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# MASTER THESIS

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## **Towards Legal Regulation of Online Platform Work**

To what extent does EU labor law address the rights and protections of online platform workers in the gig economy, and what reforms are necessary to ensure their fair treatment?

verfasst von / submitted by

Viktória Styková LL.B

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Univ.-Prof. i.R. Dr. Dr. h.c. Peter Fischer

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## A TABLE OF ABBREVIATIONS

<b>I.</b>	<b>CJEU</b>	Court of Justice of the European Union
<b>II.</b>	<b>COR</b>	European Committee of the Regions
<b>III.</b>	<b>EEA</b>	European Economic Area
<b>IV.</b>	<b>EEC</b>	European Economic Community
<b>V.</b>	<b>EPC</b>	Economic Policy Committee
<b>VI.</b>	<b>EESC</b>	European Economic and Social Committee
<b>VII.</b>	<b>EU</b>	European Union
<b>VIII.</b>	<b>ILO</b>	International Labor Organization
<b>IX.</b>	<b>IRU</b>	International Transport Organization
<b>X.</b>	<b>MS</b>	Member States of the European Union
<b>XI.</b>	<b>SSC</b>	Social Security Coordination
<b>XII.</b>	<b>TEU</b>	Treaty on the European Union
<b>XIII.</b>	<b>TFEU</b>	Treaty on the functioning of the EU
<b>XIV.</b>	<b>UK</b>	United Kingdom

## INTRODUCTION

The issue of protection of online platform workers is currently a highly debated issue in the European Union. With the growth of the Internet, more and more economic activity is being coordinated using digital or online platforms. Almost everyone in Europe knows at least one platform service like Uber, Bolt or Deliveroo.

Unusual jobs continue to gain popularity, partly due to the labor market's increasing flexibility. The workers working through online platforms are free to choose to work from anywhere, at any time, and on any project that fits their work schedule. Unusual work arrangements may give rise to legal challenges about the implementation of social security legislation and the safeguards afforded to these workers. Thus, engaging in such work carries certain risks in terms of their work status, ability to earn enough money, social protection and other benefits.

Platform workers are not covered by the legislation that apply to ordinary employees doing comparable or identical work, despite the fact that many national legal systems and international labor standards grant equal rights to all persons.<sup>1</sup> Due to the unclear employment status, online platform workers' situations vary greatly throughout Member States of the European Union (hereinafter referred as "EU") which contributes to legal uncertainty.

As a result of the potentially adverse effects of platform work on the labor market and gig economy, and more specifically on platform workers themselves, a number of initiatives have been launched at EU and Member State level to address the disparities in employment and working conditions of platform workers in order to safeguard their rights and adequate working conditions.

This Paper will thoroughly examine the issue and the question of rights and protections of online platform workers in the gig economy within the European Union and explore possible alternatives to help improve the state of protection of online platform workers within the EU and its Member States.

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<sup>1</sup> Darcy du Toit, Sandra Fredman & Mark Graham, 'Towards Legal Regulation of Platform Work: Theory and Practice' (2020) 41 Indus LJ (Juta) 1493.

In the first chapter, it will scrutinize the current state of the protection for the online platform workers in the EU, define main concepts such as gig economy or online platform worker, but also identify advantages and disadvantages of platform work.

In the second chapter the reader will learn about the prevailing challenges and gaps in the protection of platform workers.

The third chapter will deal with the background and the legislative process and its evolution of the proposed draft Directive to improve the conditions of online platform workers in the EU.

Lastly, the chapter four will propose which legislative and policy recommendations, apart from the proposed Directive, could help address the current state of protection of online platform workers.

## METHODOLOGY

In order to develop this Thesis, I will use a doctrinal and normative research methodology.<sup>2,3</sup> These two methodologies will help me to thoroughly analyze the current legislation in the European union, its developments throughout the years, but also reliable secondary sources, scholarly articles, reports written by experts etc.. Moreover, the normative research methodology will help me to find solution to improve the protection of the online platform workers and find potential policies that could be helpful platform workers engaging in the gig economy.

In addition, this Thesis will use desk research method, for the reason that the information that is presented in the Thesis is to be found in the books and online law libraries. I will examine the information concerning the rights and protections on the online platform workers not only in the EU law but also in the domestic laws of the Member States and international organizations.

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<sup>2</sup> Dawn Watkins, Mandy Burton, 'Research Methods in Law' (Routledge, 2013).

<sup>3</sup> C. R. Kothari, 'Research Methodology: Methods and Techniques' (New Age international, 2nd edn., 2004).

## CHAPTER I.

### **EU labor law, gig economy, and online platform work**

In the wake of digitalization, labor law in the European Union has developed significantly in the last few years. The popularity of unusual jobs is still on the rise, in part because the labor market is becoming more and more flexible. Apart from the unusual or atypical forms of work, also self-employment and part-time employment are on the rise. In the ever-expanding platform economy, "newer" types of atypical employment are also emerging, including app work, crowd work, or even unpaid tasks, or activities that do not follow a fixed working pattern but nevertheless generate regular income. Systems were typically built around the employee's normal or "default" scenario when creating work-related social security schemes. However, if the work is structured in an unusual way, legal issues with the application of social security law and protections of such workers occurs.<sup>4</sup>

This chapter will primarily discuss the evolution and definition of the gig economy and platform work and explain the main advantages and disadvantages of platform work in the gig economy nowadays. In addition, the reader will be provided with a typology of platform work, including brief statistics on the categorization of platform workers into employed and self-employed and on the numbers of platform workers who carry out this activity as their main occupation within the EU.

