
EUROPEAN DEVELOPMENTS

Agreement to Discuss: The Social Partners Address the Digitalisation of Work

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1. INTRODUCTION

The *European Social Partners' Autonomous Framework Agreement on Digitalisation* (FAD),¹ importantly, acknowledges the impact of digital technologies on work in European countries, as well as the need to address the associated challenges in a deliberate and thoughtful manner. It serves as a commentary by the European social partners on the challenges and opportunities that digitalisation poses for work, as well as what the parties anticipate for the near future.

The Agreement's impact, however, is likely to be limited for two main reasons. First, it is unclear whether something tangible may arise from this process. The FAD consists of issues to be considered and points that may be included in any discussions between employers, workers and their representatives. Moreover, it offers only a process for dialogue amongst the parties. While discourse remains an integral part of the social partners' work, the shift to digitalised workplaces has advanced at such a rapid pace that there should be concern that the shared commitment expressed in the FAD will be increasingly difficult to implement as further time elapses. Second, due to its emphasis on discourse, the FAD leaves some crucial matters (such as remote work) either for further discussion or relatively untouched.

This commentary consists of a critical engagement with the FAD's two primary sections. Reviewed in the first subsection below (Section 2.A), the

¹*European Social Partners' Autonomous Framework Agreement on Digitalisation* (22 June 2020). <https://www.etuc.org/en/document/eu-social-partners-agreement-digitalisation> (accessed 25 August 2021). The signatories were: BusinessEurope, SMEunited, CEEP, ETUC and the liaison committee EUROCADRES/CEC.

FAD commences with an outline of its methodology, which is then divided into five ‘stages’ of discussion, each building upon the last. Evaluated in the second subsection (Section 2.B), the Agreement also identifies four ‘issues’. These are points that can be included in a discussion by the social partners during the five-stage process.

2. THE FRAMEWORK AGREEMENT ON DIGITALISATION: SETTING THE PARAMETERS FOR FUTURE DIALOGUE

The digitalisation ‘transformation’, which has ‘large implications for labour markets, the world of work and society at large’² prompted the social partners to conclude the FAD. The agreement fits within a ‘mosaic of actions’³ at EU level, such as the EU Commission’s ‘A Europe Fit for the Digital Age’.⁴ The European Commission called the changes precipitated by digital technologies ‘a transformation as fundamental as that caused by the industrial revolution’.⁵ The European-level social partners have attempted, through the FAD, to set out a framework for a new way of working which has both a broad remit and a procedural focus on the rules for discussion by employers, workers and their representatives.

The Agreement reflects the ‘shared commitment of the European cross-sectoral social partners to optimise the benefits and deal with the challenges of digitalisation in the world of work’.⁶ It aims to: ‘[r]aise awareness and improve understanding of the opportunities and challenges resulting from the digital transformation’; ‘[p]rovide an action-oriented framework to encourage, guide and assist employers, workers and their representatives in devising measures and actions aimed to reap these opportunities and

²FAD (n.1), 3.

³As it has been called in L. Battista, ‘The European Framework Agreement on Digitalisation: A Tough Coexistence Within the EU Mosaic of Actions’ (2021) 14 *ILLeJ* 105. <https://doi.org/10.6092/issn.1561-8048/13357> (accessed 25 August 2021).

⁴This phrase was coined by Ursula von der Leyen in her ‘Political Guidelines for the Next European Commission 2019-2024’ (9 October 2019) https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf and later set out as part of the Commission plan ‘A Europe Fit for the Digital Age’ https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en both accessed 25 August 2021.

⁵European Commission, Communication *Shaping Europe’s Digital Future* (European Union, Brussels, 19 February 2020), 2.

⁶FAD (n.1), 3.

deal with the challenges’; ‘[e]ncourage a partnership approach between employers, workers and their representatives’; and ‘[s]upport development of a human-oriented approach to the integration of digital technology in the world of work’, with the aim of supporting and assisting workers as well as ‘enhancing productivity’.⁷

To this end, the FAD outlines a ‘Digitalisation Partnership Process’ (Figure 1): an ‘agreed and jointly managed dynamic circular process ... for implementation of the agreement’.⁸ The Process is intended to be tailored to different national, sectoral and enterprise circumstances, industrial relations systems, jobs and digital technologies and tools, and highlights ‘concrete approaches, actions and measures’ that employers, workers and their representatives can use according to their needs and circumstances.⁹ The Agreement also identifies a set of five topics on which digital technologies have an impact: work content—skills; working conditions (employment terms and conditions, work–life balance), working conditions (work environment, health and safety); work relations; and work organisation.¹⁰

The Digitalisation Partnership Process encompasses a set of five ‘stages’ (Section 2.A below) and four ‘issues’ (Section 2.B below). Both reflect the FAD’s primary focus, of facilitating a broad scope for the content of discussions at the national, sectoral and enterprise levels.

