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Chapter 4 - II

The reversal of labour relations by platform capitalism

Isabelle Daugareilh*

The capacity of digital employment platforms to adapt to the legislative reactions and social resistance they cause in any country is a constant source of surprise.[1] Having no ethics or morals and aiming only at getting rid of any rule or law that would not be in their favour, they polish their rhetoric, play with paradox and use it in employment matters in the most skilful and uninhibited manner, in France and at the European level. As far as labour is concerned, they have one only objective throughout the world, i.e., avoiding hiring employees at all cost and deploying algorithm-controlled independence. They managed to do so in the USA by getting involved in a public referendum against the Californian law in 2019. In Spain, those which have not left the country yet resort to third-party companies that act as employers and thus allow them to escape the application of the law establishing employment presumption for delivery workers, that is, allow them not to apply the law. In France, after failing to reinforce the presumption of independence by introducing the possibility to edict a charter via the LOM law, mobility platforms have eventually adopted the idea of social dialogue to regulate their labour relations. Acting like real regulation entrepreneurs, they have finally accepted to renounce unilateral self-regulation (charter) in exchange for bilateral self-regulation (collective labour agreement) out of necessity and/or opportunism. The sector-specific labour relations of platforms thus established show the capacity of the latter to adapt their normative strategy to context-driven evolutions and above all to use to their advantage collective bargaining, which is one of the vectors of social democracy.

That unexpected development has not happened without creating its own paradox. While the ILO recommends that its member States regularly review the field of application of labour laws 'together with management and labour' in order to guarantee that it correspond to current realities,[2] the French Government, unlike its Spanish counterpart,[3] has never considered consulting or even opening collective bargaining with management and labour on the legal status of platform labour relations. Instead of social consultation, public authorities have preferred calling upon experts. It is exclusively within that framework that labour organisations have been invited to give their opinion, which is completely different from any form of social dialogue

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1 See their intervention in the USA, Spain and elsewhere.

2 WTO, *Promoting employment and decent work in a changing landscape.* Study, WTC 109th session, 2020, with chapter 2 on labour relations which presents an overview of Recommendation 198 on labour relations.

3 The 11 March 2021 agreement is at the origin of decree law 9/2021 of 11 May 2021 establishing a legal presumption of employment contract for workers of commodity-delivering platforms.

or consultation and even more different from collective bargaining. Notwithstanding their exclusion from the field of the personal application of labour laws and their integration into the Code of Transport, the self-employed workers of mobility platforms have collective rights, among which the very controversial right to collective bargaining, which may violate competition law.

The idea of using social dialogue to regulate the relations between workers and platforms in France does not come therefore from management and labour but from the Government which has relied on the Frouin Report and the Mettling Mission. This social dialogue does not include the right to information and consultation that is the right of salaried employees but only the right to collective bargaining sector-specific collective labour agreements to regulate the relations of self-employed workers with platforms. The acknowledgement of a right to collective bargaining for self-employed platform workers has implied introducing a new restriction on competition law in France and in the European Union (1). There have been two parts in the accelerated legislation and establishment of that social dialogue with the 21st April 2021 and 7th April 2022 regulations. Those two texts were adopted without a debate in Parliament and without social consultation, even though they aim to establish collective autonomy for regulation purposes. It is therefore a regulation which is out of touch with reality and which has already yielded questionable results (2).

1 Restricting the effects of competition law on the right to collective bargaining

Without abandoning the preservation of the scope of competition law, EU bodies have adopted an open approach to self-employed workers' right to collective bargaining (B) thus getting closer to international law (A).

(A) The universality of the right to collective bargaining in international law

The ILO law, like that of the Council of Europe, grants collective rights, including collective bargaining, to all workers regardless of their status. The ILO reviewing bodies have had to decide on the field of application of ILO Convention 98 several times. 'As a logical consequence of the right to organize of workers associated in cooperatives, the trade union organizations that workers of cooperatives join should be guaranteed the right to engage in collective bargaining on their behalf with a view to defending and promoting their interests'.[4] The FOA Committee requested 'the Government to take the necessary measures to ensure that all workers, including "self-employed" workers, such as heavy goods vehicle drivers, can fully enjoy freedom of association rights with the organizations of their own choosing for the furtherance and defence of their interest, including the right to join federations and confederations of their own choosing subject to the rules of the organization concerned and without any previous authorization'.[5] The 2019 ILO Centenary

4 ILO (2018) Freedom of association - Compilation of decisions of the Committee on Freedom of Association, 6th ed., Genève, International Labour Office. See 354th report, case No 1668, §679.

