COM%3AC%282021%298838)

the context of defining what is included in “working conditions”. According to para. 16 of 2021 Draft Guidelines: *“The working conditions of solo self-employed persons include matters such as remuneration [...] and conditions under which the solo self-employed person is entitled to cease providing his/her services, for example, in response to breaches of the agreement relating to working conditions. However, agreements under which solo self-employed persons collectively decide not to provide services to particular counterparties, for example because the counterparty is not willing to enter into an agreement on working conditions require an individual assessment. Such agreements restrict the supply of labour and may therefore raise competition concerns. To the extent that it can be shown that such a coordinated refusal to supply labour is necessary and proportionate for the negotiation or conclusion of the collective agreement, it will be treated for the purposes of these Guidelines in the same way as the collective agreement to which it is linked (or would have been linked in the case of unsuccessful negotiations).”*

This provision was also addressed by the relevant stakeholders participating in the public consultation on the 2021 Draft Guidelines (before the adoption of the final version in September 2022). As mentioned in the Commission Staff Working Document Impact Assessment Report<sup>54</sup> European Trade Union Confederation (ETUC) (and most other participating trade unions) emphasised in the public consultation that *“the right to collective action is a corollary to the freedom of assembly and association, and inherent to the effective exercise of collective bargaining rights. In order for self-employed persons to be able to effectively enjoy their right to collective bargaining and to enforce their collective agreements, their right to collective action also needs to be fully guaranteed and respected. The exercise of collective action by self-employed persons cannot be made conditional on competition rules”*.<sup>55</sup> On the other hand, the platform companies (e.g., the food delivery platform Wolt) emphasised that the Guidelines should further clarify the applicable conditions to ensure such coordinated actions do not disproportionately harm other self-employed or workers.<sup>56</sup>

Interestingly, the final and enacted version of the 2022 Guidelines almost completely omitted any mention or further specification in connection to the right to strike (“right to cease providing the services”). According to para. 15 of 2022 Guidelines: *“The working conditions of solo self-employed persons include matters such as remuneration [...] and conditions under which solo self-employed persons are entitled to cease providing their services or under which the counterparty is entitled to cease using their services.”* Contrary to the 2021 Draft Guidelines this provision is not specified or explained any further in relation to the right to strike.

## 2.2 Analysis

At first the 2021 Draft Guidelines adopted a rather “restrictive” (nonetheless clearer and more specific) approach to the right to strike by emphasising that each collective strike action

<sup>54</sup> Commission Staff Working Document Impact Assessment Report Accompanying the document Communication from the Commission, Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons. *European Commission* [online]. SWD(2022) 321 final, 29 September 2022 [cit. 8. 3. 2024]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0321>

<sup>55</sup> Ibid., p. 73.

<sup>56</sup> Ibid., p. 74.

requires an individual assessment. Strike action would be, thus, covered by the 2021 Draft Guidelines: “*To the extent that it can be shown that such a coordinated refusal to supply labour is necessary and proportionate for the negotiation or conclusion of the collective agreement, it will be treated for the purposes of these Guidelines in the same way as the collective agreement to which it is linked (or would have been linked in the case of unsuccessful negotiations)*”.<sup>57</sup> Thus, according to the 2021 Draft Guidelines approach, self-employed platform workers’ exercise of collective labour rights (this time the right to strike) is once again subject to legal uncertainty (which results from the requirement of necessity and proportionality assessment in each individual case). Elimination of legal uncertainty regarding collective bargaining for solo self-employed was one of the main reasons to adopt the 2022 Guidelines in the first place. This uncertainty, therefore, runs contrary to the main objective of the Guidelines.

On the other hand, the final 2022 Guidelines completely omitted explicitly mentioning any further aspects regarding the exercise of the right to strike (from the perspective of competition law). The conditions under which “*solo self-employed persons are entitled to cease providing their services*” are only mentioned (without any further explanation) as one of the several working conditions, which may be subject to collective bargaining.

