Technology and Regulation

A Right of Social Dialogue on Automated Decision-Making

From Workers' Right to Autonomous Right

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An emerging tool in the movement for platform workers' rights is the right not to be subject to automated decision-making (ADM). In its most well-known formulation to date in art 22 of the GDPR, this right includes 'the right to obtain human intervention on the part of the controller, to express their point of view and to contest the decision'. Among other things, art 22 forms part of the groundwork of the Dec 2021 EC Proposal for a Directive on Improving Working Conditions in Platform Work, with its mantra of promotion of 'social dialogue on algorithmic management', which was approved by the EP in Dec 2022. In this article, we argue that art 22 and now the Directive offer an important tool for responding to the mechanistic working conditions of platform work. More broadly, a right of social dialogue regarding ADM, which art 22 represents, should be understood as a critical step in the development of data rights enabling democratic involvement in decisions that affect people's lives under modern industrial conditions.

1. Introduction

Digital platforms deploy complex algorithmic mechanisms that govern every aspect of workers' professional lives. Burdensome working hours are extracted from 'autonomous' gig workers through incentives and punishments. Work tasks are distributed according to opaque reputation systems, which also power automated sanctioning systems that fine and suspend workers from platform work apps.[1] These working conditions are emerging in a variety of domains previously allocated to more conventional labour practices with higher education, content creation, and even policing now increasingly made subject to the dynamics of surveillance, algorithmic management and platformization, to give just some examples.[2] They are most evident, however, in the context of already-casualised domains including ride hailing, food delivery and other types of 'gig work', with workplace surveillance and performance monitoring, worker precarity and insecurity, and highly opaque forms of algorithmic management and control as endemic features.[3] While lauded by some as disruptive and transformative technological interventions,[4] workers across these sectors collectively and individually denounce their economic, technical, and organizational transformations as cover for rolling back hard-fought workers' rights and labour protections.[5] Because platforms automate many of the traditional managerial capacities of the firm (task allocation, hiring, discipline, compensation etc),

1 Alex Rosenblat and Luke Stark, 'Algorithmic Labour and Information Asymmetries: A Case Study of Uber's Drivers' (2016) 10 *International Journal of Communication* 3758; Aaron Shapiro, 'Dynamic Exploits: Calculative Asymmetry in the "On Demand" Economy' (2020) 35 *New Technology, Work and Employment* 162; Salomé Viljoen, Jake Goldenfein, and Lee McGuigan, 'Design Choices: Mechanism Design and Platform Capitalism' (2021) 8 *Big Data & Society* 1.

2 Leah Lievrouw and Brittany Paris. 'Information, Technology, and Work: Proletarianism, Precarity, Piecework', in Leah A Lievrouw and Brian D Loader (eds), *Routledge Handbook of Digital Media and Communication* (Routledge 2020) 214; Simon Egbert, 'Predictive Policing and the Platformization of Police Work' (2019) 17 *Surveillance & Society* 83.

3 See generally *International Labour Organization, World Employment and Social Outlook Trends 2022*. https://www.ilo.org/global/research/global-reports/weso/trends2022/lang--en/index.htm 87.

4 Geoffrey G Parker, Marshall W Van Alstyne and Sangeet Paul Choudary, *Platform Revolution: How Networked Markets are Transforming the Economy and How to Make them Work for You* (WW Norton & Company 2016).

5 Peter Guest, 'We're all Fighting the Giant': Gig Workers around the World are Finally Organizing (restofworld.org, 21 September 2021) https://restofworld.org/2021/gig-workers-around-the-world-are-finally-organizing/.

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and scheduling and task acceptance decisions are made by workers (though under the influence of 'soft' forms of algorithmic influence), platforms argue that they have insufficient control over gig-workers for them to be operating under employment relationships. Workers, on the other hand, argue that these managerial functions constitute forms of control that render them 'employees' with access to the legal protections historically available to this category of workers. Outside the discussion regarding worker status and the applicability of these protections however, another tool is also being brought to bear on questions of gig-workers' rights and workplace regulation in this new industrial era of digital capitalism.

Specifically, the tool is the right not to be subject to automated decision-making. In its most well-known formulation to date in art 22 of the EU General Data Protection Regulation 2016, this includes 'the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision'.[6] Among other things, the GDPR forms part of the groundwork of the December 2021 European Commission Proposal for a Directive on Improving Working Conditions in Platform Work, with its mantra of promotion of 'social dialogue on algorithmic management'.[7] Approved by the European Union Parliament in December 2022, the draft directive now is proceeding through the deliberation processes of the European Union.[8] However, so far little has been done to understand art 22 as itself a legal standard that data subjects should be able to draw on, practically speaking, to obtain human intervention, express a point of view, and contest automated decision-making. In this article, we argue that art 22 and the proposed Directive if adopted offer an important tool for responding to the mechanistic working conditions of platform work now and looking into the future. More broadly, we suggest that a right of social dialogue regarding automated decision-making, which art 22 represents, has the potential to serve as a signal achievement in the history of data rights developing to allow democratic involvement in decisions that affect people's lives under modern industrial conditions.

The article proceeds in five parts after this introduction. In part 2, we point to the recent history of disruption of workers' rights that has occurred with the emergence of a new class of class of 'gig workers' without clear status as rights-bearing workers. In part 3, we consider the right not to be subject to automated decision-making, including the right to obtain human intervention, in art 22 of the GDPR as a response to those efforts. In part 4 we point to some difficulties of drafting as exposed in the Ola/Uber gig driver cases. In part 5 we turn to the Directive and argue that this appropriately frames the right not to be subject to automated decision-making under the mechanistic working conditions of the modern factory system. In our concluding part 6 we highlight the scope still for the general art 22 GDPR right to develop alongside the Directive as an autonomous data right for all data subjects under modern industrial conditions.