5 See 576th report, case No 2729, §888.

Declaration for the Future of Work refers to labour relations as a means to offer legal protection to workers and stipulates that all workers, regardless of their employment status, should enjoy the respect of fundamental rights (among which that of collective bargaining), adequate minimal wage (legal or negotiated), working time limitation, safety, and occupational health.

In its 12th December decision, the European Committee of Social Rights considered that 'an outright ban on collective bargaining of all self-employed workers would be excessive as it would run counter to the object and purpose of' Article 6§ 2 of the Charter.[6] Moreover, it justified the widening of the right to collective bargaining by stating that beyond the salaried/self-employed worker distinction, '*the decisive criterion is rather whether there is an imbalance of power between labour suppliers and employers.* When labour suppliers have no substantial influence on the content of contractual conditions, they must have the possibility to compensate that imbalance by collective bargaining'. That imbalanced situation as the Council of Europe calls it is also referred to in the European Union guidelines on the application of EU competition law to collective bargaining agreements on solo self-employed workers.

(B) The European Union stepping forward to support the self-employed workers' right to collective bargaining

In EU law, free competition is protected under Article 101 TFEU. That rule does not apply to the agreements that are based on collective agreements concluded by employer and employee trade unions even though restrictive competition effects are inherent in collective agreements because the 'social policy objectives pursued by the EU would be seriously compromised if social partners were subject to Article 101 TFEU provisions when they try to find measures to improve terms and conditions of employment and working conditions'.[7] However, in the *FNV* decision of 4th December 2014, the CJEU decided that a collective labour agreement 'in so far as it was concluded by an employees' organisation in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU'.[8] The same decision however underlines that the rule does not apply to agreements which have been concluded with *'false self-employed', that is to say, service providers in a situation comparable to that of employees.*[9] In other words, self-employed workers are only real companies within the meaning of EU law – provided, beyond the legal nature of their contract, they are not legally subordinate to their co-contracting party.[10]

In line with the European Parliament resolution of 2017,[11] the Commission went one step further on 1st September 2022 when it adopted the guidelines on the application of EU competition law to collective agree-

6 Decision No 123/2016 of 12th December 2018, *Irish Congress of Trade Unions*.

7 CJEU, 21 September 1999, *Albany*, C-67/96.

8 CJEU *FNV v Staat der Nederlanden*, case C-413/13 of 4 December 2014, §30.

9 Ibid

10 Ibid, §37. S. Robin-Olivier, « Une convention collective fixant le prix des prestations de travailleurs indépendants n'est pas nécessairement soumise au droit de la concurrence », *Revue Trimestrielle de Droit européen,* 2015, p.443.

11 European Parliament resolution of 15 June 2017 on online platforms and the digital single market (2016/2276(INI).

ments on the working conditions of self-employed workers without employees.[12] Those guidelines belong to soft law. They are only a commitment of the Commission as to Union law. They do not prevent the sovereign action of national competition authorities even though they may be called upon by said authorities. Their substantive field of application is collective agreements which, by nature and given their object, are about working conditions – their own field of application being self-employed workers without employees, i.e., solo self-employed workers. Those guidelines do not create anything, they only refer to the elements that have been underlined by the CJEU case law highlighted above on false self-employed workers or self-employed workers who are in a situation similar to that of salaried workers. They apply to a vast array of self-employed workers, among whom those who work for platforms.