The second part of the chapter will deal with the EU labor law framework in relation to labor protection of online platform workers. Here, the reader will learn about the competences of the EU in the labor law, the development of the labor law covering working and employment conditions, but also about the lack of a uniform legal framework covering online platform workers which leads to ambiguities. Last but not least, the reader will read about the European Pillar of Social Rights introduced by the European Commission and their 20 principles to support just and efficient labor markets and social security systems, proposal for a recommendation to access to social protection for employees and the self-employed, and initiative to improve platform work conditions through legislation in 2021.

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<sup>4</sup> Paul Schoukens et al., 'The EU Social Pillar: An Answer to the Challenge of the Social Protection of Platform Workers?' (2018) 20 Eur J Soc Sec 219.



## 1. The evolution of the gig economy and platform work

Interest in gig work has increased greatly in recent years, probably in part due to the COVID-19 pandemic. At the start of the COVID-19 pandemic in 2020, platforms were considered to be crucial in giving many enterprises the flexibility they needed to survive. However, even though the restrictions of the pandemic times have all but disappeared, gig work continues to become more popular in the market. The European Commission analysis in 2021 found out that more than 500 digital labor platforms are active in the EU.<sup>5</sup> In 2021, more than 28 million people in the EU worked through digital job platforms. In 2025, this number is expected to reach 43 million. These individuals are mainly genuinely self-employed. However, it's believed that 5.5 million of them are misclassified as self-employed. The platform economy's revenues increased from an expected €3 billion in 2016 to a projected €14 billion in 2020, nearly a fivefold increase.<sup>6</sup>

The 'platform' or 'gig economy' has seen fast growth since the Great Recession, when well-known companies such as Airbnb and Uber were founded, and now encompasses a wide range of digitally mediated economic transactions involving the exchange of goods and services.<sup>7</sup> But what exactly is meant by the gig or platform economy? Firstly, the word "gig" in "gig economy" is a reference to the short-term arrangements that are typical of music events. The gig economy can be explained as a labor market that relies to a large extent on temporary and part-time positions filled by independent contractors or self-employed and freelancers, as opposed to full-time permanent employees.<sup>8</sup> To put it simply, the gig economy refers to labor markets characterized by independent contracting on, through and on digital platforms.

The rise of the 'gig economy' has become a symbol of how market and work is changing, as the term refers to the increase in short-term contracts instead of permanent or stable jobs. It is described by many as offering far greater flexibility for workers, employers but also customers than the restrictive nature of some traditional employment contracts. The nature of business and

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<sup>5</sup> Commission Staff Working Document, 'Executive Summary of the Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council On improving working conditions in platform work' (European Commission, 2021) SWD(2021) 397 final.

<sup>6</sup> European Commission, 'Commission proposals to improve the working conditions of people working through digital labour platforms' (Press Release) Dec. 2021 < [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_6605](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605) > accessed 1. October 2023.

<sup>7</sup> Steven P. Vallas and J.B.Schor, 'What Do Platforms Do? Understanding the Gig Economy' Annual Review of Sociology 2020. 46:273–94.

<sup>8</sup> Investopedia, < <https://www.investopedia.com/terms/g/gig-economy.asp> > accessed 1. October 2023.

service will determine how much control the platform or employer has over the employee's schedule, prices paid to customers, any tools the employee uses, how the service is delivered, and how it is promoted.<sup>9</sup>

The term "platform worker" has been used by academics, policymakers, as well as the general public with widely varied meanings. Despite several efforts to develop a comprehensive and precise definition, there is no explicit consensus on the definition of 'platform work' due to the extreme heterogeneity of this phenomenon.<sup>10</sup> However, for the purpose of this Paper, a platform worker can be defined as a person who is chosen online from a pool of workers through the use of a platform to carry out short-term, on-demand jobs for various people or businesses in exchange for payment or income.<sup>11</sup> The platform work provides new opportunities for employment to those with strong hurdles to entry into the labor market, like youth and immigrants. The platform acts as a middleman between the person who requests the service and the person who provides it. In this capacity, the platform typically, though to varying degrees, possesses the following information: the nature of the tasks performed, compensation and the identities of the parties. It has a monopoly over communication between the two other parties in the relationship (i.e., the person providing the service and the person receiving it), it may monitor compliance with such rules, and may sanction non-compliance with such rules by temporarily or permanently banning an individual from accessing the platform.<sup>12</sup> Although there are certain outliers where platforms permit its platform workers to have repeat clients or develop their own clientele, in general, platform workers do not have a long-term or stable relationship with the client they are delivering the services for.