2. A tradition of workers' rights established, then disrupted

By the beginning of the 20th century, mechanization was pervasive across western society – ranging from bureaucratic governance practices,[9] to the technologies and practices of the factory and workplace,[10] to the domestic technologies employed in the home and the office.[11] The question was not so much whether technology would prevail but how it would operate and who would exercise control over its domains. Rather than simply resisting these moves, many workers sought to influence their implementation and limit their exploitative potential. One of the outcomes of the First World War was an international movement of unions and workers advocating for structural change in the face of twentieth century technocratic capitalism. This movement included organizations adopting a range of political orientations. For instance, the International Labour Organization formed in 1919, with its mantra of adopting 'humane conditions of labour', was fairly conciliatory in its approach to the antagonisms between workers and employers.[12] Its principal areas of focus were hours of work and a living wage, and protections against sickness, disease and injury.[13] Other movements were more directly invested in the material conditions of work. In Europe, collectivized workers responded to the introduction of techniques seeking 'optimal' efficiency and extraction from the labouring body. They called for an array of new and newly imagined workers' rights, including proposals for representation of workers on specially-formed works councils within industrial enterprises. The works council institution, first introduced in the Weimar Republic in the 1920s (as provided for in the Weimar Constitution of 1919),[14] and after the Second World War re-introduced in Germany and emulated in various countries across post-war Western Europe,[15] became a benchmark for European workers' rights in the post-War century.

Following the formation of the European Economic Community in the 1950s, a further important milestone was the 1989 Community Charter of Fundamental Social Rights of Workers. This stated in arts 17 and 18 that '[i]nformation, consultation and participation of workers must

6 Regulation (EU) 2016/679 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 (GDPR) art 22(2).

7 Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, Brussels, 9 December 2021, COM (2021) 762 final 2021/0414 (COD), https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=10120&furtherNews=yes.

8 See Report - A9-0301/2022, European Parliament REPORT on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work (Committee on Employment and Social Affairs, Rapporteur: Elisabetta Gualmini), https://www.europarl.europa.eu/doceo/document/A-9-2022-0301_EN.html.

9 See Cornelia Vismann, *Files: Law and Media Technology*, transl by Geoffrey Winthrop-Young (Stanford University Press, 2008). And see generally Jake Goldenfein, *Monitoring Laws: Profiling and Identity in the World State* (Cambridge University Press 2019).

10 Peter Miller and Nikolas Rose, 'Production, Identity, and Democracy' (1995) 24 *Theory and Society* 427.

11 Friedrich Kittler, *Gramophone, Film, Typewriter*, transl with an introduction by Geoffrey Winthrop-Young and Michael Wutz (Stanford University Press 1999).

12 International Labour Organization (ILO), Constitution of the International Labour Organisation (ILO), 1 April 1919.

13 *International Labour Organization* (n 12) preamble.

14 See Emil Frankel, 'The German Works Councils', (1923) 31 *Journal of Political Economy* 708-736, 718-719. See also art 165, Constitution of the German Reich, The Constitution of the German Reich, August 11, 1919, transl, Office of US Chief of Counsel, available at https://digital.library.cornell.edu/catalog/nuro1535

15 Martin Vranken, *Death of Labour Law: Comparative Perspectives* (Melbourne University Press, 2009), 94.

be developed along appropriate lines, taking account of the practices in force in the various Member States', including 'when technological changes which, from the point of view of working conditions and work organization, have major implications for the work force, are introduced into undertakings'.[16] The Charter was strictly non-binding in its legal status, in part due to UK resistance to Europeanisation of its social laws.[17] But a wave of European Community Directives followed that drew on its principle of industrial democracy.[18]

Its provisions, in turn, influenced the more concerted effort at constitutionalism of rights in the form of the EU Charter of Fundamental Rights 2000, which became part of constitutional law of the EU following ratification of the Lisbon Treaty in 2007, in force in 2009.[19] On its face, the Charter only offered a minimal gesture to workers' 'solidarity' in art 27 which provides for a right for workers or their representatives to 'be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices',[20] but does not state specifically that this should extend to full participation in decision-making (unlike the earlier Charter of workers' rights). Yet, the overriding objective of the art 27 'consultation procedure', viewed in light of the longer history of European-style works councils and industrial democracy, can be beneficially construed as being to encourage and foster 'an exchange of the different views of management and the labour representatives and to establish a continuous dialogue between both parties in order to reach, where possible, a common position and an agreement on decisions within the scope of the employers' powers'.[21]

Thus, we can say that by 2009 (if not before) the panoply of workers' rights under modern industrial conditions, as represented in the Charter, extended to rights of information, consultation and participation in decision-making of the enterprise. However one evaluates the impact of these rights, they became particularly impotent in dealing with the digital economy and its attendant severe disruptions to the conditions of work and the nature of firms.[22]

In short, what digitalization did was to leverage and exacerbate other, already existing, organisational trends such as worker casualisation, the growth of labour-hire, the 'fissured workplace',[23] and their respective impacts on workers' capacity to organise and coordinate in the workplace.[24] There is a strong echo between today's debates regarding the algorithmic management and applicable protections for gig-workers and the 20th century struggle for workers' rights in the face of efforts to control the 'calculable individual' but they still operate in very different milieu calling for different rights. It may well be that, as argued in one recent ILO working paper, 'the employment relationship remains a paramount institution in delivering workers' protection'.[25] But what is evident is that a (newly) novel approach to workers' rights is now needed that is not just premised on being classified as 'a worker' in the specific sense of an employee. Indeed, even within the broader ILO milieu, questions are being raised about whether the rights and powers associated with employee status, including the support available from unions, works councils and the like, will deliver all the benefits of democratic empowerment which digital workers seek, or whether new kinds of efforts will be needed.[26]

The above transformations and congruent insights and questions help to explain why in Europe workers in their battles with digital platforms have begun to experiment with invoking not only the extension of labour law standards, drawing *inter alia* on art 27 of the EU Charter, but also standards from outside labour law. Most notably, they are turning their attention to the right to data protection in art 8 of the Charter along with its progeny in art 22 of the GDPR, and seeking to connect algorithmic management to the rights of the 'data subject'.

