Rethinking labour law in the digitalisation era

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Introduction

The disruptive effect of digitalisation on the world of labour was analysed and discussed in the two-day webinar series organised on 15 and 16 October 2020 by the European Trade Union Institute (ETUI), the European Lawyers for Workers Network (ELW Network), the European Association of Lawyers for Democracy and World Human Rights (ELDH), and the European Trade Union Confederation (ETUC).

Academics, researchers, law practitioners, trade unionists and policymakers from across Europe came together and exchanged views and reflections. They concurred on a common position: labour law must regain its crucial function in protecting workers from the degradation of working standards that to date has gone hand in hand with digitalisation. Technology and AI have made possible new business models and the circumvention of existing regulations, exposing workers to a plethora of risks, some of which are unprecedented while others are already well known.

The organisers of the event firmly believe that synergy between actors from different backgrounds and practices is essential to increase the chances of being heard, and to ensure that the protective rationale of labour law does not get lost in Europe's race to keep up in the digital age.

Panel 1

The disruptive effects of digitalisation

In the first panel, four researchers outlined, from their particular field of expertise, different challenges that digitalisation presents for labour standards.

Andreja Schneider-Dorr (researcher at the University of Bremen) explained how technology has enabled digital platforms to develop new business models and how these impose an 'anticipated negation of labour law'. Platform-mediated workers are often excluded from the scope of labour law. This is directly related to the fact that platforms have been able to impose a narrative according to which platform and gig workers are 'independent contractors'. This is on the grounds that they have a 'choice': they can carry out the task allocated to them by the platform – or choose not to do so. Schneider-Dorr argues that when a worker logs in to the platform, they are in fact entering a virtual workplace and thereby lose any real ability to influence the organisation of the work. Regulation is needed. A window of opportunity for this might be offered, at the EU level, by the forthcoming impact assessment of the Platform to Business (P2B) Regulation. The P2B Regulation is currently applicable only to trading practices, but it also addresses several platform-specific problems, such as (the lack of) algorithmic transparency, and provides the possibility for collective redress against platform abuses. Expanding the scope of application of the P2B Regulation also to platform workers would help to alleviate some of the most critical normative gaps and substantively improve their working conditions.

The impact of digitalisation and AI is pervasive also beyond the platform economy. **Anna Byhovskaya** (senior policy advisor to the Trade Union Advisory Committee [TUAC] to the OECD) outlined the impact of digital change on employment in a wide range of ways, such as data-driven management, task automation and unregulated outsourcing on platforms. The risks or disadvantages for workers include enhanced surveillance, data privacy breaches, loss of autonomy in task performance and more intensive working rhythms. A 'just transition', in the context of technology and labour, involves making sure that digital systems that disrupt how we work are incorporated in a policy framework that results in the retention and creation of quality jobs. This policy framework should ideally include the direct involvement of trade unions and workers' representatives in co-designing the introduction of technology within business and work processes; sectoral and multi-employer bargaining and the proper exercise of information and consultation rights. Social partners should conclude agreements regulating the introduction of technology and defining workers' prerogatives concerning the deployment of technology (such as rights to disconnect and to training). A just digital transition thus implies the allocation of substantial funds that might not

be available in the current context, also in consideration of the immense job crisis caused by the Covid-19 pandemic. This crisis should not be a deterrent to change. Byhovskaya noted that digital evolution must be accompanied by policy measures that address (the lack of) algorithmic transparency; the monitoring, collection and repurposing of data; the establishment of effective liability mechanisms; as well as the establishment of adequate consultation and co-design systems.