The achievement of the FAD is that it includes worker representatives in the important, formative discussions regarding digitalisation of the workplace.¹¹ The FAD compels reflection because it suggests a tenuous state for EU labour relations: a need to set out a methodology and issues for discussion prior to delving into the critical substantive aspects of the profound challenge posed to working life by digitalisation. While the FAD contains progressive points for discussion, it is unclear what outcome this discourse intends to achieve. It may be that the FAD aims to ensure that the social partners at various levels engage in vital conversations on digitalisation, with the ambition that a more concrete outcome will organically arise. The

⁷Ibid., 4.

⁸Ibid., 6.

⁹Ibid., 4.

¹⁰Ibid., 6.

¹¹The FAD has been praised for furthering of a ‘partnership approach’: P. Collins and S. Marassi, ‘Is That Lawful? Data Privacy and Fitness Trackers in the Workplace’ (2021) 37 *IJLLIR* 65, 94.

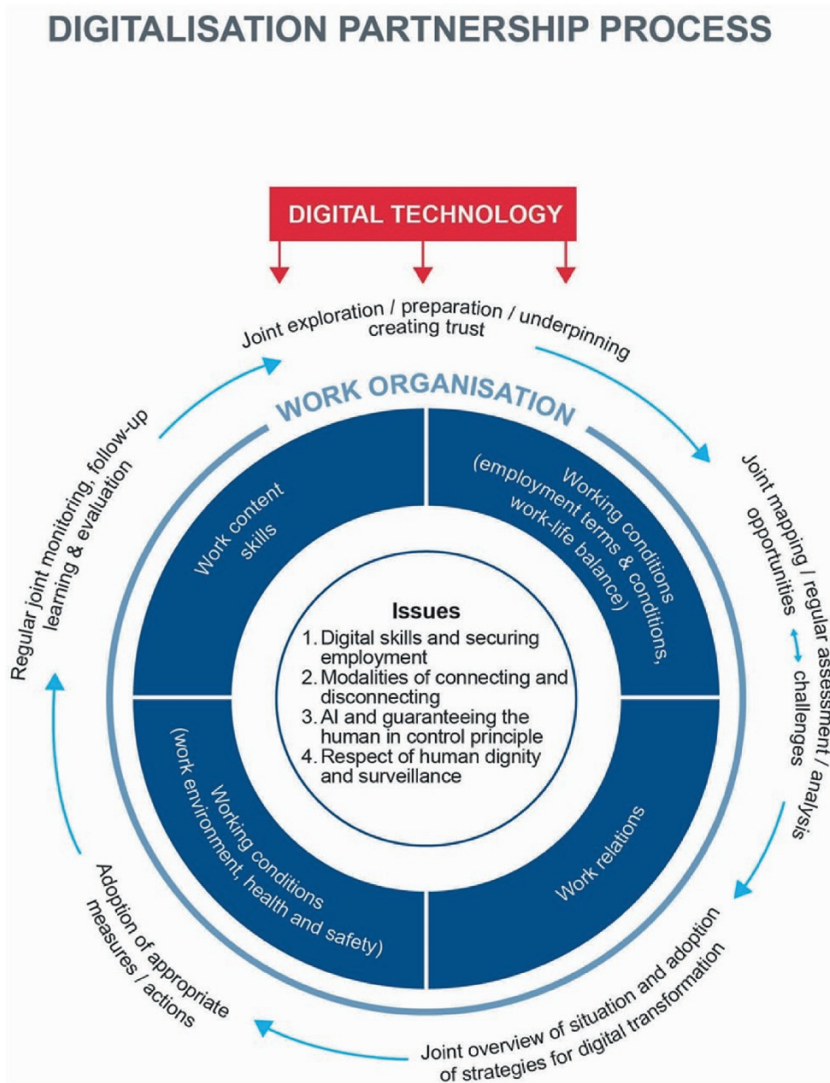


Figure 1. Digitalisation Partnership Process. Source: BusinessEurope (2020).

risk with this plan is that the FAD is susceptible to little concrete action beyond frequent reference in policy documents, academic publications and social partners' literature. Yet the FAD arrives at a critical juncture; a moment

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to ‘ensure job security and worker involvement are prioritised’ in an effort to save jobs¹² before it is too late.

A. The Five ‘Stages’: Towards a New Path?

The FAD outlines a five-stage process ‘to achieve a consensual transition.’¹³ These stages of the Digitalisation Partnership Process are expected to be ‘tailored to different national, sectoral and/or enterprise situations and industrial relations systems by adjusting the tools used in the process, the content and/or the people/experts involved.’¹⁴

The first stage, entitled ‘joint exploration/preparation/underpinning’, involves ‘exploring, raising awareness and creating the right support base and climate of trust to be able to openly discuss the opportunities and challenges/risks of digitalisation, their impact at the workplace and about the possible actions and solutions.’¹⁵ This first stage foresees open discourse in order to (optimally) engage with digitalisation¹⁶ whilst simultaneously establishing the trust amongst the parties that is needed for candid dialogue.