### I. Advantages and disadvantages of the online platform work

In this Paper, I find it important to consider pros and cons of online platform work, in order to better understand the job, the respective market, but also the rights and responsibilities and opportunities that the job offers for workers. As the author J. Prassl in his book named '*Humans*

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<sup>9</sup> Jane Dokko et al, 'Workers and the Online Gig Economy: A Hamilton Project Framing Paper' (2015) The Hamilton Project < [https://www.hamiltonproject.org/wp-content/uploads/2023/01/workers\\_and\\_the\\_online\\_gig\\_economy.pdf](https://www.hamiltonproject.org/wp-content/uploads/2023/01/workers_and_the_online_gig_economy.pdf) > accessed 1. October 2023.

<sup>10</sup> Antonio Aloisi, 'Platform work in Europe: Lessons learned, legal developments and challenges ahead' (2022) European Labour Law Journal 2022, Vol. 13(1) 4–29.

<sup>11</sup> Paul Schoukens, Alberto Barrio & Saskia Montebovi, 'The EU Social Pillar: An Answer to the Challenge of the Social Protection of Platform Workers?' (2018) 20 Eur J Soc Sec 219.

<sup>12</sup> Ibid <sup>(9)</sup>.

as a service' wrote: "*The gig economy's promise to deliver speedy services at low cost is premised on the availability of a large supply of workers who can easily be matched with consumer demand.*"<sup>13</sup> If this were true, then all stakeholders should be happy with this efficiency, and flexibility but is this really the case and what are the positives and negatives of online platform work in the gig economy?

Turning to the advantages, employers can benefit from the flexibility to choose when and how they want to employ workers, platform workers can decide when they want to work, as well as customers can benefit from the flexibility to easily and quickly order an on-demand services such as taxi or food delivery via the platform.<sup>14</sup> Another advantage is that businesses seeking to reduce labor costs can turn to contingent relationships with their workers. For illustration, it allows firms to acquire specialized skills that outside contractors have without incurring the attendant costs of training and other investments. On top of that, workers themselves might find this form of work advantageous, and in particular those seeking income while looking for a permanent job or to supplement their main job and have it as a secondary job.<sup>15</sup> Online platform work provides new work chances to those individuals with significant obstacles to entry into the labor market, such as young people and immigrants. When economic conditions are bad, as it was experienced during and after the Great Recession or the COVID-19 pandemic, workers who are most affected, such as young people or low-skilled individuals, may benefit from low-barrier-to-entry jobs exactly like online platform work.<sup>16</sup>

On the other hand, gig economy and platform work, besides the positive side of flexibility, also has a negative side for these workers, for example low pay, insecurity, stressful and dangerous working conditions, one-sided contracts and inadequate employment protection. These disadvantages are in contrast to the traditional employer-employee relationship, which mostly provides various guarantees and protections such as overtime compensation, minimum wage protection, health insurance, disability insurance, unemployment insurance, maternity and paternity leave, employer-sponsored pension plans, workers' compensation for injuries, paid sick leave, and the opportunity to engage in industrial action. The so-called 'standard

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<sup>13</sup> Jeremias Prassl, 'Humans as a service: The Promise and Perils of Work in the Gig Economy' (2018, Oxford University Press) p.13.

<sup>14</sup> Jamie Woodcock, Mark Graham, 'The Gig Economy: A critical introduction' (Polity Press, 2020) < <http://acdc2007.free.fr/woodcock2020.pdf> > accessed 1. October 2023.

<sup>15</sup> Ibid <sup>(9)</sup>.

<sup>16</sup> Eurofound, 'Back to the future: Policy pointers from platform work scenarios, New forms of employment series, (2020).

employment relationship' is being undermined by fragmentation of work and increased casualization in the form of platform work. Platform work is criticized on the grounds that activities previously considered standard employment can be mediated through platforms in an attempt to circumvent the rules, norms and traditions that were protected by labor laws. In addition to the fact that a growing number of workers are nowadays finding employment through platforms, while the existing labor unions are without effective strategies to organize gig workers, the lack of a collective voice for platform workers raises important questions about their ability to collectively organize and bargain with platforms and employers.<sup>17,18</sup>

## II. Typology of platform work

CEPS, a think tank and forum for debate on EU affairs, aimed in their study at gathering evidence on the working conditions of platform workers and grouped platform workers according to the existing typology of paper written by De Groen et al<sup>19</sup> as follows:

Online platform work refers to tasks that platform workers perform from any convenient location on their electronic devices. Another name for it is "crowd work" or "online freelancing." Platform workers typically carry out this kind of job on their own computer at their own workplace, which could be their home, but does not necessarily have to be. Such example of the online platform can be "Upwork" or "Crowflower".

On-location platform work must be performed at a specific physical location. However, the pairing still takes place online as in the case of online platform work. Only the last step differs from the previous type, and so whether the execution of the task takes place online or requires physical proximity. This kind of work is frequently done on the client's property, although it can also be done elsewhere. Deliveroo, or Uber are examples of the on-site platform work.<sup>20</sup>

The typology also differentiates between lower and higher skilled activities. The difference between lower- and higher-skilled activities relates to the service for which payment is made, not to the platform worker's qualification level or the total amount of required competence. For

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<sup>17</sup> Alex J. Wood, Mark Graham et al., 'Networked but commodified: The (dis)embeddedness of digital labour in the gig economy (2019) Sociology Volume 53, Issue 5, Pages 931-950.

<sup>18</sup> Ibid <sup>(9)</sup>.