Valerio de Stefano (BOFZAP Research Professor of Labour Law at KU Leuven) further elaborated on the importance of including algorithms within the scope of collective bargaining. Only adequate involvement of the social partners can prevent AI and algorithmic management from dismantling the labour standards established over the past century by labour and social security legislation. 'Master and servers' is a rhetorical but entirely realistic reframing of the pre-industrial law of 'master and servants', under which low wages and enforced obedience to the masters' commands were the unquestioned norm. The introduction of AI into the workplace has enabled the pervasive monitoring of workers' activities and performance, to an extent that even most employers would find hard to comprehend. Data collection informs management decision-making, not only in relation to disciplinary actions, but already during the recruitment of candidates, and thus even before the framing of the employment contract. De Stefano pointed out that the pandemic has inevitably accelerated the impact of AI on managerial supervision and, therefore, on workers' rights. This calls for the urgent engagement of collective actors: workers' representatives and unions must be involved in the decision-making that leads to the definition and implementation of algorithms. An ex ante approach is certainly more effective than an ex post damage-control approach, given the transformative use of technology in the world of labour.

Digitalisation and data processing contribute not only to expanding employers' surveillance of workers' activities, but also to exacerbating the already vast asymmetry between the contracting parties. Putting workers' data in the hands of businesses produces a marked and worrying information asymmetry which, in turn, results in an even broader inequality of bargaining power between workers and employers. **Marta Otto** (researcher and lecturer at the Doctoral School of Social Science at the University of Łódź) explained that regulating and limiting the use of people analytics (or 'workforce analytics') is not only crucial for protecting the (fundamental) individual right to privacy, but is also inherent in employment and workers' rights. Data collection can determine the course of recruitment processes and career advancement. It may involve health monitoring and can also pose a direct risk to the protection of workers' human rights. The principle of non-discrimination, the right to work, protection against dismissal, as well as occupational health and safety standards are at stake. Otto examined these concerns through the lens of the European multilevel system of privacy and data protection (including existing fundamental rights) and explained that the current normative framework does not specifically address employment-specific challenges. Persistent gaps related, among other issues, to the lack of an adequate system to determine accountability for privacy and data protection violations and to assert data subjects' rights in a context of information disparity. In order to remedy the absence of tangible rights applicable to the employment context, Otto proposed the adoption of an ad hoc EU Directive, whose provisions should

be aimed specifically at ensuring that an employer's interests in the *legitimate* processing of employees' data be adequately balanced by protections to address concerns arising from the potential impact of data processing on workers' rights.

The comments of the discussants further expanded reflections on possible regulatory avenues to strengthen workers' rights. **Agnieszka Piasna** (senior researcher at the ETUI) noted that, given the extensive monitoring of and the pervasiveness of managerial control over workers' activities, it is in fact surprising that labour legislation across Europe still appears to be struggling to recognise that platform-mediated work is, in many cases, not independent work. The justification usually put forward for the exclusion of platform workers from the scope of labour law boils down to the prevalent, but unfair narrative that such workers have the 'freedom' not to engage in this type of employment. But the very notion that the 'freedom not to accept work' is a valid criterion for determining the level of protection afforded to platform workers is deceptive, to say the least. As Piasna noted ironically, slavery was abolished in Europe a considerable while ago. It was also observed that the elaboration of a normative framework to protect workers' rights against the abuses of data analytics might lose its efficacy in presence of opt-out clauses, which currently characterise the approach of EU norms to data protection. When access to employment is dependent on workers' consent to waive their rights to privacy, the regulatory framework is failing to remedy the power imbalance between the parties in the labour relationship.

Teresa Coelho Moreira (University of Minho) insisted on the importance of reversing the narrative purveyed by digital platforms and of correctly applying the existing legal labour law categories. More than ever, the pandemic has shown the importance of establishing rules to protect the public interest. It is part and parcel of social justice that workers' human dignity should be adequately protected. On the other hand, Coelho Moreira observed that not all on-demand (digital) work is characterised by the same level of managerial monitoring and that, therefore, certain platform workers might legitimately fall outside the scope of some labour law provisions. The main challenge, then, is to define a legal framework flexible enough to provide adequate protection to all workers, taking into account the different degrees of supervision and control to which they may be subject. Another difficulty facing EU regulators is ensuring sufficient involvement of collective actors without encroaching on the national industrial relations models that coexist across Europe.