The product of stage one is taken to the second stage, ‘joint mapping/regular assessment/analysis’, where the parties commence a mapping exercise that deliberates upon the Agreement’s ‘topic areas in relation to’ benefits, opportunities and challenges/risks.¹⁷ At this stage, the parties may also identify steps to be taken.

Stage three (the ‘joint overview of [the] situation and adoption of strategies for digital transformation’) combines the efforts of the previous two stages¹⁸: ‘[i]t is about having a basic understanding of the opportunities and challenges/risks, the different elements and their interrelationships, as well as agreeing on digital strategies setting goals for the enterprise going forward.’¹⁹ The objective of stage three remains difficult to discern. For example, the outcome envisioned in the phrase ‘agreeing on digital strategies

¹²This is how Esther Lynch, Deputy General Secretary of the European Trade Union Confederation, situated the FAD: E. Lynch, ‘How Digitalisation Must Be Harnessed to Save Jobs’ *Social Europe* (29 July 2020). <https://socialeurope.eu/how-digitalisation-must-be-harnessed-to-save-jobs> (accessed 25 August 2021).

¹³FAD (n.1), 7.

¹⁴Ibid.

¹⁵Ibid.

¹⁶Ibid.

¹⁷Ibid.

¹⁸Ibid.

¹⁹Ibid.

setting goals for the enterprise going forward' is hard to understand. Are these digital strategies that lead to goal setting? Or, are the parties agreeing upon digital strategies that additionally set goals?

In stage four, the sequential steps continue, this time towards the 'adoption of appropriate measures/actions'. Stage four is an essential phase in the Digitalisation Partnership Process because it is based upon a 'joint overview of the situation',²⁰ which is the by-product of the preceding stages. Senatori has argued that power issues amongst employers and workers must be addressed as part of regulatory initiatives about digitalisation and work.²¹ He views the FAD as a step towards improving this balance of power, without presuming its effectiveness.²² Since power has largely rested with employers in the early years of digitalisation, reaching a point of more closely sharing power stands out as an ambitious goal.²³

Stage five—'regular joint monitoring/follow-up, learning, evaluation'—foresees sustained momentum throughout each of the preceding stages. Here, a finished product has been achieved and its implementation is to be assessed. The anticipated outcome by the conclusion of stage five is 'a joint assessment of the effectiveness of the actions and discussion on whether further analysis, awareness-raising, underpinning or actions are necessary'.²⁴ Stage five also reflects on the preceding phases to determine if they were effective, and to evaluate whether more needs to be done.

The FAD is different from preceding autonomous agreements, such as the European social partners' Framework Agreement on Teleworking of 2002 (FAT). The FAT was a more direct agreement. Crucially, it defined telework.²⁵ The FAD, in comparison, does not discuss what

²⁰Ibid.

²¹I. Senatori, 'Regulating the Employment Relationship in the Organization 4.0: Between Social Justice and Economic Efficiency' in A. Perulli and T. Treu (eds), *The Future of Work* (Deventer: Kluwer, 2021), 187–206.

²²I. Senatori, 'The European Framework Agreement on Digitalisation: A Whiter Shade of Pale?' (2020) 13 *ILLeJ* 159, 164. <https://doi.org/10.6092/issn.1561-8048/12045> (accessed 25 August 2021).

²³For example, employers' power to take disciplinary action against workers based upon the contents of their social media accounts (see on the adjudication of social media comments P. Wragg, 'Free Speech Rights at Work: Resolving Differences Between Practice and Liberal Principle' (2015) 44 *ILJ* 1), even when these accounts are established at the insistence of the employer (as in *Bărbulescu v Romania* App No 61496/08 (ECtHR, 5 September 2017)), has been derived from employment contracts and/or employment handbooks.

²⁴Ibid.

²⁵European Social Partners, 'Implementation of the European Framework Agreement on Telework: Report of the European Social Partners' (September 2006), 32.

digitalisation means for the social partners. The FAT was also more precise in identifying key considerations (such as voluntariness of teleworking, data protection and privacy) and laid down some relevant overarching principles (for example, that '[t]he workload and performance standards of the teleworker are equivalent to those of comparable workers at the employer's premises'²⁶). The FAT, finally, successfully laid the groundwork for local implementation within Member States,²⁷ including by the UK social partners.²⁸

The more recent history of social partner agreements may have shaped the open-endedness of the FAD. What was called the social partners' 'right of the firstborn'²⁹ when first proposed, the intended objective of social dialogue 'which was shared by all the stakeholders ... was undoubtedly to open up an area for collective bargaining at European level.'³⁰ Yet, the 'tension between the autonomy granted [to] social partners under Article 152 TFEU³¹ and the prerogatives enjoyed by the Commission in the EU legislative process' affected European social dialogue.³² The EU Commission's rejection of the Hairdressers' Agreement,³³ as well as the decision in *EPSU and Goudriaan v European Commission*,³⁴ provide two reasons for the FAD's process-focussed approach.