<sup>19</sup> Willem P. De Groen et al., 'The Digital Market for Local Services: A one-night stand for workers? An example from the on-demand economy' (2016) CEPS No. 133.

<sup>20</sup> CEPS, EFTHEIA, and HIVA-KU Leuven, 'Study to gather evidence on the working conditions of platform workers' 2019, VT/2018/032.

instance, image identification and data entry are pretty straightforward jobs that typically do not require specialized training and may be performed via clickwork (e.g., AMT). Nonetheless, the organization of such work may require highly complex methods to identify the jobs that pay the highest salaries, as well as research to gather data on the working conditions of platform workers and subcontracting duties to a bigger network. Conversely, food delivery, for instance, through well-known platform Deliveroo, typically takes little to no training. Even so, some platform workers who do these duties manage others and organize and lead agreements between employees and management. Therefore, the complexity, scale, and specialization of lower- and higher-skilled are simplified.<sup>21</sup>

To compare the typology with, JRC Science for Policy in their report on “*Platform workers in Europe*”, JRC classified platform workers into the following three broad types of services provided, namely: professional tasks (such as, translation, software or creative), non-professional tasks (such as clerical, sales or micro) and on location tasks (such as transport and ancillary).<sup>22</sup>

To give a brief overview of the statistics, according to COLEEM survey data, overall, 75.7% of platform workers claim to be employees, while 7.6% claim to be self-employed, although this includes very casual platform workers. Furthermore, COLLEEM found that the majority of platform workers perform multiple forms of platform work and use more than one platform when working and found that 1.4% of the population aged 16-74 are using platform worker as their main occupation.<sup>23</sup>

## 2. EU labor law framework in relation to protections of online platform work

Article 153(1) of the Treaty on the Functioning of the European Union (hereinafter referred as TFEU) grants the European Union the right to use the ordinary legislation procedure in a number of areas related to labor law. Notably excluded from this are wage control and collective

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<sup>21</sup> Ibid (17).

<sup>22</sup> Annarosa Pesole, et al., *Platform Workers in Europe*, EUR 29275 EN, Publications Office of the European Union, 2018, ISBN 978-92-79-87996-8, doi:10.2760/742789, JRC112157.

<sup>23</sup> Urzi Brancati et al., ‘Digital Labour Platforms in Europe: Numbers, Profiles, and Employment Status of Platform Workers’ (2019) EUR 29810 EN < <https://publications.jrc.ec.europa.eu/repository/handle/JRC117330> > accessed 6. December 2023.

bargaining.<sup>24</sup> The EU supports national policy initiatives in the field of labor law by establishing minimum criteria. It adopts rules, mostly directives, that establish minimum standards for working and employment conditions and for informing and consulting workers in conformity with the TFEU. Individual labor rights, anti-discrimination laws, rights to information, consultation, and involvement at work, and rights to job security are the areas in which the EU regulates labor rights. The EU generally adheres to the idea that member states can always develop rights that are better, or more favorable for workers. For the purposes of this Paper, I will focus mainly on the working and employment conditions, rather than information and consultation of these workers.

EU labor law covering working and employment conditions has developed considerably over time, as it is one of the main areas addressed by EU labor law. This area covers provisions on working time, part-time and fixed-term work, temporary workers as well as posting of workers. All these areas are key to safeguarding high level of employment and social protection across the EU.<sup>25</sup> Some of the important directives that aim to help improve working conditions and employment of workers within the EU are: Directive on transparent and predictable working conditions, Part-time work Directive, Working time Directive, Work-life balance Directive, Health and safety in fixed-term Directive and Temporary employment Directive etc. But is it clear which of these directives mentioned specifically covers online platform workers?

Although platform workers who are employees are subject to labor law rules, many platform workers are, at least technically considered to be self-employed. Thus, platform workers' employment status is often decided by courts on a case-by-case basis throughout the whole EU and its Member States. The way that Member States approach platform work varies significantly across the EU. Despite the fact that national law has largely been introduced in specific areas such as the food delivery services sectors, it is important to mention that national responses to platform working vary and develop unevenly across Europe.

Nevertheless, some EU legislation, in particular the Directive on transparent and predictable working conditions (TPWC) already includes reference to platform workers. The Council's

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<sup>24</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art.153(1).

<sup>25</sup> European Commission, 'Employment, Social Affairs and Inclusion' < <https://ec.europa.eu/social/main.jsp?catId=706&langId=en> > accessed 4. October 2023.

recommendation regarding access to social protection for employees and the self-employed also makes mention of platform workers. Having said that, such reference in recital 8 of the Directive on transparent and predictable working conditions says that platform workers falls within the scope of the Directive only if he or she fulfills the criteria established by the CJEU, and that genuinely self-employed people should not be covered by this Directive for the reason that they do not meet the requirements.<sup>26</sup> In this recital we can also find references to some of the CJEU decisions that have defined the term "worker". One of them is the landmark case *Lawrie-Blum v Land Baden-Württemberg*<sup>27</sup>, which established, that concept of 'worker' stipulated Article 45 of the TFEU should be interpreted broadly as a person, performing services, under the direction of another, and for remuneration. Moreover, such activity cannot be marginal or ancillary.<sup>28</sup>

In spite of the fact that the TPWC Directive has significantly decreased the option to exclude small-scale work from its ambit, especially where it concerns unpredictable employment, platform employment, as well as other types of unconventional work done in economic dependence may still elude these regulations, because the Directive only addresses certain working situations.<sup>29</sup>

Yet, the lack of a uniform legal framework often leads to inconsistent judicial decisions. Platform work is a non-standard form of employment, hence ordinary EU labor legislation does not contain any particular regulations regarding the working conditions and social rights of platform workers. The majority of platform workers, especially the ones that are more qualified, are legitimately categorized as self-employed. Despite that, some are at risk of being classified as self-employed, even though they work mostly or exclusively for one employer and must abide by the same rules and restrictions as if they were employees.