The guidelines define solo self-employed workers as 'persons who *do not have an employment contract* or who are not in an employment relationship and who *rely primarily on their own personal labour* for the provision of the services concerned. *Solo self-employed persons* may use certain goods or assets in order to provide their services'. The text then presents different solo self-employed workers: 1. solo self-employed persons being in a situation comparable to that of workers, regardless of whether they are false self-employed workers, since the Commission considers they are economically dependent solo self-employed persons; 2. solo self-employed persons who perform the same or similar tasks 'side-by-side' with workers; 3. solo self-employed persons working through digital labour platforms; 4. solo self-employed persons who are not in one of those previous situations but deal with counterparties that have a certain level of economic strength,[13] which results in a clear imbalance in bargaining power. Finally, the guidelines also exclude from the field of application of Article 101 TFEU collective agreements concluded by self-employed persons pursuant to national or EU legislation which also have 'social objectives'. Among all those cases, the one based on the existence of a clear imbalance of the bargaining power must be compared to the grounds of the 12th December 2018 ECSR decision and may be used as a general and theoretical ground. The French legislator implicitly belongs to that school of thought since it has created a title in the Labour Code that applies to self-employed workers who are imposed conditions on the exercise of their business activities by price-setting platforms.

The guidelines moreover present the layout elements of that new type of collective bargaining and of its results. First, those agreements may be negotiated for workers through social partners as well as associations and directly by groups of workers. Allowing for the right to collective bargaining outside trade unions breaks with the trade union monopoly that presides over the collective negotiations of salaried workers in the EU member States. That is also the option chosen by the French legislator. Second, those agreements may be the result of existing collective conventions which have been concluded by salaried worker/self-employed worker organisations. Third, those conventions on working conditions may deal with different aspects – remuneration, working time, holiday, leave, physical spaces where work takes place, health and safety, insurance and social security. This is not a complete list, but it has one limit: the agreements that go beyond the improve-

12 Communication from the Commission, OJEU 18 March 2022, C 123/1.

13 That economic strength is set at a yearly turnover of more than 2,000,000 euros or when the workforce comprises at least 10 salaried employees.

ments of working conditions are subject to competition law. That limit will undoubtedly be interpreted and challenged.

The European guidelines finally suggest that the modes and results of the collective negotiations should be included into what already exists or that a *sui generis* dialogue should be created from beginning to end. It is that second option that French public authorities have chosen.

2 Creating an *ad hoc* system of social dialogue for self-employed persons working for mobility platforms

It is not the first time that the French legislator has admitted self-employed persons' right to collective bargaining.[14] However, as to self-employed persons working for mobility platforms, the French legislator has gone further by creating a completely new and autonomous system of social dialogue with its own institution – the Autorité des relations sociales des plateformes d'emploi (ARPE).[15] That legal construction partly imitates[16] and at the same time breaks with the French common law of collective negotiation. There are breaks as to actors (A) and ends (B).

(A) Break-ups as to the actors of collective negotiation

The legislator has introduced a major break with the principle of trade union monopoly to negotiate and conclude collective working agreements – probably for two reasons. The first one is that new actors have appeared under the form of spontaneous groups, which were created for collective mobilisations and then as advocacy groups for platform workers.[17] The second results from the fact that those new actors, having real legitimacy in the eyes of their working community and expertise on the conditions of business activity exercise, have, over a very short period of time, taken on the stature and position of a key social actor.[18] That

14 It is the same for non-salaried managers (Art.L.7322-3 of the French Labour Code), performers (Art.L.212-14 of the French Code of Intellectual Property), or general insurance brokers (Act of 16th April 1996).

15 It is a public institution, located in the Ministry of Labour and Transports, which has functions related to the organisation of social dialogue, protection of workers with a mandate, approval of sector agreements, and mediation in case of litigation as to the implementation of a collective sector agreement.

16 In a mirror-image of the French common labour law, actors of social dialogue are elected nationally every four years by electronic single ballot. Each worker has one vote per sector, whatever the number of platforms for which they work. The election is organised by acronym, that is, workers vote for trade unions, which in turn elect their representatives. The criterion of audience is that of common law (8% of ballots cast). In terms of the protection of the representatives of workers, when there is a breach of contract, an authorisation must be asked for to ARPE, the decision of which may be appealed before an administrative court. The order provides adapted voter base conditions (having performed at least five times per month for at least 3 of the 6 months prior to the election. Representatives are protected during their term and for six months after the end of the latter). Mimetically too, the legislators have introduced a yearly obligation to negotiate on at least one of the following topics: 1) income, including the price of service supply; 2) conditions of the exercise of the activity; 3) professional risk prevention and damage to a third party; 4) the development of professional skills and security of vocational careers; 5) other topics are listed as optional (complementary social protection, work control by the platform, trade relations breach).