Panel 2
| Litigation strategies

Case law, especially at the EU level, has contributed substantially to the evolution and maturation of the normative context. Judicial proceedings can provide the occasion and the setting for redressing regulatory gaps. Panel 2 gave the floor to labour lawyers and to experts in strategic litigation in the field of labour law, who shared their views on how the existing national and EU legal orders can be interpreted and expanded to protect workers' rights.

Carlo de Marchis (labour lawyer, Rome) illustrated how litigation can be of enormous help in strengthening platform workers' rights, outlining the litigation strategies that he himself had developed against well-known food-delivery platforms. For instance, in a (currently pending) case before the Tribunal of Bologna, De Marchis claimed that Deliveroo allocates tasks on the basis of a discriminatory algorithm: it was observed that the riders who make themselves available for the longest continuous period of time receive more assignments. Workers who have been unavailable due to sickness, maternity or, say, involvement in strike action, tend to be penalised. De Marchis thus argued that anti-discrimination legislation offers an opportunity to extend labour law claims to a broader number of plaintiffs. This may circumvent the limitations of a system such as the Italian one, which does not permit collective redress before the labour courts. De Marchis also addressed the importance of litigation in upholding the collective rights of platform workers. A recent case concerned the legitimacy of a collective agreement between some multinational food-delivery platforms and a right-wing 'yellow' union, which led to the unilateral imposition of new and adverse working conditions for the riders. It was noted, finally, that the Covid-19 emergency has provided an opportunity to formulate judicial claims about platform workers' rights to nominate health and safety representatives. De Marchis put forward these examples of judicial strategies to show how litigation has the potential to bring to the fore crucial issues that are not (yet) covered by legislation, such as the right to strike, collective rights and the right to be covered by adequate health and safety standards.

Rüdiger Helm (labour lawyer, Cape Town and Munich) presented the example of a judicial proceeding he had brought against the Dutch crowd-work platform Roamler. Roamler allocates micro jobs to workers who log in to it. These workers sign a commercial agreement with the platform, but Helm claims that the relationship between Roamler and the workers should be requalified as an employment relationship. Helm's claim is based on the extent of Roamler's control over the execution of the crowd-workers' work activities. Step-by-step instructions are conveyed to the microjobbers digitally via the app (the 'virtual workplace'). Also via the app, the platform receives work orders that have been carried out, expresses

criticisms and rejects work orders. The app provides constant GPS tracking and is the platform's control and communication tool for organising and guiding its 'workforce' within the framework of its production process. The crowd-workers do not have any discretion in implementing the work orders. The High Labour Court, which recently decided the case, established that each individual work order can be qualified as a fixed-term employment contract, but dismissed Helm's arguments on procedural grounds, ruling that the time limitations on legal action related to fixed-term contracts had been exceeded. Helm appealed this judgment before the German Federal Labour Court (where the case is currently pending), arguing that on average the plaintiff performed more than ten work orders per day. Under German law, fixed-term contracts are only possible as calendar-based; the legal system does not provide for fixed-term employment contracts limited to hours several times a day, and this provides a strong argument for recognising the existence of an employment relationship.

Platform workers are also very often excluded from the scope of application of occupational health and safety provisions. **Aude Cefaliello** (researcher at the ETUI) reminded those present that Framework Directive 89/391/EEC establishes the general principle of prevention, which imposes basic employers' duties towards workers. The pervasive introduction of technology and AI into the world of labour challenges occupational safety and health principles in two ways: (i) scope (the principle of prevention and the related employers' obligations do not apply to self-employed workers – and by extension, to platform workers – in many jurisdictions), and (ii) the nature of the work challenges the way the preventive principle is applied, even when the workers are recognised as 'employees'. The use of AI adds a layer of hazards – because of the pace, the surveillance, the flexibility of working hours and the precarity – which considerably increases workers' stress and anxiety. The impact of digitalisation on workers' health and safety appeared clearly in the context of a judicial proceeding during the early stages of the pandemic in relation to working conditions in Amazon warehouses in France. The union (CFDT) sued Amazon based on its lack of appropriate health and safety standards. This eventually led to a favourable ruling for the workers, whereby the court imposed a change in work organisation at Amazon and gave more effective implementation to the principle of prevention (Cour d'Appel de Versailles, 24 April 2020). Moreover, Cefaliello noted that the current EU and national legal frameworks already provide rationales on whose grounds the courts can argue, by means of a teleological interpretation, that AI and technology should be deployed to increase prevention, not to undermine health and safety standards. Strategic litigation might not provide a direct and definitive solution, but it can certainly pave the way for regulators, create space for debate and mobilise public attention.