As mentioned above, numerous platform workers struggle with unstable working conditions and limited access to social protections like zero hour contracts and unpaid waiting time.

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<sup>26</sup> Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L 186.

<sup>27</sup> C-66/85, *Lawrie-Blum v Land Baden-Württemberg*, [1986] EU:C:1986:284 para 17.

<sup>28</sup> C-53/81 D.M. Levin v Staatssecretaris van Justitie, EU:C:1982:105, para. 17; see also judgment C-176/96 Lehtonen, EU:C:2000:201, para. 44.

<sup>29</sup> Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L 186, see also < <https://ec.europa.eu/social/main.jsp?langId=en&catId=1313> > accessed 11. December 2023.

Platform workers are also often not sufficiently informed about their working conditions. They may not always be covered by social security systems for benefits related to health, accident, unemployment, protection at work as well as and pensions. Meanwhile, companies that use platform labor to reduce social contribution costs are engaging in unfair competition that weakens the social safety net for the whole society.<sup>30</sup>

In November 2017, the European Parliament, the Council, and the Commission together announced the European Pillar of Social Rights, which outlined 20 principles and rights to support just and efficient labor markets and social security systems.<sup>31</sup> According to principle 12 of the Pillar, "*workers and, under comparable conditions, the self-employed have the right to adequate social protection regardless of the type and duration of their employment relationship.*" After the introduction of these 20 principles and European Pillar of Social Rights, the European Commission issued a proposal for a Council Recommendation on access to social protection for employees and the self-employed in order to further this idea presented in the Pillar and principles. The proposed Recommendation, which aimed to ensure minimum standards in the area of social protection of workers and the self-employed, is applicable to all traditional social insurance programs related to labor (including unemployment benefits, sickness and health care, maternity and equivalent paternity leave, invalidity, pension, and benefits for accidents at workplace and occupational diseases).<sup>32</sup>

Following a two-stage engagement with social partners, the Commission Work Programme 2021 launched an initiative to improve platform work conditions through legislation until the end of 2021. One of the main initiatives of the Action Plan for the European Pillar of Social Rights was the proposal for a Directive to improve working conditions of platform workers.<sup>33</sup> The European Commission proposed a new draft rules in December 2021 to guarantee that gig workers receive a minimum wage, access to sick pay, holidays, and general employment rights

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<sup>30</sup> European Parliamentary Research Service, 'Digital platform workers: EU rules one step closer' (2023) < <https://epthinktank.eu/2023/06/22/digital-platform-workers-eu-rules-one-step-closer/> > accessed 04. October 2023.

<sup>31</sup> European Commission, Proposal for a Interinstitutional Proclamation on the European Pillar of Social Rights, COM(2017) 251.

<sup>32</sup> European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, COM(2018) 132, Scope Recommendation, Nos. 1-6.

<sup>33</sup> European Commission, 'Communication from the Commission to the European Parliament, The Council, The European Economic And Social Committee and The Committee Of The Regions: The Commission Work Programme 2021' (19. October 2021) COM(2020) 690 final.



and encourage the EU's digital labor platforms to expand sustainably.<sup>34</sup> The Directive is part of the Commission's wider "Digital Agenda", along with the new Digital Markets Act and the Digital Services Act. As part of the package, the Commission has proposed:

- Communication outlining EU policy and actions regarding platform work;
- Proposal for a Directive aimed at enhancing platform worker conditions;
- Draft guidelines outlining how EU competition law should be applied to collective agreements of self-employed looking to enhance their working conditions.

Negotiations between Parliament, the EU Council and Member States started in spring 2022 and are still ongoing. The Commission hopes that the final version of the Directive will be adopted ideally by the end of 2023.

### Conclusion

This chapter has introduced the reader to the topic of EU labor law and the development of the gig economy and working for online platforms. In this way, digitalization has played a substantial role in the development of EU labor legislation in recent years, especially when it considers online platform work. In a rapidly evolving digital world, the gig-economy, a labor market characterized by independent contracting through digital platforms, is also growing. In the gig-economy, it is said that working via online platforms is gaining popularity precisely because of the great flexibility of workers.

Work of this type has its advantages, but also disadvantages, which were highlighted in this chapter. First of all, working for online platforms has no legal framework, and so there is often a misclassification of workers as either employees or self-employed, which affects their social protection within the EU and its Member States.