3. The turn to art 22 GDPR

The digital economy was beginning to emerge when the EU Charter was formulated. But by 2015, it could be said that '"[b]ig data" and algorithms now contribute to the ... scientifically managed system'.[27] Although the right not to be subject to automated decision-making does not have a direct parallel in art 8 of the Charter, in broad terms art 8 provides the underpinning of art 22 (along with the GDPR's other provisions). Art 8 is premised on the protection of democratic values 'such as the requirement of fair processing, consent, legitimacy and nondiscrimination', and the pragmatic formulation of 'conditions under which processing [of personal data] is legitimate', ie 'lawful' and 'proportionate'.[28]

16 The Community Charter of Fundamental Social Rights for Workers (EC, 1989).
17 Bob Hepple, 'The Implementation of the Community Charter of Fundamental Social Rights' (1990) 53 *Modern Law Review* 643, 653.
18 See the European Works Councils Directive 1994 (Directive 1994/45/EC) (updated in 2009: 2009/38/EC); EU Directive on Informing and Consulting Employees (Directive 2002/14/EC).
19 EU Charter of Fundamental Rights of the European Union 2000 (2007/C 303/01), 14 December 2007, C 303/1.
20 *EU Charter of Fundamental Rights of the European Union* (n 19) art 27.
21 Thomas Blanke, 'Workers' Right to Information and Consultation Within the Undertaking (Article 27)', in Brian Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights: Summary Version* (European Trade Union Institute 2002) 45, 48; cf Bruno Veneziani (regarding the earlier EC Charter of 1989), 'Article 21. The Right to Information and Consultation', in Niklas Bruun, Klaus Lörcher, Isabelle Schömann and Stefan Clauwaert (eds), *The European Social Charter and the Employment Relation* (Hart Publishing 2017) 381, 384.
22 Julia Tomassetti, 'Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology' (2016) 34(1) *Hofstra Labor & Employment Law Journal* Art 3.
23 David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many* (Harvard University Press 2014).
24 Sanjukta Paul, 'Fissuring and the Firm Exemption' (2019) 82(3) *Law and Contemporary Problems* 65.
25 Valerio De Stefano, Ilda Durri, Charalampos Stylogiannis, Mathias Wouters, *Platform Work and the Employment Relationship* (ILO Working Paper 2021) 42.
26 See eg Agnieszka Piasna and Wouter Zwysen, 'New wine in Old Bottles: Organizing and Collective Bargaining in the Platform Economy' in *Trade Union Revitalization: Organizing New Forms of Work including Platform Workers*, 11 *International Journal of Labour Research* (International Labour Office 2022) 35; Jon Hiatt, 'Trade Union Revitalization in the United States of America: A Call for a Labour Movement Programme in Support of Self-Organizing Workers', in *Trade Union Revitalization: Organizing New Forms of Work including Platform* 106.
27 Paul Duguid, 'Making Sense of the Systems of Scientific Management' (2015) 11 *Le Libellio* 5, 8.
28 Paul de Hert and Serge Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxemburg: Constitutionalisation in Action', in Serge Gutwirth, Yves Poullet, Paul De Hert, Cécile de Terwangne, Sjaak Nouwt (eds), *Data Protection in the Case Law of Strasbourg and Luxemburg: Constitutionalisation in Action* (Springer 2009) 3-4,