Hence, the final version of the 2022 Guidelines does not impose explicit restrictions on the right to strike – yet neither does it explicitly exclude the exercise of the right to strike from the competition law restrictions (as it does for collective bargaining). Consequently, it seems that, since the 2022 Guidelines do not mention the right to strike, the latter remains “in limbo” from a competition law perspective (and left to possible divergent practices on the EU Member States’ level). It remains to be seen whether the complete absence of clarification in this area will cause problems in practice. The legal uncertainty for platform workers regarding this aspect was certainly not removed.

And finally, it follows from the analysis that it would not be appropriate (from the viewpoint of safeguarding fundamental collective labour rights) to impose any additional restrictions on the access to the right to strike (as compared to the competition law restrictions on the right to collective bargaining) on self-employed platform workers. The latter necessarily follows from the purposeful interconnectedness and inseparability of both rights – for one right alone has no meaningful and equally strong existence without the other. Meaning other collective labour rights remain without their essence insofar as their holders are without the right to strike. There is no reason why this argumentation should not also be applied to the context of self-employed platform workers (who have access to the right to collective bargaining). In their case too, the right to collective bargaining remains a “dead letter” if they do not also have a recognised right to strike (without being subject to any further legal uncertainties arising from competition law restrictions in this respect<sup>58</sup>).

Therefore, it is remaining to be seen what effect the 2022 Guidelines will have on their right to strike on the national level. The guidelines scope is only in narrowing the competition law

<sup>57</sup> 2021 Draft Guidelines, op. cit., para. 16.

<sup>58</sup> As justifiably highlighted by ETUC: “*The exercise of collective action by self-employed persons cannot be made conditional on competition rules.*” (EUROPEAN COMMISSION, 29 September 2022, op. cit., p. 73).

restrictions – what will be its impact on the right to strike is to be decided by the EU Member States on the national level. Nonetheless, in order to observe the fundamental collective labour rights’ purpose and essence (purposive approach) it would be highly justified for the Member States to drop the binary divide at the national level also in relation to the right to strike (for those self-employed platform workers who meet the 2022 Guidelines criteria).

### 3 Access of Platform Workers to the Collective Right to Information and Consultation

The collective right to information and consultation is recognised in the European legal area.<sup>59</sup> The essence of this right is that workers are through collective consultation to a certain extent priorly involved in decisions (on selected topics) taken by the undertaking.<sup>60</sup> Importantly, this right can also cover (have a significant impact on) areas such as the protection of personal data, privacy and communications, health and safety at work, monitoring systems in the workplace, algorithmic management, etc.<sup>61</sup> In the EU context, the legal framework for collective information and consultation rights is set by several Directives.<sup>62</sup>

Importantly, the personal scope of these Directives and the collective right to information and consultation (taking into account the scope of Article 153 TFEU) is linked to the concept of subordinate “worker”.<sup>63</sup> The same is also true from the ESC (Articles 21 and 22) perspective.<sup>64</sup>

<sup>59</sup> Within the Council of Europe, this right is regulated in ESC Articles 21 («The right to information and consultations») and 22 («The right to take part in the determination and improvement of the working conditions and working environment»). On the EU level this right is regulated in Article 27 of the EU Charter of Fundamental Rights (Workers’ right to information and consultation within the undertaking), and subsequently furtherly concretised in EU Directives.

<sup>60</sup> VENEZIANI, B. Article 27 – Worker’s Right to Information and Consultation within the Undertaking. In: DORSSEMONT, F. et al. (eds.). *The Charter of Fundamental Rights of the European Union and the Employment Relation*. Oxford: Hart Publishing, 2019, pp. 429–431. ISBN 9781509922659. DOI: <https://doi.org/10.5040/9781509922680.ch-021>

<sup>61</sup> Ibid., p. 441; BAGDI, K. A new side to employee participation: A possible tool to protect the employees’ right to respect for private life in the era of digitalisation and data protection. *Hungarian Labour Law E-Journal* [online]. 2019, no. 2, pp. 48–70, pp. 65, 68 [cit. 8. 3. 2024]. ISSN 2064-6526. Available at: [https://hllj.hu/letolt/2019\\_2\\_a/A\\_05\\_Bagdi\\_hllj\\_2019\\_2](https://hllj.hu/letolt/2019_2_a/A_05_Bagdi_hllj_2019_2)

<sup>62</sup> See GYULAVÁRI, 2020, op. cit., p. 412, the most important for the scope of our discussion being the Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0014> [cit. 8. 3. 2024].