Although current EU legislation contains some reference to online platform workers, the current lack of legislation dedicated to these workers puts them in a precarious situation. In response to this situation, the European Commission proposed a Directive aimed at improving the

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<sup>34</sup> European Commission, 'Commission proposals to improve the working conditions of people working through digital labor platforms' (Press Release, 09. December 2021) < [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_6605](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605) > accessed 03. October 2023.

conditions of platform workers, which is currently in trilogue between the Council of the EU and the European Parliament and will be discussed in chapter III. of this Paper more in depth.

## CHAPTER II.

### **Gaps and challenges in the current protection of online platform workers**

As we have seen in the first chapter, the gig economy and working through online platforms has evolved significantly in recent years to what it is today and will continue to evolve in the near future. Along with rapid development, there are also challenges. Not only the number of platforms and the people working for them is growing, but also the types of work that platforms are engaging in and the business models they are using are becoming more and more diverse. This creates an environment in which some platforms are constantly changing the way they operate with the aim to grow, while others are disappearing in a very competitive market.

This relatively rapid rise of the platform economy is transforming the European labor market. There are several influences, such as globalization, technological progress, changes in economic structure or demographic developments, which are changing work, its organization, its content, and the way it is carried out.<sup>35</sup>

Platform work challenges and confronts existing legal and institutional frameworks and raises concerns about the quality of work and employment of platform workers, as well as the effects it has on economy and society. Workers have no control over algorithms that decide about their employment and income, which makes them unpredictable. Some platforms control when and where workers work, punish them for declining to work, and set prices and quality standards that are non-negotiable. Because social security is based on employment status, access to such protection is many times restricted. Due to the ambiguity of current tax laws, social security contributions, income tax, and social security protections are also difficult to identify.<sup>36</sup>

This chapter will address the main gaps and challenges in the protection of online platform workers. More specifically, I will investigate the main problem of platform workers, which is the misclassification of platform workers, their working conditions, lack of representation and

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<sup>35</sup> SRI, 'Interim Report No. 15: Sector-led innovation towards an efficient labor market in the Slovak Republic' (August 2022) < <https://www.employment.gov.sk/files/sk/praca-zamestnanost/podpora-zamestnanosti/np-sektorovo-riadene-inovacie/vystupy-np-sektorovo-riadene-inovacie/priebezna-sprava-c-15.pdf> > accessed 24. October 2023.

<sup>36</sup> Ibid <sup>(35)</sup>.

collective bargaining and last but not least, fragmented case-law and legislation within EU Member States.

### 1. Misclassification of platform workers

At the end of year 2023, no Member State in the EU has introduced a clear separate employment status for platform workers, which means that they are included in the traditional employment statuses as regulated by national law. A worker's employment status plays an important role in their protection because in most Member States it determines the level of social protection they receive, and this level is generally lower for the self-employed than for employees.

As the author I. Morsello has pointed out in her Paper, legislation on its own is not sufficient to describe the concept of employment (and self-employment) precisely, thereby de facto leaving the task of deciding who falls within these definitions and who does not to the national judicial authorities. Different countries may have different approaches to this classification and thus, may interpret this concept of employment in a very different way.<sup>37</sup>

Despite this, states around the world are being urged not only by the International Labor Organization (hereinafter referred as ILO)<sup>38</sup> but also by the EU to use certain "indicators" to prove the existence of an employment relationship and exclude self-employment. The establishment of the existence of an employment relationship should be governed by the facts and not by the name or form given to it by the parties. To give an example, ILO (of which all EU countries are members) has as its indicators the following: the fact that the work is carried out under the direction and supervision of and for the benefit of another party,<sup>39</sup> and the fact that the worker is regularly remunerated.<sup>40</sup>

Platform work is associated with a number of problems, one of which is the misclassification of these workers. Platform work makes it difficult to distinguish between an employment relationship and self-employment, as well as the duties that employers and employees have

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<sup>37</sup> Ilaria Morsello, Addressing Platform Worker Misclassification: State of the Art and Developments in the EU and in the US, Stanford-Vienna TTLF Working Paper No. 93 < <https://law.stanford.edu/wp-content/uploads/2022/09/TTLF-WP-93-Morsello.pdf> > accessed 25. October 2023.

<sup>38</sup> ILO, International Labor Conference (95th session), 'Recommendation concerning the employment relationship' (Geneva, 2006) p.66.

<sup>39</sup> ILO, Report V(1): The employment relationship' (International Labour Conference, 95th Session' (2006)) < [https://www.ilo.org/public/libdoc/ilo/2005/105B09\\_8\\_engl.pdf](https://www.ilo.org/public/libdoc/ilo/2005/105B09_8_engl.pdf) > accessed 25. October 2023 p.7-8.

<sup>40</sup>Ibid <sup>(39)</sup>.

towards one another. This is also mentioned in the recital 6 of the proposed EU Directive, where it states that misclassification of such workers may have also other consequences, as it may deprive these workers their access to existing labor and social rights, creates an unfair playing field for companies that correctly classify their employees but also can have effects on the tax bases of Member States, the coverage and viability of their national social security programs, and their industrial relations regimes.<sup>41</sup>

It is obvious that the results of the trialogues between the Council and the European Parliament will differ from the initial proposal of the Commission, however, is unlikely, that the crucial innovative elements of the Directive like a rebuttable legal presumption to assess employment status, which was originally proposed by the Commission, would be withdrawn.