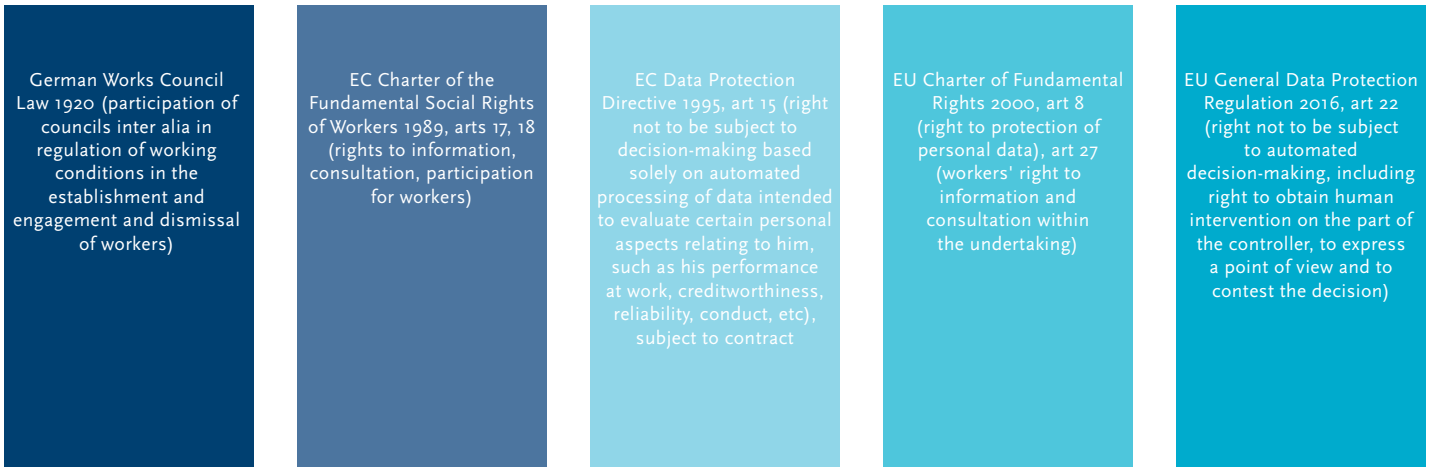

Figure One: Intellectual Milieu of art 22 GDPR

Moreover, there were some more direct progenitors for the art 22 right in art 15 of the Data Protection Directive 1995, which provided that states should offer protection against automated decision-making but subject to flexible scope for derogation (a) by contract if 'there are suitable measures to safeguard … [the data subject's] legitimate interests, such as arrangements allowing him to put his point of view', or (b) by a law 'which also lays down measures to safeguard the data subject's legitimate interests'.[29] Even the art 15 right itself is not an entirely novel provision. For instance, Bygrave refers to a range of precursors,[30] including provisions about data protection in the Spanish and Dutch Constitutions, as revised in 1978 and 1983 respectively,[31] and in the French Data Protection Law of 1978.[32] However, none of these earlier efforts is framed in such broad and elaborated terms as the right provided for in art 22 GDPR – and, in particular, none is so oriented to articulating a domain for human participation in automated decision-making.

Art 22(1) of the GDPR begins by prescribing a right 'not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning … [the data subject] or similarly significantly affects him or her'. However, its evident aim is not to ban or impede automated decision-making altogether (at least in the context of the GDPR, although other laws may seek to do so).[33] While art 22(2) permits derogation from a *prima facie* ban on automated decision-making, inter alia if the decision 'is necessary for entering into, or performance of, a contract between the data subject and a data controller', or is based on 'the data subject's explicit consent', art 22(3) states that a data controller seeking to take advantage of this derogation must 'implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision'.[34] This latter qualification cannot be subject to further derogation, meaning it survives any effort in work contracts or platform terms of service agreements to have workers waive the right. As such, its ethos is broadly liberal and democratic with data subjects granted significant scope 'to exhibit autonomy and exert control' (at least, within the scope prescribed by art 22).[35] In broad terms, this qualification in art 22(3) may be considered a central feature of the right not to be subject to automated decision-making which applies even if the *prima facie* ban in art 22(1) is subject to an art 22(2) derogation.

The GDPR is clearly designed to protect rights and freedoms and in particular the right to data protection or, in other words, it aims to balance the protection of all Charter rights where personal data are processed.[36] As such, Art 22's efforts to prescribe a scope for human input into automated decision-making can be aligned to the underly-

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29 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, OJ L 281, 23 November 1995 p 31-50, art 15.

30 Lee A Bygrave, 'Minding the Machine: Art 15 of the EC Data Protection Directive and Automated Profiling' [2000] PrivLawPRpr 40; 7 *Privacy Law and Policy Reporter* 67.

31 See art 18(4) Spanish Constitution; art 10(2) Netherlands Constitution; and cf de Hert and Gutwirth, 11

32 The provision states that '[d]ata processing shall … infringe neither human identity, nor the rights of man, nor privacy, nor individual or public liberties' (s 1), adding that '[n]o governmental or private decision involving an appraisal of human conduct may be based solely on any automatic processing of data which describes the profile or personality of the person concerned' (s 2), and '[a]ny person shall be entitled to know and to dispute the data and logic used in automatic processing the results of which are asserted against him' (s 3). [French] Act 78-17 of 6 January 1978 on Data Processing, Data Files and Individual Liberties, available at <https://www.ssi.ens.fr/textes/a78-17-text.html>.

33 Notably, the proposed Artificial Intelligence Act: Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts COM/2021/206 final. See Luciano Floridi, 'The European Legislation on AI: a Brief Analysis of its Philosophical Approach' (2021) 34 *Philosophy & Technology* 215.

34 Further, art 22(4) GDPR adds that special protections against automated decision-making apply if processing reveals racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, or concerns other sensitive data. And see art 9(1) GDPR regarding the categories of sensitive (or 'special') data.

35 Margot E Kaminski and Gianclaudio Malgieri, 'Algorithmic Impact Assessments under the GDPR: Producing Multi-Layered Explanations' (2021) 11 *International Data Privacy Law* 125, 128

36 See here Article 1(2) GDPR.

ing concerns of art 8 of the Charter, namely the protection of democratic (and essentially human) values as noted above.[37] Moreover, as Frank Hendrickx points out, it can also be accepted that 'all persons who perform work or services, independent of their contractual or other status, enjoy the rights under art 8'.[38] Hence they can also enjoy rights under art 22 GDPR, which gives effect to art 8. Indeed, we can also go further and posit that art 22 and art 8 are part of a tradition of thinking about democratic information, consultation and participation in decision-making that is evident also, as far as workers are concerned, in art 27 of the Charter and its precursors stretching back to the rights granted to German Works councils in the Weimar republic. In other words, art 22 can be seen as falling within a broader intellectual milieu that is now established, as shown in Figure One.