The potential of litigation to strengthen workers' rights in relation to the effects of digital innovation was explored more extensively by the discussants. As **Antonio Aloisi** (IE Law School) highlighted, one of the most crucial issues is the frequent failure of both legislators and courts to go beyond an analogical understanding of managerial control. Court rulings still refer to outdated concepts of subordination and to a distorted notion of (organisational) flexibility. This prevents workers from accessing fundamental rights, not only in platform-mediated work but also in traditional industries. Judicial proceedings present an opportunity to

revive the idea of 'worker' and to overcome regulatory shortcomings. If court decisions reflected an accurate understanding of the impact of technology and algorithms on working relations, a more appropriate definition of employment could emerge and could be used to challenge the predominant classification of platform work as autonomous work. An opportunity might be offered by the EU Directive on Transparent and Predictable Working Conditions. The Court of Justice and national courts can indeed become strategic forums in which national implementation is scrutinised and claims brought to ensure that national transpositions of the Directive are inclusive and progressive, and cover the (digital and precarious) workers who would benefit most from its provisions.

Alberto Barrio (researcher at KU Leuven and part of the 'Working, Yet Poor' project) noted that all presentations had made clear that workers are subject to substantially different levels of protection in both labour and social security law, depending on their status as 'employee' or 'self-employed'. How to avoid distortions provoked by an outdated taxonomy? A more direct solution would be to classify platform workers as employees, but this might be a long road. Some progress was made recently by the Spanish Constitutional Court, which declared that Glovo riders should be classified as employees, drawing attention to their economic insecurity and vulnerability. Another avenue is to focus on the legitimacy (and constitutionality) of national legislations that exclude platform workers from labour law and social protection, specifically by focusing on the proportionality of such measures. Divergent levels of protection that regulators confer on workers indeed must be grounded on and justified by the principle of proportionality. This is even more relevant given that, generally, those who engage in platform work are already suffering from in-work poverty. Barrio explained that proportionality is the ground on which a Belgian law (from 18 July 2018) excluding platform workers from labour and social security provisions was recently found to be unconstitutional. References to the principle of proportionality are also present in the Council Recommendations on access to social protection.

Silvia Rainone (researcher at the ETUI) proposed a closer look at the potential of EU law and of the Court of Justice's jurisprudence to expand the prerogatives of digital and vulnerable workers, given the transnational dimension of the relevant challenges. EU labour law has already established a large set of substantial rights, whose protective rationale could be extended to also cover platform and gig-workers. Addressing the Court of Justice with preliminary ruling requests concerning the specific employment-related problems that have emerged in the context of the platform economy might lead to a more progressive EU *acquis*. Despite some ambiguity, positive steps were taken in the FNV Kunsten case, for instance. Rainone then pointed to the opportunity to include the personal nature of work among the criteria that courts (and legislators) generally use to determine whether a worker has the status of employee or of self-employed. The significance of the personal execution of the working activity as an indicator of a de facto employment relationship has been extensively elaborated by academics, but does not seem to have reached the courts yet. In addition, it could be interesting to reflect on the relevance, for the purpose of determining the nature of the contractual relationship between platform and worker, of identifying legal or natural persons that profit (economically) from the service performed by the

worker. If the 'tariff' paid by the customer is not directed towards the worker but towards the platform, it could be a symptom that the relationship between the platform and the worker should be regulated by labour law. (Strategic) litigation could provide an opportunity to test the practical viability of these criteria.

Panel 3
Trade union and works council strategies

The impact of digitalisation on labour rights has long been evident to trade unionists and workers' representatives. They are indeed the closest to the workers and at the forefront of the struggles against the detrimental effects of digitalisation on labour rights.