²⁶Ibid., 33.

²⁷European Commission, 'Report on the Implementation of the European Social Partners' Framework Agreement on Telework' COM (2008) 412 final (2 July 2008).

²⁸*Telework Guidance* (Department of Trade and Industry, London, August 2003).

²⁹R. Blanpain, *European Labour Law*, 14th edn (Alphen aan den Rijn: Wolters Kluwer, 2014), 216.

³⁰J-P Tricart, *Legislative implementation of European Social Partner Agreements: Challenges and debates*, Working Paper 2019.09 (Brussels: ETUI, 2019), 46.

³¹Treaty on the Functioning of the European Union [2012] OJ C326/47.

³²Senatori, 'A Whiter Shade of Pale?' (n.22), 161.

³³<https://osha.europa.eu/en/legislation/guidelines/european-framework-agreement-on-the-protection-of-occupational-health-and-safety-in-the-hairdressing-sector> (accessed 25 August 2021). The Hairdressers' Agreement had been called 'a sign of the growing autonomy and maturity of the ESD': F. Dorsemont, K. Lörcher and M. Schmitt, 'On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case' (2019) 48 *ILJ* 571, 602. While the *EPSU* decision is currently under appeal, the first *EPSU* judgment has been characterised as a by-product 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': E. Somaglia, 'Are the Prerogatives of EU Social Partners under Threat?' (2020) 6 *ILRCL* 156, 157.

³⁴Case T-310/18, 24 October 2019.

B. Digitalisation in Four 'Issues'

The Agreement identifies four 'issues [that] should also be discussed and taken into account as part of the process'.³⁵ These are: 'digital skills and securing employment'; 'modalities of connecting and disconnecting'; 'Artificial Intelligence [AI] and guaranteeing the human in control principle'; and 'respect of human dignity and surveillance'.³⁶

As will be outlined below, the FAD puts forward several considerations which form part of these four larger issues. That these are only 'considerations' further underscores the early stage of the discourse on digitalisation. There are also some important aspects that warrant further attention. First, as AI presently attracts significant attention in scholarly,³⁷ policy³⁸ and regulatory discourse,³⁹ the fact that it is one of the four issues set out by the social partners should be lauded. Its inclusion reflects an expansive understanding of the significant changes currently unfolding in the world of work.

Second, the social partners do not define what they see as digitalisation of work. This absence may be a by-product of the early stage at which the FAD seems pitched. Still, the omission stands out, given the prominence of the term in the Framework's title. Greater precision in defining digitalisation would have implications for the FAD's laudable aims. For example, if one focuses on AI and roboticisation as digitalisation, the FAD may come at an opportune time, since the European Commission has turned its attention to the regulation of algorithms. If a wider definition of the term is adopted, however, it is arguable that we are well into the digitalisation era⁴⁰ in the move to digital-based means of work (as well as socialisation).

³⁵FAD (n.1), 6.

³⁶Ibid.

³⁷See, for example, M. H. Murphy 'Algorithmic Surveillance: The Collection Conundrum' (2017) 31 *IRLCT* 225; K. Yeung, 'Algorithmic Regulation: A Critical Interrogation' (2018) 12 *RG* 505; V. De Stefano, "'Negotiating the Algorithm": Automation, Artificial Intelligence and Labour Protection' (2020) 41 *CLLPJ* 1.

³⁸Council of Europe, *Algorithms and Human Rights: Study on the Human Rights Dimensions of Automated Data Processing Techniques and Possible Regulatory Implications* (DGI (2017)12) (Council of Europe, Strasbourg, March 2018).

³⁹European Commission, *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 (21 April 2021). The proposal was a response to the Council of the European Union's invitation: Council of the European Union, *Shaping Europe's Digital Future - Council Conclusions*, Brussels, 9 June 2020, 8098/1/20, 10.

⁴⁰See the treatment of digitalisation in Cedefop and Eurofound, *European Company Survey 2019: Workplace Practices Unlocking Employee Potential* (Luxembourg: Publications Office of the European Union, 2020), Ch 3.

Another question of concern, third, is to what end are these issues identified? They are important, but it is unclear how they advance a plan for a ‘shared commitment ... to optimise the benefits and deal with the challenges of digitalisation in the world of work’.⁴¹ The discussion of each issue commences with paragraphs that approximate a memorandum of understanding tailored to that topic. For example, ‘modalities of connecting and disconnecting’ (the second issue) identifies the interest of employers and workers in adapt[ing] work organisation to the ‘ongoing transformation of work’ precipitated by the widespread use of digital work devices.⁴² After these statements, several ‘measures to be considered’ are named, although these are matters to be included in consideration, but are not mandated points for engagement. The drafters may have envisaged that the aforementioned concern would arise later in the lengthy discussion set out in the FAD.

Taking the framework as only an initial point of departure, the four issues are discussed below (in the sequence in which they are mentioned in the FAD).