<sup>63</sup> UNTERSCHÜTZ, J. The Concept of the Employment Relation. In: DORSSEMONT, F. et al. (eds.). *The Charter of Fundamental Rights of the European Union and the Employment Relation*. Oxford: Hart Publishing, 2019, pp. 429–431. ISBN 9781509922659. DOI: <https://doi.org/10.5040/9781509922680.ch-005>; GYULAVÁRI, 2020, op. cit., p. 413. In this context, Gyulavari emphasises that also an autonomous EU “notion of worker” is to be taken into account when determining the personal scope of collective consultation and information rights directives (GYULAVÁRI, 2020, op. cit., p. 413). For a concise overview of the case law that has significantly shaped the autonomous concept of “worker” in the context of EU law, see ALOISI, 2022, op. cit., pp. 22–25; and GYULAVÁRI, 2020, op. cit., p. 413.

<sup>64</sup> The same is also true from the ESC (Article 21 and 22) perspective, see VENEZIANI, B. The Right to Information and Consultation. In: BRUUN, N. et al. (eds.). *The European Social Charter and the Employment Relation*. Oxford: Hart Publishing, 2017, pp. 395–396. ISBN 9781509929719.



### 3.1 Collective Information and Consultation Rights and the 2021 Platform Work Directive Proposal

In its preparatory documents before the adoption of the first draft of the Platform Work Directive, the EU Commission already stated that it was considering the possibility of extending the rights of information and joint consultation to the area of platform work.<sup>65</sup> Moreover, according to the EU Commission, *“the question of workers’ involvement and information and consultation processes in platform work is also important. This is particularly relevant to help overcome the opacity of certain aspects of platform work, such as algorithmic management and the asymmetry of information that such remote and fragmented work organisation may entail”*.<sup>66</sup> As a consequence, the 2021 Platform Work Directive proposal also includes provisions on collective information and consultation rights for platform workers.

According to Article 9, para. 1 (“Information and consultation”) of the 2021 Platform Work Directive proposal Member States shall ensure information and consultation<sup>67</sup> of platform workers’ representatives (or, where there are no such representatives, of the platform workers concerned by digital labour platforms) on decisions likely to lead to the introduction of or substantial changes in the use of automated monitoring and decision-making systems referred to in Article 6, para. 1<sup>68</sup> of this directive.<sup>69</sup> Moreover, according to Article 9, para. 3 an important new right “to an expert opinion” is foreseen: *“The platform workers’ representatives or the platform workers concerned may be assisted by an expert of their choice, in so far as this is necessary for them to examine the matter that is the subject of information and consultation and formulate an opinion. Where a digital labour platform has more than 500 platform workers in a Member State, the expenses for the expert shall be borne by the digital labour platform, provided that they are proportionate.”*

<sup>65</sup> EUROPEAN COMMISSION. *Consultation Document, First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work, C(2021) 1127 final* [online]. 24 February 2021 [cit. 8. 3. 2024]. Available at: <https://ec.europa.eu/social/BlobServlet?docId=23655&langId=en>

<sup>66</sup> Ibid., p. 21. This is important, moreover, since as emphasised by Aloisi and Potocka-Sionek the provisions of the General Data Protection Regulation (GDPR) fail to provide workers with actionable collective rights (ALOISI, A., POTOCKA-SIONEK, N. De-gigging the labour market? An analysis of the ‘algorithmic management’ provisions in the proposed Platform Work Directive. *Italian Labour Law e-Journal* [online]. 2022, Vol. 15, no. 1, pp. 29–50, p. 34 [cit. 8. 3. 2024]. ISSN 1561-8048. DOI: <https://doi.org/10.6092/issn.1561-8048/15027>).

<sup>67</sup> Regarding the meaning and the specifics of exercising the mentioned collective rights to «information» and «consultation» the Platform Work Directive refers (in Article 9, para. 2) to the rules of the general framework for collective information and consultation rights in the EU under Directive 2002/14/EC.