Orhan Akman (head of the retail department of the German trade union federation Ver.di) vividly presented the repercussions of technology and algorithmic management for workers' rights. Amazon's fulfilment centres are the perfect example of how digitalisation can lead to the dehumanisation of labour. Amazon's workers feel alienated by technology. There, work is completely organised by algorithms, which compel workers to perform repetitive tasks, impose frenetic and inhuman rhythms, deprive workers of any social interaction, and therefore prevent them from getting to know one another. This also means that workers do not have an opportunity to discuss collective strategies to improve their situation. Akman stated that it is 'not just about wages'. The crucial issue is how to ensure that machines do not command workers, and how to enable workers to perform their jobs in dignity and safety, not in alienation but with a sense of fulfilment. Akman argued that the solution lies in a collective and informed design of the algorithm, to guarantee that not only productivity objectives but also workers' interests are taken into account. Ver.di has attempted for eight years to conclude an agreement covering algorithmic management, but Amazon has consistently refused to sit down at the negotiating table. Despite Amazon's overt hostility towards collective rights and any forms of industrial relations, the unions will continue to resist and fight to be included in the process of writing the algorithms. This is the core of the problems and therefore should be (part of) the solution.

Romain Descottes (international sector of French trade union CGT) introduced a different but closely related scenario, trade unions' profound difficulties reaching the tech workers behind the design of software and algorithms. These tech developers are often seconded to their employer's clients (often large companies, such as ING or Paribas) and perform their activities on the clients' premises. Also, their working statuses differ widely. These elements (inconsistent employment status and externalisation) make it very hard for unions to establish contact with workers in the tech sector and to intervene in the work they perform for the clients. Descottes explained that the obstacles hindering the unionisation of tech workers combine to exclude digital platforms from unionism and from any – even embryonic – form of industrial relations. Digital platforms such as those operating in the food delivery sector rely heavily on services to clients that go beyond those performed by the riders. These services depend on the efforts

of tech workers who are often externalised and generally work as self-employed. Including these workers within the perimeter of industrial relations in the tech sector is thus essential in order to introduce collective rights and unionisation within the platform economy. Finally, Descottes argued that the chances of success of unions' strategies strongly depend on their ability to coordinate and develop a transnational strategy, because this is what the national branches of companies such as Foodora and Deliveroo regularly do.

Ignacio Doreste (ETUC advisor on self-employment, atypical work, platform economy and AI, among other dossiers), noted that platform companies depend on the competitive advantage obtained by pushing down labour costs. Digital companies are lobbying at all levels to promote a narrative whereby they merely provide a market space, while their services are performed by self-employed workers. This narrative is intended to legitimise platforms' efforts to avoid employers' risks and obligations, but the reality is different. Those platforms are employers and should be recognised as such. Moreover, Doreste explained that the ETUC believes that *all* workers should be able to organise, to bargain collectively and to receive adequate minimum wages. Doreste referred to the many positive examples that stem from the practices of the national trade unions, which have often managed to enter into collective bargaining with digital platforms. These practices and other useful information are collected in the ETUC observatory on the platform economy[1]. Doreste noted, however, that collective agreements have often been enabled by favourable cultural as well as normative contexts. Therefore, to obtain a tangible improvement in working conditions, the EU's normative framework needs to be transformed. The ETUC is thus currently seeking a mandate from its affiliates to ask the European Commission to launch a serious initiative to finally allow platform workers to access and exercise their fundamental rights.