(i) Digital Skills and Securing Employment

The objective of the first issue — ‘digital skills and securing employment’ — is preparation for digitalisation⁴³: ‘to prepare our current and future workforce and enterprises with the appropriate skills by continuous learning, to reap the opportunities and deal with the challenges of the digital transformation in the world of work’.⁴⁴

The FAD astutely highlights the challenge of prompting the European workforce to remain fluent in technological developments by up-skilling or re-skilling⁴⁵: that the infrastructure and development of skill levels for

⁴¹FAD (n.1), 3

⁴²Ibid., 10.

⁴³Ibid., 8.

⁴⁴Ibid. The Council of the European Union also identified this concern: Council of the European Union, *Shaping Europe’s Digital Future - Council Conclusions* (n.38), 21.

⁴⁵FAD (n.1), 9. In written evidence to a Parliamentary Committee, the TUC has also identified skills development as an urgent need, though it viewed the government as responsible for doing so: <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Education/Quality%20of%20apprenticeships%20and%20skills%20training/written/76348.html> (accessed 25 August 2021).

digitalisation vary across Europe. The ‘unparalleled shift in skill sets’ has drawn the European Commission’s attention.⁴⁶ The task of up- or re-skilling has certain preconditions, such as access to digital networks, that seem necessary to recognise. As one example, although Ireland has made tremendous gains in digital transformation over the last five years, approximately 23% of the population, largely rural residents, still do not have access to reliable high-speed broadband.⁴⁷ And yet Ireland performs better than the EU average.⁴⁸ Another precondition to up- and re-skilling is the current state of individuals’ digital skills. The EU Commission’s *Digital Economy and Society Index (DESI) 2020* estimated that only 58% of EU citizens possess basic digital skills.⁴⁹ The Commission has set a goal of 80% of the population possessing at least basic digital skills by 2030.⁵⁰

Issue one also identifies skills development (including access to training) as a ‘shared interest’ of the social partners.⁵¹ It calls for the development of digital transformation strategies through which ‘both the enterprise and the workers benefit from the introduction of digital technology, e.g. working conditions, innovation, productivity and share of productivity gains, business continuity, employability.’⁵² There may be some further engagement needed, however, to ascertain the extent to which these are shared interests. Both employers and workers have an essential role in the kind of digital skills development which would lead ‘to successful enterprises, high-quality public services, and a skilled workforce.’⁵³ It remains a question, however, whether employers would widely accept responsibilities such as ‘[t]he re-design of jobs to allow workers to remain within the enterprise in a new role if some of their tasks or their job disappears due to digital technology.’⁵⁴ The

⁴⁶European Commission, Communication *European Skills Agenda for Sustainable Competitiveness, Social Fairness and Resilience*, Brussels, 1 July 2020, 3.

⁴⁷Ireland, *Delivering the National Broadband Plan* (Department of Communications, Climate Action and Environment, Dublin, May 2019), 7.

⁴⁸European Commission, *Digital Economy and Society Index (DESI) 2020* (11 June 2020) <https://digital-strategy.ec.europa.eu/en/policies/desi> (accessed 25 August 2021). This figure did not take into consideration the widespread shift to remote working undertaken during the Covid-19 pandemic.

⁴⁹*Ibid.*, 15.

⁵⁰European Commission, ‘Europe’s Digital Decade: Digital targets for 2030’ https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/europes-digital-decade-digital-targets-2030_en (accessed 25 August 2021).

⁵¹FAD (n.1), 8.

⁵²*Ibid.*, 9.

⁵³*Ibid.*, 8.

⁵⁴*Ibid.*, 9.

decline in the extent of worker training—by 44% between 1997 and 2009 and by 6% between 2009 and 2011⁵⁵—and of worker participation does not suggest a positive trend when it comes to the training challenges posed by digitalisation.⁵⁶

(ii) ‘Modalities of Connecting and Disconnecting’

The Agreement’s second issue—‘modalities of connecting and disconnecting’—considers the health and safety of workers. The FAD rightly recognises the ‘risks and challenges around the delineation of work and of personal time both during and beyond working time.’⁵⁷ The Agreement’s focus on ‘connecting and disconnecting’ relates to work–life balance; whether (and, if so, when) work stops in a digitalised workplace. Employers carry responsibility for ‘ensur[ing] the safety and health of workers in every aspect related to the work.’⁵⁸

In this regard, a practice has developed across EU Member States in which workers are expected to respond to work-related communications outside of typical working hours.⁵⁹ A July 2020 report of the EU Parliament’s Committee on Employment and Social Affairs grounded its recommendation of a right to disconnect directive in part on an ‘ever-connected’ or ‘always on’ culture that ‘can have detrimental effects on workers.’⁶⁰ Though not explicitly referenced in the FAD, France’s ‘right to

⁵⁵F. Green and G. Henseke, *Training Trends in Britain*, Research Paper 22 (LLAKES/Unionlearn, London, June 2019).