4. Difficulties in drafting and the Ola/Uber cases

Even so, it is a fair criticism that the drafting of art 22 could be improved if the goal is truly to prescribe a scope for democratic input into automated decision-making.[39] In particular, although the art 22 guidance indicates a broad interpretation of the scope of Art 22, [40] the provision by its terms seems to require that a decision should be 'based *solely* on automated processing' to come within its rubric. If treated literally, this creates considerable scope for avoidance. For instance, Paul de Hert and Guillermo Lazcoz, writing in the European Law Blog in 2021, recommended that the wording of art 22(1) be amended to provide more explicitly and categorically that the data subject shall 'not be subject to a decision based on automated processing without meaningful human intervention, including profiling, which produces a significant effect on him or her'.[41] Moreover, they pointed out that art 22(3) could state more directly, and without restriction to cases of derogation under art 22(2), that '[t]he data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain meaningful human intervention on the part of the controller, to express his or her point of view, to obtain a justification of the decision reached after such assessment and to contest the decision'.[42] Finally, they suggested that the European Data Protection Board could contribute new guidelines clarifying the issue of 'significant legal effect'. While these proposed amendments would improve the clarity of art 22, we believe that the provision already achieves the substantive result of allowing the subject of automated decision-making to obtain meaningful human intervention, to express a point of view, and to contest the decision. Further, as to what is meant by 'significant' effect, while it would be helpful to have more guidance as to when automated decision-making produces a 'significant effect', and what amounts to 'significant' here, this does not require amendment of the provision. More challenging is achieving a workable approach to the requirement for a decision to be 'based solely on automated processing'. At very least, we argue this requirement should not be treated in an overly literal fashion.

Unfortunately, the most significant decisions to date under art 22, the Dutch Ola/Uber cases from March 2021, offers mixed support for a flexible approach to the strictures of the art 22 right. The cases were initiated in the Netherlands, where Ola and Uber have their European bases, by a number of UK drivers and a driver from Portugal, seeking to find grounds to object to the delivery companies' algorithmic processes for suspension and termination of drivers. The claimants were backed up by the UK App Drivers & Couriers Union, affiliated to the International Alliance of App Transport Workers, formed in the wake of the UK Supreme Court's recognition that platform workers enjoy at least some of the rights traditionally associated with employees.[43] Another interested party was the Worker Info Exchange, a London-based non-profit data trust seeking to access and analyse as much data about platform operations as possible to support collective bargaining and advance worker rights. The claimants were partially successful in their claims before the Amsterdam District Court. However, it stopped short of finding that art 22 was breached in this case, holding that Uber's deactivation system was not a solely automated decision-making system per art 22 GDPR, and, regarding Ola, that there were no art 22 issues associated with Ola's automated fraud assessments (leading to App suspensions), driver earning profiling (leading to bonuses), 'Guardian' trip irregularity detector (leading to calls to check well-being of passengers), or ride allocation system, because they did not produce legal or similarly significant effects or involved some human evaluation.

On the other hand, even taking a rather restrictive approach to the terms of art 22, the Dutch court did find that Ola's automated system of 'penalties and deductions' was within the scope of art 22. Further, the court confirmed that a decision to suspend or terminate employment was one producing 'a significant effect' for Ola drivers, bringing them within the scope of the provision. As a result, Ola was ordered to 'communicate the main assessment criteria and their role in the automated decision to [applicants], so that they can understand the criteria on the basis of which the decisions were taken and they are able to check the correctness and lawfulness of the data processing', applying the right of access in art 15 GDPR and thus the right to meaningful information about the logic, significance and consequences of the automated decision in art 15 para 1(h).[44] Thus, at very least it can be said that the Court recognised a GDPR right to explanation for automated decision-making,[45] which hopefully will also

37 De Hert and Gutwirth (n 28).

38 Frank Hendrickx, 'Article 8 – Protection of Personal Data', in Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart Publishing, 2019): 249, 258

39 Paul de Hert and Guillermo Lazcoz, 'Radical Rewriting of Article 22 GDPR on Machine Decisions in the AI Era' (European Law Blog, October 2021) https://europeanlawblog.eu/2021/10/13/radical-rewriting-of-article-22-gdpr-on-machine-decisions-in-the-ai-era/.

40 See Article 29 Working Party, Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679 (wp251rev.01), https://ec.europa.eu/newsroom/article29/items/612053.

41 de Hert and Lazcoz (n 39).

42 de Hert and Lazcoz (n 39).

43 See *Uber BV and others v Aslam and others*, [2021] ICR 657 (UK), Case ID: UKSC 2019/0029, https://www.supremecourt.uk/cases/uksc-2019-0029.html.

44 See See Ekker Legal, Dutch court rules on data transparency for Uber and Ola drivers, https://ekker.legal/en/2021/03/13/dutch-court-rules-on-data-transparency-for-uber-and-ola-drivers/ (with links to the judgments in Dutch and English and especially Para 4.52 Ola transparency judgment).

45 See Raphaël Gellert, Marvin van Bekkum, and Frederik Zuiderveen Borgesius, The Ola & Uber Judgments: For the First Time a Court Recognises a GDPR Right to an Explanation for Algorithmic Decision-Making (EU Law Analysis, 28 April 2021) http://eulawanalysis.blogspot.com/2021/04/the-ola-uber-judgments-for-first-time.html. And cf earlier Sandra Wachter, Brent Mittelstadt, and Luciano Floridi, 'Why a Right to Explanation of

provide the basis for more consultation with and input from platform workers on these automated decisions as applied to them. Already, a decision of the Italian Garante issued a few months after the Ola/Uber cases went the next step in finding that the Deliveroo platform's use of algorithms to automatically penalise riders by excluding them from job opportunities if their ratings fell below a certain level was discriminatory, and the fact that there was no opportunity for human review nor the ability to challenge the decision also contravened the GDPR provision.[46]