Aline Hoffmann (head of unit 'Europeanisation of industrial relations' at the ETUI) brought the discussion back to a more holistic reflection on the impact of technology on workers' surveillance and labour rights. Hoffmann showed that EU labour law is, at least to some extent, already equipped to confer adequate tools on workers and workers' representative to ensure that when AI and algorithmic monitoring are introduced into a company, workers' interests are taken into account. The rights laid down in national and EU legislation for employee representatives to be informed and consulted when new technology is introduced provide the means to address the impacts of digitalisation in the workplace. This is particularly true where the introduction of new technology can be expected to be disruptive, can be used to monitor employees' behaviour and performance, and where it has implications for workers' health and safety. In her presentation, Hoffmann explored the potential to strategically articulate the national and transnational influence that can be wielded via information, consultation and participation rights in European companies. Hoffmann argued that if, as foreseen in legislation across the board and in many collective agreements, employee representatives can effectively use their rights to information and consultation in

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1.   https://digitalplatformobservatory.org/

good time, with the appropriate level of management, and with all the information that is needed to engage meaningfully, then workers' participation can be a powerful source of influence and protection in shaping digitalisation processes in workers' interests. As is often the case, proper enforcement is crucial.

The discussants further explored some of the most critical issues that trade unions face in relation to the digitalisation of work. **Fotis Bregiannis** (doctoral researcher at UC Louvain – CRIDES) identified three main problematic aspects that modern unions will need to solve. First, digitalisation has led to more fragmentation and this has a negative impact on the recruitment of new members. Second, technology reduces the opportunity for face-to-face social interactions at the workplace, with repercussions for the workers' representatives and unions' ability to organise, mobilise and get people involved. Personal communication is fundamental for engagement. Third, information, consultation and participation strategies should be renewed and made 'fit' for the challenges brought by digitalisation. In other words, there should be more and better information – also covering the functioning and implications of algorithms – in order to enable unions and workers' representatives to be effectively involved in defining the role and the implications of technology. Bregiannis noted that it might be worth exploring technology's potential (for instance, with social digital platforms) to reverse these three negative trends and to revive unionisation, as well as its engagement and decision-making capacity. Moreover, Bregiannis suggested that there be some reflection on the opportunity to integrate grassroots movements (for instance, those organising riders) within traditional unions, as this might contribute to fertilising and modernising their strategies.

Kurt Vandaele (senior researcher at the ETUI) noted that workers and unions are confronted with a regulatory void, showing that both at the EU and the national level institutions have not been able to comprehend and address the transformative effects of digitalisation on the world of work. Vandaele also pointed out that often this institutional void leaves room for organisational creativity. In the absence of a pre-existing industrial relations culture in the digital economy, we are seeing simultaneous social 'laboratories' in which unions and other movements are identifying the best tactics for exercising their collective rights and organising workers. It should be reiterated that platform workers and unions have agency and even if algorithmic management often acts as a shadow employer, this can be reverted. The intensity of algorithmic management has generated a sense of shared identity among workers, which is a prerequisite for collectivism, and which has effects beyond the exercise of collective rights. Bottom-up struggles and movements can provide more leverage to unions and social actors in their requests to institutional law makers to address the platform economy and the working conditions of platform workers.

Panel 4
| **Policy responses**

The last session of the conference was dedicated to a reflection on the crucial role of policymakers in addressing the challenges identified so far.

Stefan Olsson (Director for Employment in the European Commission's Directorate-General for Employment, Social Affairs and Inclusion) presented the Commission's approach towards the platform economy. Olsson highlighted that platform work comes with opportunities (job creation, expansion of business, flexible working arrangements) but also with risks, notably the regulatory difficulties connected to possible cross-border considerations, to precariousness, to workers' lack of skills, and to the broad divergences in the normative approaches of national regulators. All these issues call for a regulatory strategy at the EU level aimed at strengthening the rights of platform workers and at ensuring coherence in the normative framework across Europe, thus minimising the repercussions for the functioning of the internal market. Some instruments are already there (Directive on predictable and transparent working conditions, the Council Recommendation on access to social protection and the Platform to Business Regulation), but they present substantial shortcomings, either concerning their (lack of) binding force or their scope of application. The Commission intends to improve the regulatory framework by involving all the relevant actors and stakeholders in defining policies (by means of consultations and through a cycle of dedicated events). Important steps will be taken in the context of the Digital Service Package, in which the Commission envisages a series of measures to make platforms more accountable for their liabilities and to impose compliance with higher standards of transparency. Olsson reminded that the forthcoming Action Plan to implement the European Pillar of Social Rights will also play a relevant role in giving platform workers access to social and labour rights.