<sup>68</sup> According to Article 6, para. 1 this information concerns: (a) *“automated monitoring systems which are used to monitor, supervise or evaluate the work performance of platform workers through electronic means”*; and (b) *“automated decision-making systems which are used to take or support decisions that significantly affect those platform workers’ working conditions, in particular their access to work assignments, their earnings, their occupational safety and health, their working time, their promotion and their contractual status, including the restriction, suspension or termination of their account”*. Moreover, Article 6, para. 2 further specifies what the latter information (described in Article 6, para. 1) in relation to automated monitoring and decision-making systems shall entail.

<sup>69</sup> For a detailed analysis of the algorithmic management provisions in the 2021 Platform Work Directive proposal see ALOISI, POTOCKA-SIONEK, 2022, op. cit.

It is important to emphasise the rationale for these important developments. As explained in Recital 39 of the 2021 Platform Work Directive proposal: *“The introduction of or substantial changes in the use of automated monitoring and decision-making systems by digital labour platforms have direct impacts on the work organisation and individual working conditions of platform workers. Additional measures are necessary to ensure that digital labour platforms inform and consult platform workers or their representatives before such decisions are taken, at the appropriate level and, given the technical complexity of algorithmic management systems, with the assistance of an expert chosen by the platform workers or their representatives in a concerted manner where needed.”*

Nonetheless, the above-described Article 9 (“Information and consultation”) of the 2021 Platform Work Directive proposal does not apply to persons performing platform work who do not have an employment relationship.<sup>70</sup> As explained in Recital 40 of the 2021 Platform Work Directive proposal *“The rights pertaining to health and safety at work and information and consultation of platform workers or their representatives, which are specific to workers in view of Union law, should not apply to them”*.

Yet at the same time, the explanation in Recital 40 recognises the vulnerable position of self-employed platform workers (in the context of platform work) and emphasises that: *“persons who do not have an employment relationship constitute a significant part of the persons performing platform work. The impact of automated monitoring and decision-making systems used by digital labour platforms on their working conditions and their earning opportunities is similar to that on platform workers”*<sup>71</sup>. Therefore, the rights in Articles 6, 7 and 8 of this Directive pertaining to the protection of natural persons in relation to the processing of personal data in the context of algorithmic management, namely those regarding transparency on automated monitoring and decision-making systems, restrictions to process or collect personal data, human monitoring and review of significant decisions, should also apply to persons in the Union performing platform work who do not have an employment contract or employment relationship.”

### 3.2 Analysis

The current legal framework shows that in the area of collective information and consultation rights, the binary divide remains consistently drawn – only platform workers with the status of “worker” are entitled to these collective labour rights.

However, similarly to the extension of the right to collective bargaining, the extension of collective information and consultation rights (at least on certain selected issues) to platform workers (regardless of their employment status) could be seriously considered.

In a similar way, as a platform worker is in an unequal position on the market vis-à-vis the platform<sup>72</sup>, and thus justifiably considered as in a situation *“comparable to that of workers”*

<sup>70</sup> See Article 10 of the 2021 Platform Work Directive proposal, which states that only Articles 6, 7 (paras 1 and 2) and Article 8 shall also apply to persons performing platform work who do not have an employment contract or employment relationship.

<sup>71</sup> Emphasis added by the author.

<sup>72</sup> Which (as a rule) unilaterally prescribes working conditions (including the remuneration for performed tasks), thus leaving the platform workers with no relevant room for possible negotiation (See 2022 Guidelines, para. 28).

from the competition law perspective<sup>73</sup> (and thus entitled to labour law protection) – a platform worker is (regardless of employment status) in a vulnerable situation (“*comparable to that of workers*”) vis-a-vis the platform due to the nature of its work organisation (*inter alia*, algorithmic management, automated monitoring and decision-making systems, and the asymmetry of information, all of which have an impact on the individual working conditions of platform workers<sup>74</sup>). The main purpose of the envisaged joint consultation procedures is precisely that platform workers, participate through their representatives (collective dimension) in decision-making on selected aspects (prior to the final decisions/changes by the platform being made). The position of workers’ representatives in joint consultation procedures is further strengthened by the envisaged right to the engagement of an expert (with expenses covered by the platform under certain conditions).