M. Palimariciuc, a policy analyst, in his commentary for European Policy Center said that resolving misclassification will not be sufficient to enhance platform economy labor conditions. In his text he mentioned that the proposal to improve online platform work situation should create new rights on algorithmic governance, remove obstacles to collective bargaining and ensure effective cooperation between the Commission and the platforms.<sup>42</sup> Thus, he pointed on other challenges that the platform workers face, but are linked to the misclassification.

Conversely, V. De Stefano and A. Aloisi claim in their Paper that in order to resolve the other difficulties, the issue of the employment relationship needs to be resolved first and that the current labor law framework is inadequate to accommodate new working patterns and should be revised, both at the legislative and interpretative level.<sup>43</sup> This is also agreed by J.Berg et al., who wrote in their ILO Research Paper that recognition of employee status would immediately and automatically confer a number of benefits and rights on workers, which will be discussed in the following paragraphs.<sup>44</sup>

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<sup>41</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM(2021) 762 final, recital 6.

<sup>42</sup> Mihai Palimariciuc, 'Solving misclassification will not be enough to improve working conditions in the platform economy' (EPC, 23.6.2021) < <https://www.epc.eu/en/Publications/Solving-misclassification-will-not-be-enough-to-improve-working-condit~40b08c> > accessed 25. October 2023.

<sup>43</sup> Valerio De Stefano and A. Aloisi, European Legal framework for digital labour platforms, European Commission, 2018, ISBN 978-92-79-94131-3, doi:10.2760/78590, JRC112243.

<sup>44</sup> Janine Berg et.al, , Digital labour platforms and the future of work: Towards decent work in the online world' (2018) International Labour Office.

## 2. Working conditions

At both levels, on the EU and national level, the employment relationship continues to be the point of entry to labor and social protection. The uncertainty in the classification of employment status for platform workers often leads to their inability to claim labor and social rights, which has an impact on the precariousness of their work.

Currently, platform workers have no other choice except to file a complaint in court or depend on the labor inspectorates' authority in their Member States in order to get clarification on their employment status. AS ILO study shows, those who work through platforms often worry about irregular income and a large number of unpaid hours, especially when it comes to online web-based platform labor.<sup>45</sup>

In addition to low remuneration, social protection coverage of platform workers was relatively low and was perceived as another major problem among workers. The ILO survey conducted in 2017 found that one third of platform workers were covered only by some form of social protection and women had less access to social protection than men.

Platform workers are not protected in the event that their employment contract is terminated. The reason for this is that platforms are not obliged to give explanations or prior notice before dismissal. Some platforms can automatically link dismissal to a worker's (low) performance and not allow low-rated workers to continue working for platforms. In addition, the platform's employees are not covered either in the event of mass redundancies if the platform becomes insolvent.<sup>46</sup>

In most EU Member States online platform workers does not have access to minimum wages. As the author D. du Toit in his Paper wrote, there are two aspects of platform work, namely that employees have flexible schedules and that they are responsible for most or for all of the expenses associated with providing the services. Thus, it won't be feasible to establish an appropriate legal minimum wage for them until all of the expenses and time they devote to performing the services provided by the platform are included.<sup>47</sup>

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<sup>45</sup> ILO, 'World Employment and Social Outlook: The Role of Digital Labour Platforms in Transforming the World of Work' (2021) International Labor Office.

<sup>46</sup> Zachary Kilhoffer, et al., Study to gather evidence on the working conditions of platform workers. Final report, (2020) CEPS, EFTHEIA, HIVA-KU Leuven.

<sup>47</sup> Darcy du Toit, et al., 'Towards Legal Regulation of Platform Work: Theory and Practice' (2020) 41 Indus LJ (Juta) 1493.

Still, there are several EU member states where concerns about potentially insecure working conditions for platform workers are mitigated. This includes Sweden, which has solidly built social dialogue systems and comparatively few differences between employee and self-employed access to social protection and coverage.<sup>48</sup>

Another issue is working time of platform workers. As it was mentioned in the chapter I., one of the advantages of online platform work is that platform workers can decide on their own when they want to work and for how long. However, according to the European Commission, their flexibility in terms of working time is nevertheless limited by the systems and algorithms monitoring the platforms, even though at first sight this flexibility appears to be quite high. Moreover, many platform workers, especially those working on location-based platforms, might be required to work irregular hours, such as over the weekends, during public holidays or late nights. This is due to the fact that national laws on working hours, which typically only apply to employees, does not cover all platform workers.<sup>49</sup>

It is important to mention that platform workers also have a lack of opportunities for career development, training, and mobility compared to employees. Although people working across platforms can theoretically work for multiple platforms at the same time, a recent CEDEFOP study showed that platform workers do not feel that they could change platforms without affecting their earnings. This dependency on a single platform threatens the mobility of platform workers and can have a chilling effect on their career development.<sup>50</sup>

On top of that, pursuant to the European Centre of Expertise thematic review 2021 on platform work, workers hired through platforms in several EU countries are working through a network of subcontractors. As a result, they run the risk of not declaring their work officially and have access to somewhat poorer working conditions than regular workers, including access to health and safety standards.<sup>51</sup>

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<sup>48</sup> European Centre of Expertise in the field of labour law, employment and labour market policies (Thematic Review 2021 on Platform work < <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8419&furtherPubs=yes> > accessed 31. October 2023.