17 L. Rioux, « Etat des lieux, lutte et syndicalisation des travailleurs des plates-formes de livraison*, Droit ouvrier,* 2022, No 890, p.414.

18 A. Trenta, « Militer dans l'économie des plateformes. Rapport à l'action collective et au syndicalisme de livreurs engagés », *La revue de l'Ires,* No 106 ; 2022/1, p.95.

is the case of the CLAP (Collectif des Livreurs Autonomes Parisiens) delivery workers , which was created in April 2018.[19] Opposite those groups/associations which advocate for the recharacterisation of the employment relationship, there is FNAE (Fédération nationale des auto-entrepreneurs et micro entrepreneurs) which was created in 2009 and which aims to protect and improve the self-employment regime.[20]

The action of trade unions as to the development of new self-employed workers remains fragmented and limited to some very specific sectors where there are many self-employed or freelance workers (transportation, media, communication, entertainment). Advocating for self-employed persons' rights inside worker trade unions is not obvious due to statuses, traditions and strategies.[21] In France, the CFDT trade union has chosen to outsource self-employed unionisation by creating Union indépendants which is for all the workers whose self-employment activity is a complement to their main activity, who do not have salaried employees, and whose activity, generating at least 50% of their income, is not governed by a professional order.[22] Conversely, the other trade unions, CGT, CGT FO, SUD and CNT have progressively integrated platform workers into their organisations. For their part, platforms have been structured outside employer organisations, and some of them have joined the Association des plateformes des indépendants (API) created in October 2019.

Mobility platforms, professional trade unions and associations under the 1901 law can therefore run for representative elections of self-employed workers,[23] 'provided the representation of those workers and the negotiation of conventions and agreements which apply to them are part of their company purpose'. Such normative break has consequences on the relations that have to be built between traditional actors, which are experienced in collective bargaining, and those new actors, which have a sector-specific or even local field of intervention, which may result in corporatist attitudes.[24] That is quite the opposite of the world of salaried employees whose organisations have been built and consolidated thanks to broadened, inter-professional and/or inter-sector solidarities. In any case, the arrival of associations in the field of self-employed workers' collective bargaining is going to change the latter's meaning and scope.

(B) Break-ups as to the ends of collective negotiation

The French legislator has introduced two differences compared to the ends of conventional law which, from a social public order perspective, aim not only to improve working conditions, but also smooth out

19 See I. Daugareilh, Formes de mobilisation collective et économie de plateformes, sp.p.246ff. [https://halshs.archives-ouvertes.fr/halshs-03615403]

20 Ibid, sp.p.300ff.

21 A. Jan, « Des salariés comme les autres ? La CGT au défi de la syndicalisation des autoentrepreneurs des plateformes de livraison de repas », *La revue de l'Ires,* No 106 ; 2022/1, p.63.

22 They are occasional individual workers, in a way, and are called 'slashers'. They do not have multiple activities, but multiple statuses, which is often the case with so-called knowledge professions, especially communication, media, culture, design or graphic design. The Union has joined the 3C trade union of the CFDT which is represented as the Confédération on the Union board. A similar initiative was launched at the same time in Belgium by trade union CSC, which is close to CFDT. See Daugareilh, Formes de mobilisation collective, op.cit. esp. p.309ff.