One further positive feature of the Ola/Uber cases is that, to the extent art 22 was held to apply (ie because in the Ola case it was deemed to be a wholly automated system) the provision was read as not just a right concerning the processing of personal data which workers may enforce in individual circumstances pertaining to them, but as a right available to categories of workers faced with modern technologies and practices of automated decision-making in the sphere of work. Thus, it takes on the appearance of a workers' right, which among other things enables drawing on the assistance of unions, civil society and other third parties for support and connects to the affordances of other provisions of the GDPR, such as the right to meaningful information (i.e. the so-called right to explanation),[47] and the provision made in art 80 (and recital 142) for collective and representative enforcement of GDPR rights.[48] This approach could be taken further. For instance, collectivized rights to algorithmic transparency could be demanded by and on behalf of platformed workers,49 while the right to collective enforcement of GDPR rights in art 88 GDPR could be leveraged into forms of participatory governance over automated workplace management and disciplinary systems, enabling diverse forms of collective worker participation and dialogue even without formal union status.[50]

In other words, the approach to collective deployment of art 22 in aid of platform workers as a group, and with the support of collective associations, albeit still embryonic in the Ola/Uber cases, gives a promise of the art 22 right as more than just a right of discrete individuals. What we are starting to see already in this early art 22 jurisprudence is the potential for a new kind of digital workers' right emerging in response to the distinctive features of the digital economy with its increasing automated decision-making systems. We are also seeing cross-pollination in regulatory approaches, with the art 22 right emerging as a regulatory mechanism being transplanted into another important legislative proposal in the form of the proposed Platform Work Directive, released in December 2021.[51]

5. The Art 22 right as a regulatory mechanism: The Proposed Platform Work Directive

The proposed Platform Work Directive has a broad scope of its own. Aside from instituting presumptions around employment status for platform workers, the proposal would regulate automated decision-making and algorithmic management in various ways, including requiring digital labour platforms to: provide transparency on the workings of their algorithmic systems (art 6); 'regularly monitor and evaluate the impact of individual decisions taken or supported by automated monitoring and decision-making systems on working conditions' including deploying 'sufficient human resources' to carry out this task (art 7); provide a right of explanation and scope for human review of 'significant decisions' with more specific protections for 'decision[s] to restrict, suspend or terminate the platform worker's account, to refuse the remuneration for work performed by the platform worker, or affecting the platform worker's contractual status' (art 8); and to 'inform and consult platform workers' representatives or, if there are no representatives, the platform workers themselves on algorithmic management decisions – for instance if they intend to introduce new automated monitoring or decision-making systems or make substantial changes to those systems – with the aim of 'promot[ing] social dialogue on algorithmic management' (art 9).[52] Although the Directive introduces a rebuttable presumption of employee status for platform workers its protections relating to the processing of personal data by automated systems, with the exception of the social dialogue right, would extend to all platform workers (art 10). Finally, the proposed Directive envisions representative and collective enforcement, so that 'representatives of persons performing platform work or other legal entities which have a legitimate inter-

Automated Decision-Making Does not Exist in the General Data Protection Regulation' (2017) 7 *International Data Privacy Law* 76.

46 Garante Per La Protezione Dei Dati Personali, Abstract of Italian SA's Order as Issued against Foodinho Srl (Press Release, June 2021) https://www.gpdp.it/web/guest/home/docweb/-/docweb-display/docweb/9677611; and Garante per la protezione dei dati personali (Italy) – 9675440, (GDPR Hub, 28 July 2021) https://gdprhub.eu/index.php?title=Garante_per_la_protezione_dei_dati_personali_(Italy)_-_9675440.

47 Art 15(1)(h) GSPR bolsters the art 22 right with a right of access to information as to 'the existence of automated decision-making, including profiling … [and at least] meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject' (including, according to art 15(3), a copy of the personal data undergoing processing.

48 Specifically, art 80 GDPR states that individuals should have the right to mandate a public interest body, non-governmental organization, consumer advocacy group, or not-for-profit, to lodge complaints, exercise judicial remedies, and receive compensation with respect to the infringement of GDPR rights.

49 Although art 15(4) states that this 'shall not adversely affect the rights and freedoms of others', including trade secrecy rights, as Lilian Edwards and Michael Veale point out, this reservation does not preclude all forms of useful algorithmic transparency; Lilian Edwards and Michael Veale, 'Slave to the Algorithm? Why a "Right to an Explanation" Is Probably Not the Remedy You are Looking For' (2017) 16 *Duke Law & Technology Review* 18, 53; and see further recital 63 GDPR and recital 35 and article 9(4) Trade Secret Directive 2018 (Directive (EU) 2016/943).

50 See art 88 GDPR ('Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context … and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment'). And see Karolien Lenaerts, Zachary Kilhoffer and Mehtap Akgüç. 'Traditional and New Forms of Organisation and Representation in the Platform Economy (2018) 12 *Work Organisation, Labour & Globalisation* 60, 66; and Jon Hiatt, 'Trade Union Revitalization in the United States of America: A Call for a Labour Movement Programme in Support of Self-Organizing Workers', in *Trade Union Revitalization: Organizing New Forms of Work including Platform* 106.

51 Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work (n 7).

52 Further art 9(3) provides that platform workers or their representatives may be assisted by an expert of their choice, and that 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.'