Consequently, such collective information and consultation procedures within the Platform constitute (likewise collective bargaining) an important legal safeguard to protect the fundamental rights and freedoms<sup>75</sup> of all platform workers (regardless of their employment status).<sup>76</sup> It could hardly be argued that self-employed platform workers are not in “*a situation comparable to that of employed platform workers*” vis-à-vis the platform in this context – that

<sup>73</sup> See 2022 Guidelines, para. 28.

<sup>74</sup> It is precisely to overcome this problem that the European Commission has also stressed the importance of the participation of platform workers in joint consultation processes (EUROPEAN COMMISSION, 24 February 2021, op. cit., p. 21). This is also highlighted in Recital 39 of the 2021 Platform Work Directive proposal. Moreover, in Recital 40 it is explicitly stated (regarding persons, who do not have an employment relationship) that the “*impact of automated monitoring and decision-making systems used by digital labour platforms on their working conditions and their earning opportunities is similar to that on platform workers.*”

Likewise, Kilboffer et al., point out in their analysis of EU collective information and consultation rights directives that these rights would also be highly relevant for self-employed platform workers (and not only for those with worker status). *Inter alia*, it would be relevant for all platform workers to have an influence, through the collective right to information and consultation, on the decisions taken by the platform regarding changes in work organisation (related to algorithmic management etc.) (KILHOFFER, Z. et al. *Study to gather evidence on the working conditions of platform workers*. Luxembourg: Publications Office of the European Union, 2020, pp. 157–158 [cit. 8. 3. 2024]. ISBN 9789276103042. Available at: <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8280>).

<sup>75</sup> For example, the fundamental rights to privacy and personal data protection at work, which are being challenged in the light of technological changes in the organisation of work (including platform work). See, *inter alia*, Katsabian who emphasises the role of workers’ representatives’ involvement in this context (constituting a procedural safeguard for worker’s protection of the right to privacy at work). KATSABIAN, T. Employees’ Privacy in the Internet Age: Towards a New Procedural Approach, *Berkeley Journal of Employment and Labor Law* [online]. 2019, Vol. 40, no. 2, pp. 203–255, p. 249 [cit. 8. 3. 2024]. ISSN 2378-1882. DOI: <https://doi.org/10.15779/Z38NG4GS3G>

<sup>76</sup> Similarly, De Stefano (in the light of management-by-algorithm and tech-enabled surveillance) points out that it is problematic that, *inter alia*, platform workers are excluded from the scope of collective labour rights. Consequently, it is precisely the provision of additional protection of workers’ fundamental freedoms that is an additional reason justifying the universal recognition of collective labour rights, regardless of employment status (DE STEFANO, V. ‘Masters and Servants’: Collective Labour Rights and Private Government in the Contemporary World of Work. *International Journal of Comparative Labour Law and Industrial Relations* [online]. 2020, Vol. 36, no. 4, pp. 425–444, pp. 443–444. ISSN 1875-838X. DOI: <https://doi.org/10.54648/ijcl2020022>. It is true, however, that *De Stefano* refers in the latter article only to the rights to freedom of association and collective bargaining – collective information and consultation rights as they exist in the context of EU law are not addressed.

it would, thus, not be necessary to include them in these “safeguards” provided by the collective information and consultation procedures.

The text of the 2021 Platform Work Directive proposal already suggests that in light of algorithmic management there is a rise of a new paradigm of “digital rights” for all workers regardless of their employment status.<sup>77</sup> The only missing dimension (additional safeguard) of these rights according to the proposed legal framework is (apparently) the collective dimension (information and consultation rights).<sup>78</sup>

In line with the above, it is worth carefully considering whether the consistent insistence on a binary divide (worker v. self-employed) in the area of collective information and consultation rights (at least regarding certain matters<sup>79</sup>) is appropriate in the context of platform work.<sup>80</sup>

<sup>77</sup> See Article 10 of the 2021 Platform Work Directive proposal, which states that only Articles 6, 7 (paras 1 and 2) and Article 8 shall also apply to persons performing platform work who do not have an employment contract or employment relationship.