Ibán García del Blanco (MEP at the European Parliament in the S&D group and rapporteur for a legislative initiative report on an ethical framework for AI, robotics and related technologies) compared the impact of digitalisation on the world of labour to the effects of the previous industrial revolutions. Technology and AI demand a holistic reconsideration of the regulatory framework and a renewed reflection on the forces that shape labour markets. Technology, however, cannot be considered to be the workers' enemy. Rather, we are living in a moment in which it is crucial that policymakers reform workers' rights and labour policies in order to adequately identify and target the actors that are accountable for and benefit most from the digital transformation of work. Technology is not, in itself, hostile to workers' rights; the real danger is that the transition to the digital age be guided by a neoliberal model, leading to inevitable deregulation and to the

materialisation of a market-oriented vision of society and innovation. This is why it is essential that rule-makers act quickly and effectively to ensure that technology has a human-centric approach. García del Blanco outlined the innovative character of the European Parliament's legislative initiative addressing the ethical aspects of AI, which introduces important provisions to allocate liability in relation to the use and production of technology and software. García del Blanco explained that, in this legislative initiative, the accountability system addresses the programmers and the companies that define the algorithms. Their liability will be measured in accordance with the principle of prevention on the basis of a risk assessment, whereby the risks related to the use of AI are ranked in consideration of the interests at stake. This initiative will pave the way to further regulations aimed at strengthening the social function of technological innovation.

Aída Ponce Del Castillo (senior researcher at the ETUI) pointed out that there are many legal measures related to AI, but only a few address the implications of AI for the world of labour and employment. In particular, the overall EU digital strategy, the White Paper and the Data Strategy should contain more provisions about the specific situation of workers, the risks they face, and the power imbalance in relation to employers. EU lawmakers need to put in place a legal framework for AI that protects workers and considers the specific dynamics of employment relations. Until EU policymakers give serious consideration to these priorities, the objective of building an 'ecosystem of trust' around AI is doomed to fail. This can be achieved by enforcing and updating existing legislation, drawing lessons from other legislation, establishing a clear role and scope for standards, defining the role of soft law/ethical guidelines/principles, and by addressing regulatory gaps. To address regulatory gaps, Ponce del Castillo proposed seven concrete actions: (1) safeguarding worker privacy and data protection; (2) addressing surveillance, tracking and monitoring; (3) making the purpose of AI algorithms transparent; (4) ensuring the exercise of the 'right to explanation' for decisions made by algorithms or machine-learning models; (5) preserving the security and safety of workers in human–machine interactions; (6) boosting workers' autonomy in human–machine interactions; and (7) enabling workers to become 'AI literate'. Only then, when workers' interests are reflected in the constellation of priorities and requirements that regulate technology, will the deployment of AI be trustworthy.

Policy proposals to ensure that the transition towards digitalisation and a new business model is fair and takes workers' rights into account have also been formulated by **Maria Helena André** (Director of the ILO Bureau for Workers' Activities – ACTRAV). André argued that the main policymakers' struggle is to identify an adequate balance between capturing the 'good side' of digitalisation and guaranteeing that labour prerogatives are not jeopardised. A clear example of the complexity of interests that need to be evaluated and considered is the normative approach to the enhanced flexibility that derives from digitalisation. First and foremost, regulation is necessary to contrast the predominant rhetoric that qualifies platform-mediated workers as 'independent contractors'. Especially in the context of the current socio-economic crisis, policymakers should ensure that those who have suffered the most from the crisis should also benefit most from the recovery. An essential component of a fair digital transition is the full accountability of all (policy) actors, including unions and employees' representatives. It is paramount

that regulators, and especially EU lawmakers, do not approach AI and technology only from a business perspective. Aspects such wages, work organisation, and working time should be included in the political discussion and addressed by legal provisions. André recalled the urgency of a universal labour guarantee to counteract the disruptive effects of technology on labour. The ILO centenary declaration for the future of work already provides useful guidance by establishing that all workers, regardless of employment status, should be able to exercise their fundamental rights. The actualisation of this principle is vital, even more so now, given the additional element of instability brought by the Covid-19 crisis.