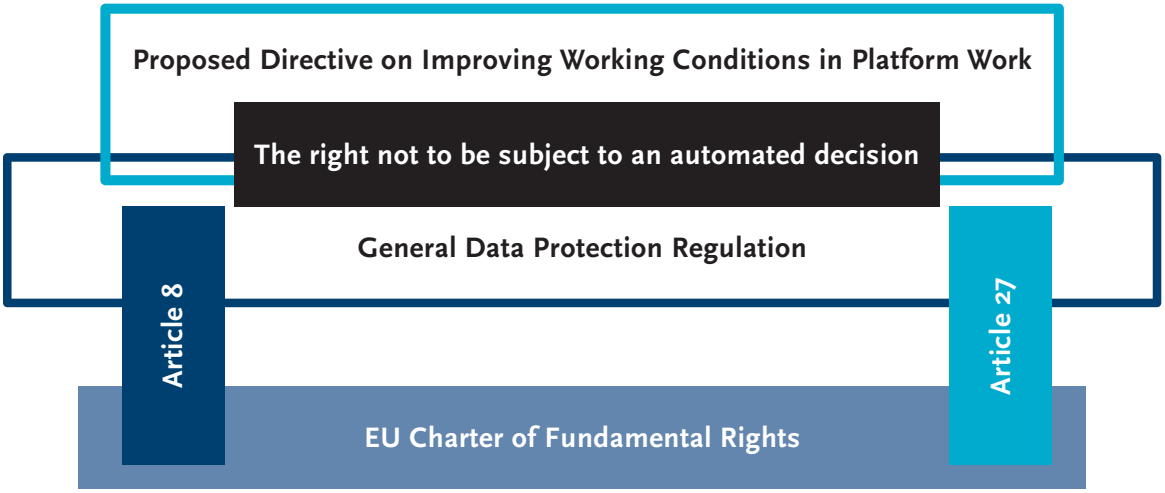

Figure Two: Hierarchy of Rights Related to Automated Decision-Making

est in defending the rights of persons performing platform work' are enabled to enforce any of its rights or obligations, and also specifies that in such procedures representatives are entitled to bring claims on behalf of more than one person performing platform work (art 14). At the time of writing, negotiations are continuing, with more conservative jurisdictions anxious to not undermine workers preferring independent contractor status, and some more progressive jurisdictions preferring stricter rules. The final form is yet to be determined, however negotiations are focused more on the legal presumption of employment (and possible derogations) rather than rules on automated decision-making.

But how are we to understand the relationship between this proposed Directive and art 22? We argue that the proposed Directive offers a corollary and extension of the art 22 right, which itself draws on and extends a panoply of earlier rights, to accommodate the effects of the new digital economy. The Directive could be understood as the *lex specialis* to the more general protection afforded by the art 22 right, sharpened in ways to overcome limitations to its functioning that emerged in the jurisprudence. In the specific framework it offers to platform workers, the proposed Directive is a substantial instrument, which will hopefully offer significant benefits to these most precarious gig workers – and it will hopefully go further to clarify or resolve some of the ambiguities in art 22 about the meaning of 'solely' automated decision with 'significant' effect on a platform worker. The proposal appears to go further than art 22 by extending to decisions that are algorithmically supported (but still in involve humans) thus avoiding tokenistic 'human in the loop' solutions that remove certain decisions from the provision's purview. However, it may be that these rules remain limited in similar ways to art 22, focusing primarily on improved fairness for app suspensions and other disciplinary exercises, but offering only limited transparency into (i.e. information on the parameters taken into account for) the basic operation of algorithmic management techniques that supervise, direct and evaluate workers. Notably, these rules do not address issues like dynamic wage setting – what Vena Dubal has called 'algorithmic wage discrimination'[53] or other critical tools for influencing worker conduct, with human oversight required only for decisions with 'significant effect'.

As noted by Antonio Aloisi and Despoina Georgiou, interventions around algorithmic management are not intended to limit its utility as a practice, instead only proscribing the use of health, emotional, psychological, or non-work related data as inputs into managerial outputs.[54] Even the Explanatory Memorandum for the proposed Directive describes a desire to retain the efficiencies that algorithmic management brings to the labour platform business model.[55] While the consultative approach promoted in art 9 is certainly an important step for bringing platform workers within the horizon of workplace rights, it is yet to be seen whether it will enable real worker participation in decision-making around the functioning of those systems in ways that achieve the ideals of industrial democracy, or will instead operate to merely smooth over the antagonisms between platforms and platform workers.

At the same time, although we contest the suggestion in the Explanatory Memorandum that art 22 is solely individual in focus:[56] as we have noted above the Uber/Ola cases point to a collective dimension, as does art 88 GDPR, the proposed Directive provides more explicitly for collective enforcement of its provisions in the way of labour law. But it is also clear, and indeed explicit in the terms of the proposed Directive, that the basic idea of art 22 – of prescribing a scope for democratic input into automated decision-making significantly affecting data subjects – lies at the heart of the Directive's protections with respect to automated decision-making as applied to platform workers. The proposed Directive not only cites key provisions of the EU Charter including arts 8 (the right to data protection) and 27 (the right to information and consultation within the undertaking) as its background and authority.[57] It also notes the importance of the GDPR as a data protection instrument operating in this space,[58] adding that

53 See Vena Dubal, 'On Algorithmic Wage Discrimination' (2023) *University of California, San Francisco Research Paper* (forthcoming).

54 Antonio Aloisi and Despoina Georgiou, 'Two steps forward, one step back: the EU's plans for improving gig working conditions' (Ada Lovelace Institute Blog, 7 April 2022) https://www.adalovelaceinstitute.org/blog/eu-gig-economy/.