⁵⁶Senatori, *A Whiter Shade of Pale?* (n.22), 167, elaborates upon the FAD in the context of other EU skills initiatives.

⁵⁷*Ibid.*, 10.

⁵⁸*Ibid.* Note the failed challenge to the EU Working Time Directive in which the UK Government argued that working time was not a health and safety issue: Case C-84/94, *UK v Council* [1996] ECR I-5755.

⁵⁹K. Müller, ‘The Right to Disconnect’ European Parliamentary Research Service PE642.847 (Brussels, July 2020), 1. The ILO identifies a ‘bifurcation’ of working time wherein some worker groups (estimated at 36.1% of the global workforce) work excessively long hours (defined as working more than 48 hours in line with ILO Conventions 1 and 30) and others work short hours, such as part-time work (estimated at 18.8% of the global workforce): J. Messenger (Team Leader), *Working Time and the Future of Work* (ILO, 2018), Part 2. Note that, even with digitalisation, women’s household and caring work remains unvalued.

⁶⁰European Parliament, Committee on Employment and Social Affairs, *Draft Report with Recommendations to the Commission on the Right to Disconnect*, 2019/2181(INL), 28 July 2020, 4.

disconnect' law has been a pioneering attempt to engage with workers' health and safety in the context of the extension of working time precipitated by digitalisation.⁶¹ Action at the EU level on the right to disconnect has been recommended.⁶²

Since the FAD, further action on disconnecting from work has come into question. SMEunited (a signatory to the FAD) asked the European Parliament (in advance of its January 2021 discussion of the matter) to reject such a right, 'in order to fully respect the prerogatives of national social partners' and their FAD.⁶³ SMEunited's statement hints at its opposition to the July 2020 text of the Committee on Employment and Social Affairs' recommendation.⁶⁴ The Committee's report had 'stresse[d] the importance of the social partners to ensure the effective implementation and enforcement of the right to disconnect'⁶⁵ and also identified the FAD as providing for 'possible measures to be agreed between the social partners with regards to the workers' connecting and disconnecting from work'.⁶⁶ On 21 January 2021, the EU Parliament called upon the Commission to propose such a law,⁶⁷ but added that, pursuant to the TFEU, the social partners have a three-year period within which the FAD may be implemented⁶⁸ before any legislative proposal could be laid down. That European Social Dialogue could preclude the European Commission's right of legal initiative has been contested by the ETUC.⁶⁹

⁶¹B. Mettling, *Transformation Numérique et Vie au Travail* (Ministre du Travail, de l'Emploi, de la Formation Professionnelle et du Dialogue Social) (September 2015). See also Italy's 2017 Senate Act no 2233-B 'Measures to safeguard non-entrepreneurial self-employment and measures to facilitate flexible articulation in times and places of subordinate employment'.

⁶²Committee on Employment and Social Affairs (n.60).

⁶³V. Guerra, 'Right to Disconnect – SMEunited Calls on the European Parliament to Respect the Role of Social Partners' (13 January 2021) <https://www.smeunited.eu/news/smeunited-calls-on-the-european-parliament-to-respect-the-role-of-social-partners> (accessed 25 August 2021).

⁶⁴Committee on Employment and Social Affairs (n.60).

⁶⁵*Ibid.*, 6.

⁶⁶*Ibid.*, 12.

⁶⁷European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)) https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html (accessed 25 August 2021).

⁶⁸*Ibid.*, point 13.

⁶⁹ETUC, *Right to Disconnect - Joint ETUC/ETUFs Letter to the Members of the European Parliament* (20 January 2021), <https://www.etuc.org/en/document/right-disconnect-joint-etucetufs-letter-members-european-parliament> (accessed 25 August 2021). For further discussion on this point, see Battista (n.3), 113–4.

The FAD's second issue also touches upon the rise in remote working triggered by the Covid-19 pandemic, but does not offer much more.⁷⁰ The Committee on Employment and Social Affairs' recommendation of a right to disconnect noted, amongst other points, that those who work from home 'are more prone to working longer and more irregular hours'.⁷¹ Prior to the pandemic, many employers were hesitant to allow remote working, for reasons of lack of control or reduced levels of commitment.⁷² During the pandemic, however, non-essential work has largely been carried out by workers in their own homes.⁷³ Remote work can facilitate greater work–life balance, but it also blurs the boundaries between work and home life.⁷⁴

(iii) AI and Guaranteeing the Human in Control Principle

The third issue—AI and guaranteeing the human in control principle—fits within EU-wide plans, such as the European Commission's *Shaping Europe's Digital Future* plan (specifically '[t]echnology that works for the people').⁷⁵ A variety of benefits have been identified from AI.⁷⁶ In relation to work, however, there has been more concern about the effect of AI on

⁷⁰Covid-19 caused an increase in remote working of more than 30%, including above 50% in Luxembourg, the Netherlands, Belgium and Denmark, and 40% or more in Ireland, Sweden, Austria and Italy: D. Ahrendt, J. Cabrita, E. Clerici, J. Hurley, T. Leončikas, M. Mascherini, S. Riso and E. Sándor, (Eurofound) *Living, Working and COVID-19*, COVID-19 series (Luxembourg: Publications Office of the European Union, 2020), 5.