23 Those of delivery of goods and transport of passengers.

24 The participation rate has been very low despite a high involvement of platforms together with ARPE: 1.83% of delivery workers and 3.91% of private-hire chauffeurs out of 120,000 delivery workers and private-hire chauffeurs with a vote.

competition among workers, which Marc Rigaux calls social competition.[25]

The French legislator has delegated to the actors of the social dialogue the task of creating the rights and duties of self-employed platform workers. However, by excluding those workers from the field of application of labour law, it has opened the way for social dialogue without safeguards, without lower limits, without public order, without even references or landmarks in suppletive legal rules. That suggests that what is being aimed at here by the legislator is not the improvement of working conditions, which is a historical function of collective negotiation, but more probably a political will to reduce social and legal conflicts which have left their mark on this sector of activity, as well as a withdrawal of the State from its regulatory function. Without imperative legal minimum, social dialogue risks creating a situation in which the bargaining power is in favour of platform organisations against the non-unionised groups of workers that have the majority necessary to conclude an agreement.[26] While collective negotiation is a means to compensate for the inequality of the parties to an employment contract, social dialogue with platforms is the exact opposite. For that matter, the agreement concluded for the delivery workers by FNAE and API,[27] and approved by ARPE, on minimal hourly average earning of 11.75 euros/hour on a one-month period – which does not include waiting time or the worker's taxes – shows a misuse of social dialogue in aid of the platforms' interests.[28]

The legislator has introduced another difference by ignoring the existence of a collective convention on labour in the transport branch which has been extended since 1955.[29] That branch convention has included urban fare in its field of application since 1988.[30] The 'delivery worker' additional clause 94 of 13th December 2005 gathers all the provisions on working time, remuneration, training and complementary social protection. The initiative of the French legislator to decree a level of negotiation only for mobility platforms without social consultation with social partners is at least out of touch with reality and unheard-of in France. Thus, the workers of companies other than platforms benefit from the legal and conventional protection under the transport collective agreement, while those working for platforms only have concluded agreements that have been authorised by ARPE. How will companies other than platforms be able to resist such competition? By putting the law on collective negotiation to the service of platforms' interests, the French legislator puts in competition the self-employed workers of platforms and those who are salaried by companies, which opens a vast field of application for the Gresham law according to which bad money drives out good.

25 M. Rigaux, *Droit du travail ou droit de la concurrence sociale ? Essai sur un droit de la dignité de l'homme au travail (re) mis en cause*, ed. Bruylant, 2009.

26 That is the case of FNAE for the delivery workers college, and AVF for private-hire chauffeurs.

27 Union indépendants has not signed this agreement following an online consultation of 940 delivery workers, 52.2% of whom disagreed. Source Le Monde, Jeudi 11 May 2023, p.17.

28 The minimum hourly wage of a salaried employee was 9.11 euros as of 1st May 2023. The after-tax income of a self-employed delivery worker is 7.90 euros /hour (net of the social security expenses flat rate of 22%). That figure would be lower if it were relative to the full time of activity including waiting time, to which one should add the buying and/or maintaining of tools and clothes. The situation is the same for the agreement on the minimal price of a fare for private-hire chauffeurs, which is set at 7.65 euros, regardless of distance and duration.

29 Decree of 1st February 1955, French OJ 26 February 1955.

30 Dressen M., Mias A., « Action publique et institution d'une branche professionnelle. Le cas de la course urbaine », *Travail et emploi,* No 114, 2008, p.7

Conclusion: Is social dialogue in the interest of platforms or workers?

Finally, the first results of social dialogue in France – at least as to the agreements on the income that it is possible to assess – show the failure of the scenario of a *sui generis* social dialogue, which is out of touch with reality or 'without compass'.[31] Wrested without negotiation by platforms, it has in no sense improved the income of chauffeurs or delivery workers, and has even been followed by a change in the platform pricing system which has resulted in a decrease in remunerations![32] After seducing public authorities in Europe and in France in particular, as Uber queues show, platforms have embarked on the conquest of trade unions. They have already managed to get signed agreements – with GMB on 26th May 2021 in the United Kingdom, at the international level with ITF in February 2022, with FGTB in Belgium on 21st October 2022 and in Australia with the transport trade union (TWU) on 28th June 2022.[33] What can be said of that rising strategy of platforms which looks so much like dialogue washing? For better or for worse?

31 As G. Loiseau said in « Travailleurs des plateformes de mobilité : où va-t-on ? » *JCP S*, 25 May 2021, No 1129.

32 J. Thomas « Livreurs, VTC…Le dialogue social tourne court », Le Monde 6 November 2023, p.15.

33 A. Dufresne, « La stratégie politique d'Uber : le lobbying et le dialogue social », La Revue du salariat, 2022.