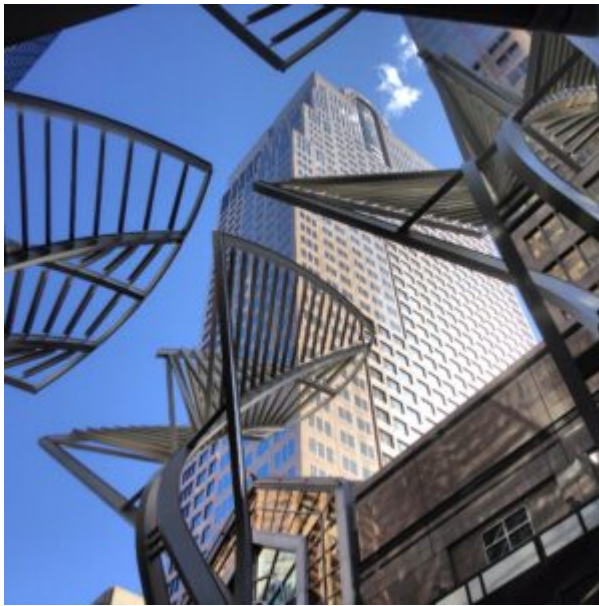# Regulating for Globalization

Trade, Labor and EU Law Perspectives

Re: The Future of Work

David Mangan (Maynooth University (Ireland)) · Thursday, January 7th, 2021

Industry © David Mangan

On 22 June 2020, the European Social Partners released their Autonomous Framework Agreement on Digitalisation.The Social Partners signing this agreement were: BusinessEurope, SMEunited, CEEP, ETUC and the liaison committee EUROCADRES/CEC,

The Agreement is welcome (particularly in the midst of a pandemic) as an acknowledgement of the continuing movement towards a predominantly digital means of working amongst the Member States. Additionally, it serves as a commentary by the Social Partners on: digitalisation; the challenges and opportunities it poses for work; and how these parties foresee future engagement on this topic. Nonetheless, the Agreement only offers a process for engaging with some of the significant questions facing work; seemingly suggesting a long-term process of engagement. It leaves a number of matters for further discussion.

EU Social Partners and the EU Commission

The recent history of social partners agreements may be one of the reasons that this framework agreement focuses on procedure as opposed to outlining more concrete steps that could be implemented.

The EU social partners have the "right of the firstborn" (as the late Roger Blanpain called it) to create EU Law. It has been argued that when social dialogue provisions were first put forward, that the "the intended objective, which was shared by all the stakeholders – European institutions, Member States and social partners – was undoubtedly to open up an area for collective bargaining at European level." The effectiveness of European social dialogue, though, is a by-product of the "tension between the autonomy granted by social partners under article 152 TFEU and the prerogatives enjoyed by the Commission in the EU legislative process". The EU Commission's

rejection of the Hairdressers' Agreement as well as the decision in *European Federation of Public Service Unions (EPSU) and Jan Willem Goudriaan v European Commission*, Case T–310/18, 24 October 2019 come to mind. Dorssemont, Lörcher, and Schmitt called the Hairdressers' Agreement "a sign of the growing autonomy and maturity of the ESD." The *EPSU* decision is currently under appeal. It has been argued that *EPSU* is a consequence of the Barroso 2 EU Commission (2009-2014) when "the Commission opposed the idea that legislation in the social policy field could be triggered by initiatives outside its control." From this critique, it would seem that the Commission wants to affirm that it is not bound to act upon a request from the social partners. If the court upholds the decision in favour of the Commission, there would likely be questions regarding the role of the EU social partners; that is, whether the social partners will be inclined to conclude framework agreements (if not whether this diminishes collective agreement efforts), and if they do achieve agreements, whether they will take the now uncertain step of requesting "*erga omnes* implementation" of these partner agreements. Perhaps matters will be clarified on appeal.

The Social Partners' Agreement on Digitalisation

Aside from the history of partner agreements, where the Teleworking Framework Agreement was forward-looking, the one on digitalisation is reactive and to a certain extent retrospective. It lacks engagement with the capacities of technological innovation, particularly where industry data is sourced from humans. A contrast may be made with *Workers' Personal Data Protection: An ILO Code of Practice* which was devised in 1996 and contained some prescient observations.

The opening sentence of the introduction suggests a singular focus: "The digital transformation of the economy is a multifaceted topic with large implications for labour markets, the world of work and society at large." One omission from this statement is the more widespread transformation that has arisen as a result of technological innovations encapsulated in the term digitalisation (mention of 'society at large' falls far short of adequately speaking to this matter). These developments have changed how we communicate with each other. Failing to mention this point is called an omission here because we have plenty of evidence to suggest that digitalisation has been a primary factor in the means by which the divide between work and private life has been blurred to a now challenging extent.