The discussants concluded the panel with a reflection on the policy approaches outlined by the speakers. **Isabelle Schömann** (ETUC confederal secretary) noted that the various policy actors have a common message: there is an evident need to act urgently and effectively. There is widespread agreement that digitalisation can lead to advantages for society as a whole and that it therefore must be embraced. At the same time, it is essential to take into account the important downsides that digitalisation creates for workers. Technology and AI allow new business models based on the intensive use of data, with immense repercussions for labour and other rights (including new forms of surveillance, algorithmic management, and health and safety). Moreover, it is widely acknowledged that digitalisation has exacerbated the misclassification of de facto employment relationships as 'autonomous' work, thus broadening inequality within the working population. Schömann also noted that the various regulatory actors propose different solutions to these challenges. EU legislation, soft law and codes of conduct are all in policymakers' sights. Schömann argues that when it is about workers' rights, the policymakers' initiatives should lead to the adoption of binding regulatory instruments, and nothing less. Guidance for such instruments should be provided by the Pillar of Social Rights, the Charter of Fundamental Rights, and the TFEU provisions on social dialogue and on the importance of social partners for the definition of labour standards.

Elena Gramano (researcher at Università Roma Tre) argued that policymakers should acknowledge and embrace the complexity of the critical issues raised by the integration of technology in the world of work. In particular, Gramano identified three sets of issues. First, technology often enables the circumvention of existing labour law regulations. A clear example is the discriminatory potential of algorithms and algorithmic management. This highlights the importance of enforcement. Second, the judiciary – among others – tends to apply the current legal framework in an anachronistic manner, not taking into account the transformative effect of digitalisation on labour relations. This shows that we have a problem of the interpretation of existing law. Third, labour lawyers are confronted with the objective limits of the legislation in force, in terms of its scope but also in terms of the nature of the rights and obligations that are established therein. This should trigger a serious reflection concerning the rationale and the function of labour law in our society. As the title of this conference suggests, policymakers should embark on an effort to rethink labour law, to ensure that it effectively meets the challenges presented by technology and, at the same time, preserves the purpose for which it was originally established.

Concluding remarks

Concluding observations were put forward by **Nicola Countouris** (Director of Research of the ETUI) and by Thomas Schmidt, representing the ELDH and the ELW Network. Nicola Countouris suggested that, paradoxically, the labour law community should be thankful to digital companies and platforms because, thanks to the challenges and issues that they have brought to the fore, we now have the opportunity to engage with longstanding regulatory gaps in labour law's protective arsenal, and entertain a serious conversation about what should change in the future. It is also clear that, with the introduction of new technologies in the world of work, new risks have emerged. These include new concerns about health and safety, working conditions and, more broadly, workers' fundamental rights and dignity, as well as the redistribution of the fruits of progress within our society, and even the rule of law. These risks prompt new questions, such as the identification of the adequate normative level at which to act, the correct approach from an industrial relations perspective, and the avenues available for reinventing existing legislation to protect labour rights in courts. These questions create a fertile environment in which to revitalise labour law and to activate all the actors involved in its evolution, from policymakers to academics, activist lawyers and unions. There is now an opportunity to develop a concerted strategy, which must look to the future without abandoning the fundamentals of labour law.

Thomas Schmidt (labour lawyer, secretary general of the ELDH and member of the coordinating committee of the ELW Network) noted that the road to finding solutions and strategies is long, but that it is vital to continue the current discussions, and to further develop the spirit of cooperation and the networks that bring together those who are engaged in protecting workers' rights. It emerged vividly that the inadequacies of national and EU legal systems as regards tackling the impact of technology on labour have been to the advantage of employers and capital. To date, the benefits of digitalisation have not been fairly distributed within society. Labour law could play a key role in reversing this trend. Schmidt concluded the event by stressing the importance of maintaining the exchange of practices and strategies among those who share the view that labour rights must be a cornerstone of our democracies, enabling us to keep in check the immense power that business and capital will otherwise continue to amass.

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