55 See Explanatory Memorandum to Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work (n 7) 2.

56 See Explanatory Memorandum to Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work (n 7) 7.

57 Recital 2.

58 Recital 12.

its goal is to provide 'for more specific rules in the context of platform work, including to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data within the meaning of art 88 of the GDPR.[59]

Moreover, the fact that the proposed Directive neglects to extend its own right of social dialogue to platform workers who do not have an employment relationship suggests a residual role for art 22 to fill the gap. Indeed, the Directive references the continuing relevance of art 22 along with art 15 and other provisions of the GDPR, acknowledging that those obligations apply also to digital labour platforms,[60] and adds that the proposed Directive is 'without prejudice' to the continuing operation of these Articles.[61]

Thus, we can anticipate that the right not to be subjected to automated decision-making in art 22 GDPR (bolstered by the right to information in art 15 and the right to collective enforcement in art 80) will continue to provide important institutional support for digitalised industrial democracy. At the same time, one of the intriguing consequences of the proposed Directive's gesturing to art 22 GDPR marks this GDPR right not to be subject to automated decision-making (including its right 'to obtain human intervention on the part of the controller, to express ... [a] point of view and to contest the decision') as a critical point of inflection between the heritage of European industrial democracy and the EU's proposed Directive on platform work – and potentially also ultimately a model for others to think about going well beyond the EU.[62] Figure 2 above aims to represent these intersections between the rights contained in the GDPR and the proposed Directive while also pointing to their fundamental rights foundations.

We can see a mirroring of these developments in other regulatory developments, albeit in varying forms. Indeed, the proposed Platform Work Directive is not the only regulatory development since the adoption of the GDPR which refers to the automated decision marking. For instance, in the Modernisation Directive, a Directive[63] adopted in 2019 to ensure the 'better enforcement and modernisation of Union consumer protection rules', specific transparency obligations were added to the EU consumer law *acquis* requiring *inter alia* traders to inform consumers where a 'price was personalised on the basis of automated decision-making.'[64] In addition, we can also point to the array of provisions in the proposed Digital Services Act Regulation with an intersection with automated decision-making protections.[65]

Although these respective developments have clear differences in terms of their approach (i.e. in particular the Modernisation Directive is focused entirely on transparency and not explanation) and also seemingly reflect differing levels of risk, there are clear overlaps in regulatory focus. We might therefore, speculate that this mushrooming of references to automated decision making is indicative of the emergence of an autonomous right at least in the context high risk decision making. Although each context has its peculiarities, there are shared concerns with asymmetries of power and information given the opaque manner in which automated decision-making systems are often deployed. It seems logical therefore, to anticipate more of these provisions emerging in legislative reforms regulating the use of socio-technical innovations in the relationship between natural persons and those deploying them.

6. Conclusion: Towards an autonomous right?

We have argued in this article that art 22 GDPR represents an important step in the evolving legal response to mechanistic platform working conditions (as well as to mechanistic conditions more generally). At the same time, however, the art 22 right, including 'the right [of a data subject] to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision', can also be understood as a regulatory mechanism. Its transplantation into the proposed Platform Work Directive with its mantra of promoting 'social dialogue on algorithmic management' reflects not only the increasing digitisation of workplaces and gig-workers' need of protections, but also the capacity for more elaborate expressions of this right in specific contexts. As automated decision making systems continue to proliferate in our modern society, these expressions of the right that art 22 represents can be positioned as a critical moment in a longer history of data rights being developed to allow a measure of democratic involvement in decisions that fundamentally affect people's lives under modern industrial conditions.

We believe that this right, both within the GDPR and also as a regulatory mechanism, is only increasing in importance. Other policy agendas may benefit from a similar transplantation and specification of the GDPR right. As automation of decision making proliferates across the public and private sectors, it is hard to imagine that similar protections will not be developed. Indeed, the emergence of the proposed AI Act Regulation and its focus on those who develop and/

59 Recital 29.
60 Recital 30.
61 Recital 31.
62 Although not necessarily in the short term in the US or even in the UK: see Michael Cross (discussing recommendation of the Taskforce on Innovation, Growth and Regulatory Reform), 'Automated decision-making ban could go in GDPR bonfire' (Law Gazette, 10 September 2021) https://www.lawgazette.co.uk/law/automated-decision-making-ban-could-go-in-gdpr-bonfire/5109756.article. In fact, the Data Protection and Digital Information Bill 2022 as introduced into the UK Parliament, while restricting its *prima facie* ban to automated decision-making, continues to make provision for data subjects to obtain information, make representations, obtain human intervention and contest decisions where a significant decision 'based entirely or partly on personal data' is 'based solely on automated processing': see cl 11(1). However, the Bill was withdrawn prior to the Second Reading Speech 'to allow ministers to consider the legislation further' following the election of Liz Truss as Britain's new Prime Minister. No date has yet been set for the second reading of the Bill to take place: see Jonathan Kirsop and Kathryn Wynn, 'UK Data Protection and Digital Information Bill Faces Delay (OutLaw News, 6 September 2022) https://www.pinsentmasons.com/out-law/news/data-protection-digital-information-bill-delay. Query whether the leadership of Rishi Sunak will create further impediments to the expansion of GDPR data rights beyond the EU or at least into the UK: see https://techmonitor.ai/policy/privacy-and-data-protection/rishi-sunak-gdpr-treasury-connect.
63 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, p. 7–28.
64 Art 4(4)(ii).
65 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM/2020/825 final.

or deploy of AI (i.e. its so-called 'users') leaves a clear space for sector specific protections designed to counter-act the negative impacts of AI, and autonomous decision making systems more generally, in a more citizen-consumer facing manner.[66] Protections for these users, or rather subjects of autonomous decision making, remains a concern for regulators in a range of sectors. We hope that this article will provide a basis for these future comparisons.

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66 Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending certain Union Legislative Acts COM/2021/206 final.