The intermingling of Industry 3.0 and 4.0 represents the state of matters in the current period of digitalisation of work. In the early 21st century, digitalisation of the workplace is a multi-staged process; within which we are at an early juncture of digitalisation. (The Social Partners allude to the early stage of digitalisation: "Today most enterprises in Europe are still in the early stages of using new AI-based possibilities to optimise work processes or create new business models. At this point of departure, it is essential to explore the design options of using AI or Machine) It is contended that part of the reason that we are at an early stage is attributable to the lack of infrastructure to effect widespread digitalisation of work. This argument is advanced in conjunction with identifying four degrees of digitalisation of work. These degrees are not linear as there are elements of each which can be found presently. With digitalisation of work, not only have the tools used or the means of production been subject to efficiencies, but the ways in which the workforce may be systematically assessed have also been remarkably augmented.

Under-appreciating the process

There is an understandable human desire to wish for better times. Negative public reactions to

'lockdown' or other measures taken in response to the Covid-19 pandemic illustrate. With several vaccine candidates having been developed, the desire to return to normalcy seems tantalisingly close. However, the reality is that these vaccines require approval. Once approved, there are decisions made as to who receives this treatment at which point. There is a process. It is argued that appreciation for the process is missing from *Digitalisation*. It may seem strange to criticise the social partners on this point given the above statement regarding the Agreement's focus on process. The emphasis here, however, is on an appreciation for the process of digitalisation, not simply a method that may lead to consensus amongst labour and management. Digitalisation is not a fixed point in time. It has been in development for a while. It is argued that, at present, we can only conjecture about an end point and what that may look like. Put another way, our desire to categorise events into tight packages leads us to often underappreciate the time it takes to arrive at any sort of conclusion.

Degrees of Digitalisation of Work

With this in mind, four degrees of digitalisation of work are proposed as a way of engaging with digitalisation as a process (likely one that extends longer than we would like).

The first degree (innovations in communications) has seen a change in the means by which communications have been conducted where there are now multiple, rapid and reliable platforms for connecting with others around the world. The capacity to communicate in various locales (in text and visual forms) and to share files in these locations offer efficiencies for work purposes; no longer tethered to landlines or portals at office desks, for example. The infrastructure for these platforms has largely been found in more populous countries, and even then are more prevalent in urban centres. It may be contended that these platforms skew towards text-based communications, as opposed to oral conversations. And yet, the choice for users to communicate in either form on most of these platforms does not necessarily mean that the technologies are nudging users in one direction. Finally, communications have been carried out with some form of traceable copy or evidence of communication in existence.

Overlapping with the first, in the second degree of digitalisation of work, the communications from the first degree are viewed as sources for data analysis. Data processing recognizes the utility in the data created by these communications technologies. The growth in the breadth of the type of data as well as the widened capacity for data collection offer new means for oversight of the workforce. In addition to older forms of technology such as video surveillance, employers have access to more minute details about workers, such as time spent online at work, as well as, personal views and off-duty conduct (where workers post on social media platforms about these). The scope of this oversight extends into private life (with the capacity to scan social media) which expands the bases upon which disciplinary action may be undertaken.

A third degree, performance and predictive analytics, delves further into the data collected. It attempts to aggregate and classify this raw data for predictive outcomes. Artificial intelligence can increase in sophistication by including workplace performance incentives. Attention turns to adapting the third degree data to more complex algorithms that can modify themselves and create new algorithms in response to data. Precision performance mechanisms ('nudging' workers) are honed and expanded for use in professional types of workplaces. (A simple example of this already in place are the taxi/delivery applications of the 'gig economy' which encourage drivers to stay online longer.) To this end, data analytics employ algorithms to comb through the vast volume of data and to package it in a manner that can then be used for secondary applications. These analytics

recall Frederick Winslow Taylor's 'scientific management', particularly Taylor's emphasis on controlling outcomes. How these algorithms are being employed also remains diverse. They can be used in order to collect information for decision-making by human managers or automated means. (Here the intricacies of the General Data Protection Regulation's application to work come to mind; particularly the effect of Article 22's regulation of automated decision-making.) The role of these human managers may be diminished to the point that artificial intelligence collects the data and makes the decisions. The link with 'scientific management' is the continued reliance upon data collected from automated means to almost exclusively assess workforce productivity.

A fourth degree is human displacing technologies which build from performance and predictive analytics. Efforts turn to human replacing technologies on a wider scale; premised on an absence of reliability or the limitations of humans, evidence of which the preceding stages are said to provide. With this degree, there is a question of what type of residual work will remain for humans (accepting that not all human labour may be automated). For example, will there be a clustering of jobs into 'wealth work'?

An Early Stage in the Process

Presently, we are at an early point in the digitalisation of industry. The cost of and capacity to use new technologies contribute to the slower pace of digitalisation, as compared to the ambitions for such innovations. Looking longer term, there would need to be a more integrated strategy to more fully realise the often-discussed transformational potential of digitalisation.

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