⁷¹European Parliament, Committee on Employment and Social Affairs, *Draft Report with Recommendations to the Commission on the Right to Disconnect* (n.60), 5.

⁷²O. Vargas-Llave, I. Mandl, T. Weber and M. Wilkens, *Telework and ICT-Based Mobile Work: Flexible Working in the Digital Age* (Luxembourg: Publications Office of the European Union, 2020), 42.

⁷³Though there seems to be some liberty in defining what is essential work. See A. Hern, 'Facebook Moderators Forced to Work in Dublin Office Despite High-Tier Lockdown', *The Guardian*, 23 October 2020.

⁷⁴A Eurofound study found that 24% of respondents to a telework survey reported working during their free time: D. Ahrendt, J. Cabrita, E. Clerici, J. Hurley, T. Leončikas, M. Mascherini, S. Riso and E. Sándor (Eurofound), *Living, Working and COVID-19*, COVID-19 series (Luxembourg: Publications Office of the European Union, 2020), 33.

⁷⁵European Commission, 'Europe's Digital Decade: Digital Targets for 2030' https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/europes-digital-decade-digital-targets-2030_en (accessed 25 August 2021).

⁷⁶Council of the European Union, *Shaping Europe's Digital Future - Council Conclusions* (n.38), 9.

employment, whether a decrease in jobs or the potential for unjust or discriminatory outcomes.⁷⁷

In the FAD, the social partners acknowledge concern about these technologies and commit to ensuring that AI augments human involvement at work.⁷⁸ The FAD recommends that the ‘control of humans over machines and artificial intelligence should be guaranteed in the workplace and should underpin the use of robotics and artificial intelligence applications whilst respecting and complying with safety and security controls.’⁷⁹ The social partners’ advancing a human-centred or ‘human-in-command’ approach in the FAD aligns with other commentaries in this area.⁸⁰ The FAD also mentions a need to ensure that AI does ‘not jeopardise but augment[s] human involvement and capacities at work.’⁸¹ The Agreement, additionally, outlines three components for ‘trustworthy AI’: being ‘lawful, fair, transparent, safe, and secure’; following ‘agreed ethical standards, ensuring adherence to EU [f]undamental/human rights, equality and other ethical principles’; and, finally, being ‘robust and sustainable, both from a technical and social perspective since, even with good intentions, AI systems can cause unintentional harm.’⁸²

The social partners also call for transparency and explainability in decision-making.⁸³ While an important step, this objective recalls queries⁸⁴ about Article 22 of the General Data Protection Regulation.⁸⁵ Article 22 distinguishes between automated decision support (where a person makes the final decision) and automated decision-making (where there is no human judgement involved). The FAD does not delve further into this area (such as recourse for changing a decision), presumably leaving it for further discussion. If this is the case, a challenge for this next stage is the appearance of transparency (the ‘transparency fallacy’⁸⁶) as opposed to transparency

⁷⁷V. De Stefano and S. Taes, ‘Algorithmic Management and Collective Bargaining’ *Etui Foresight Brief*, 2021.

⁷⁸FAD (n.1), 11.

⁷⁹Ibid.

⁸⁰Global Commission on the Future of Work, *Work for a Brighter Future* (ILO, Geneva, 2019), 27 ff.

⁸¹FAD (n.1), 11.

⁸²Ibid.

⁸³FAD (n.1), 12.

⁸⁴A. Seifert, ‘Employee Data Protection in the Transnational Company’ in F. Hendrickx and V. de Stefano (eds), *Game Changers in Labour Law* (Deventer: Kluwer, 2018), Ch 12.

⁸⁵Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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 [2016] OJ L119/1.

⁸⁶L. Edwards and M. Veale, ‘Slave to the Algorithm? Why a “Right to an Explanation” Is Probably Not the Remedy You Are Looking For’ (2017) 16 *Duke LTR* 18.

in some substantive form, since an explanation of AI decision-making presumes that the receiver has sufficient digital literacy to understand.⁸⁷

This third issue, finally, offers limited treatment of the seismic impact of the pandemic and the evidence of its disparate effect on women.⁸⁸ The FAD does not address enduring issues around gender and work.⁸⁹ Discrimination based on gender and race, for example, is not pursued beyond being mentioned as a measure to consider in algorithmic decision-making.⁹⁰