<sup>78</sup> Yet, the author acknowledges (in this respect) that the 2021 Platform Work Directive proposal also impacts another route through which platform workers can access collective labour rights. An important aim of the latter Directive is to combat disguised self-employment in platform work by means of a rebuttable presumption of an employment relationship. The latter will, therefore, also positively strengthen the legal position of platform workers in disguised self-employment (that should be classified as workers in an employment relationship) with regard to access to collective labour rights. Nonetheless, the aspect of employment status determination in platform work will not be addressed further within this paper (as already highlighted in the introduction). For more on the legal aspects of employment status determination in platform work see, *inter alia*: ALOISI, 2022, op. cit.; DAVIDOV, ALON-SHENKER, 2022, op. cit.; DAVIDOV, 2016, op. cit.; HENDRICKX, 2018, op. cit.; ALES, 2019, op. cit.

<sup>79</sup> For example, regarding algorithmic management – as already concretely provided for under the 2021 Platform Work Directive proposal.

<sup>80</sup> However, the author is aware that the paper leaves open (for future research) some questions regarding additional details concerning the regulation of legal (and practical) aspects of exercise and access to collective labour rights of information and consultation for self-employed platform workers, including the question of works council (or other forms of workers’ representation) formation and functioning; possible opt-in/out option for platform workers to be included in these consultation mechanisms; and other necessary legal steps to enable adapted ways of exercising collective labour rights within the context of platform work. These aspects can also be very relevant for practice in light of the possible heterogeneity of interests and working patterns of platform workers working within the same platform. Nevertheless, the effort to facilitate the organisation of all persons performing platform work (meaning regardless of their employment status) is also reflected in Article 15 of the 2021 Platform Work Directive proposal: “Member States shall take the necessary measures to ensure that digital labour platforms create the possibility for persons performing platform work to contact and communicate with each other, and to be contacted by representatives of persons performing platform work, through the digital labour platforms’ digital infrastructure or similarly effective means”.

And lastly, it is very important to emphasise that at the same time when considering extending the scope of (collective) labour law protection – care should be taken to ensure that the fundamental concept of the employment relationship is not at the same time undermined (see, *inter alia*: WEISS, M. Re-Inventing Labour Law? In: DAVIDOV, G., LANGILLE, B. (eds.). *The Idea of Labour Law*. Oxford: Oxford University Press, 2011, p. 49. ISBN 9780199669455. DOI: <https://doi.org/10.1093/acprof:oso/9780199693610.003.0004>; and SENČUR PEČEK, FRANCA, op. cit., p. 131). Moreover, extending labour law protection (collective rights aspect) to self-employed platform workers raises questions about whether the same should be done for other groups of persons who work outside the employment relationship and, in light of technological developments, face similar vulnerabilities vis-a-vis their counterparty as platform workers vis-à-vis the platform. Nevertheless, these aspects will not be addressed further in the context of this paper, yet they may be a good starting point for further research on the question of the extension of collective labour rights to (platform) workers outside the employment relationship.

## Conclusion

In summary of the key findings that have been presented in the “analysis sections” within this paper (author’s analysis and conclusions (proposals) in sections 1.2, 2.2, and 3.2 of this paper), it is to be emphasised that at the current stage, the relevant international and European legal framework is not providing access of self-employed platform workers to all examined collective labour rights. In light of the analysed legal developments the binary divide “has fallen” (for those self-employed platform workers who fulfil the 2022 Guidelines criteria) regarding access to collective bargaining. Therefore, also access to the right to strike should be ensured for the latter platform workers due to the purposeful interconnectedness and inseparability of both rights. Nonetheless, the binary divide is remaining “firm” regarding access to collective information and consultation rights. The latter remain accessible (including considering the Platform Work Directive proposal) only to platform workers with a subordinate “worker” status. However, as argued in the paper, the possibility to drop the binary divide (at least regarding certain matters) also in relation to collective information and consultation rights (in the context of platform work) should be seriously considered.