(iv) Respect of Human Dignity and Surveillance

The fourth and last issue—respect of human dignity and surveillance—segues from the third insofar as AI has been perceived to pose a risk to human dignity.⁹¹ Protecting human dignity has been a concern of international labour policy for some time. The International Labour Organization's 1997 Code of Practice on *Protection of workers' personal data* identified in its preamble the need to protect human dignity.⁹² To reinforce just how challenging the balance of human dignity and surveillance (in its many forms) is, consider that the EU and the US have had two agreements on transatlantic data-sharing rendered invalid by the Court of Justice on the basis of the broad notion of privacy set out in Articles 7 and 8 of the Charter of Fundamental Rights.⁹³ It is notable that the social partners link this issue with Article 88 of the GDPR, particularly in relation to collective bargaining (which is mentioned in both Article 88 and the FAD⁹⁴). The GDPR has been allegedly

⁸⁷There may be a slow recognition of this point developing: European Parliament, *Resolution with Recommendations to the Commission on a Framework of Ethical Aspects of Artificial Intelligence, Robotics and Related Technologies* (2020/2012(INL)) P9 TA (2020)0275, 20 October 2020.

⁸⁸A. Adams-Prassl, T. Boneva, M. Golin and C. Rauh, 'Inequality in the Impact of the Coronavirus Shock: Evidence from Real Time Surveys' *IZA Discussion Paper No. 13183* (April 2020).

⁸⁹Issues outlined in J. Berg, 'Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work' (2019) 41 *CLLPJ* 69.

⁹⁰A matter explored in M. Kullmann, 'Platform Work, Algorithmic Decision-Making, and EU Gender Equality Law' (2018) 34 *IJCLLIR* 1.

⁹¹Council of the European Union, *Shaping Europe's Digital Future - Council Conclusions* (n.38), 9.

⁹²International Labour Organization, *Protection of Workers' Personal Data. An ILO Code of Practice* (ILO, Geneva, 1997).

⁹³Case C-362/14, *Maximillian Schrems v Data Protection Commissioner* [2016] QB 527; Case C-311/18, *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems* [2021] 1 WLR 751.

⁹⁴FAD (n.1), 12.

‘misused’ by employers to deny trade unions contact with workers.⁹⁵ As it applies to the workplace, the GDPR remains somewhat unclear.⁹⁶ For example, it seems to permit processing of data in circumstances in which it is ‘necessary for the performance of a contract to which the data subject is part’.⁹⁷ There would be questions pertaining to the protection of human dignity if an employer were to rely upon this provision in order to monitor its workforce to ensure ‘performance of a contract and legitimate interests ... provided the processing is strictly necessary for a legitimate purpose and complies with the principles of proportionality and subsidiarity’.⁹⁸

Issue four highlights the risk of compromising the dignity of the human being, ‘particularly in cases of personal monitoring’.⁹⁹ This reference recalls the case law of the European Court of Human Rights on Article 8 of the European Convention of Human Rights (ECHR). The Court’s decision in *Bărbulescu v Romania*¹⁰⁰ stands out amongst recent rulings, where the court found that the employer’s monitoring of the worker’s social media activity (both his work and personal accounts) violated his right to private life. Bărbulescu had not been sufficiently informed about the employer’s monitoring of his social media platforms as well as the potential consequences thereof. The Court also prohibited reducing workplace privacy to zero.¹⁰¹ And so, *Bărbulescu* is complemented by the social partners identifying human dignity as a priority matter in the FAD.

3. CONCLUSION

The FAD remains a welcome addition to a significant and, to this point, rapidly developing area. The Agreement outlines how the parties foresee their future engagement on the topic. And yet, the FAD also indicates that there is much work to be done amongst the social partners before

⁹⁵ETUC, ‘GDPR Being Misused by Employers to Hinder Trade Unions’ (19 March 2020) <https://www.etuc.org/en/pressrelease/gdpr-being-misused-employers-hinder-trade-unions> (accessed 25 August 2021).

⁹⁶See, for example, C. Brassert Olsen, ‘To Track or Not to Track? Employees’ Data Privacy in the Age of Corporate Wellness, Mobile Health, and GDPR’ (2020) 10 *IDPL* 236.

⁹⁷Article 6(1)(b) GDPR.

⁹⁸Article 29 Working Party, *Opinion 2/2017 on Data Processing at Work*, WP 249 (8 June 2017), 3.

⁹⁹FAD (n.1), 12.

¹⁰⁰*Bărbulescu v Romania* App No 61496/08 (ECtHR, 5 September 2017).

¹⁰¹*Ibid.*, [80].

a more substantive agreement can be reached regarding how, in the EU Commission's words, the digital transformation may 'work for people and businesses'.¹⁰² The first stage (of five) noted above is in-part a trust-building endeavour, suggesting some level of trust deficit. It may be that the FAD brings the social partners closer together, and this in itself would be a valuable outcome. While the Agreement aims for an invigorating discussion at each of the five stages relating to the four issues the social partners have identified, this ambition may not be met. The FAD will be what the social partners at national, sectoral and enterprise levels make of it. In this way, the FAD remains notably open-ended, since it offers a path for dialogue. It is hoped that it will ultimately yield a more substantial agreement amongst the parties.

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¹⁰²European Commission, 'A Europe Fit for the Digital Age' (n.4).

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