<sup>49</sup> European Commission, Commission Staff Working Document SWD (2021) 143 final of 15.6.2021 p.70.

<sup>50</sup> Cedefop, 'Developing and matching skills in the online platform economy: findings on new forms of digital work and learning from Cedefop's CrowdLearn study. (2020) Cedefop reference series, 116. < <http://data.europa.eu/doi/10.2801/758653> > accessed 31. October 2023.

<sup>51</sup> Ibid <sup>(48)</sup> .

### 3. Lack of representation and limited bargaining power

The current EU legal framework presents certain obstacles that prevent self-employed platform workers from enjoying the right to information and consultation, as well as the right to collective bargaining.<sup>52</sup> Thus, platform workers face very limited bargaining power and are often not represented.

In order to protect fair working and employment conditions and to improve the labor situation for workers, representation is essential. Collective rights are the basis of employment protection as a means of balancing the unequal powers of workers and employers. This is not always possible since many platform workers are classified as self-employed.<sup>53</sup>

As the author I. Morsello has written in her paper, self-employed persons are under EU law not prohibited from forming associations, nonetheless, there is a degree of uncertainty about the distinction between agreements made by these groups that comply with EU competition law and those that do not.<sup>54</sup>

Although the judgment *C-413/13 FNV Kunsten*<sup>55</sup> has recently made some positive developments by extending the concept of 'worker' to include the concept of 'false self-employed person', scholar T. Gyulavári is of the opinion that further steps need to be taken to meet the main objective by moving the emphasis of interpretation from the control test to economic dependence.<sup>56</sup>

Without consulting the platform workers themselves, platforms have the power to unilaterally establish contractual terms and conditions pertaining to compensation, working hours, dispute resolution, customer service, and other matters related to platform work. This provides those who work for platforms with minimal negotiating power, especially when combined with some platforms' capability to deactivate users and workers for little to no reason. The right to collective bargaining is crucial in the matter of increasing protection for platform workers, because collective agreements can improve working conditions, balance competition and fill

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<sup>52</sup> Tamás Gyulavári, 'Collective rights of platform workers: The role of EU law' (2020) Volume 27, Issue 4 < <https://journals.sagepub.com/doi/10.1177/1023263X20932070> > accessed 31. October 2023.

<sup>53</sup> *Ibid* (52).

<sup>54</sup> Zachary Kilhoffer, et al., Study to gather evidence on the working conditions of platform workers. Final report, 2020.

<sup>55</sup> C-413/13 FNV Kunsten Informatie en Media proti Staat der Nederlanden [2014] ECLI:EU:C:2014:2411.

<sup>56</sup> *Ibid* (49).



legislative gaps that are just as crucial for platform workers as they are for ordinary employees in other fields.

#### 4. Fragmented legislation and case-law within EU MS

To begin with, Member States of the EU have different labor markets, social security systems and taxes. National responses to platform work are thus diverse and developing unevenly across Europe. Therefore, only few EU Member States have legislated or issued court rulings with definitions of employment criteria at national level.<sup>57</sup>

Very few Member States have so far addressed the issue of online platform workers, either through specific measures or by addressing all forms of platform work. Several EU Member States (EL, ES, FR, IT and PT) have adopted national legislation specifically targeting the improvement of working conditions and/or access to social protection in platform work. In some Member States (AT, DK, EE, FI, HU, HR, LU, RO, SK and SI) people working through platforms may be indirectly influenced by wider, non-platform specific legislative initiatives. In Member States DE, LT and NL, according to the Commission's 2021 Impact Assessment document, the potential emergence of relevant legislation has been discussed.<sup>58</sup>

The growth of the gig economy during COVID-19 has led to several important questions regarding the legal nature of the platforms and the precarious legal status of their workers. In 2020, the International Trade Union Confederation adopted a joint statement at the World Council of Trade Unions calling for the extension of social protection to all workers, regardless of their employment status.<sup>59</sup>

The legal status of platform workers is under review by multiple European courts as a result of lawsuits brought by drivers of digital platforms operating on the European market such as Uber. The workers have sought recognition of their legal status as employees performing subordinate work. In the proceedings, judges have suggested a number of universal criteria for assessing

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<sup>57</sup> World Road Transport Organisation, 'Position on European Commission's proposal for a directive on improving working conditions in platform work' (June 2022) AD/BR8242/SMR.

<sup>58</sup> Ibid (49).

<sup>59</sup> ITUC, 'COVID-19: Urgent Economic Stimulus and Workplace Measures Required' (2020) < <https://www.ituc-csi.org/covid-19-urgent-economic-stimulus?lang=en> > accessed 13. November 2023.

whether reclassification of "self-employed" status to traditional employment status can be achieved.<sup>60</sup>

Despite these universal criteria, it is obvious that judges in various jurisdictions struggle with the task of properly classifying platform workers. Part of the difficulty in defining fictitious self-employment stems from how the definition of an employment contract is created and interpreted. Platforms often do this with the intention of circumventing labor, tax and social laws and regulations in order to cut costs and avoid payment obligations. Hence, the most effective way to oppose this is to challenge the formal classification in court.<sup>61</sup>

Although it could be argued that consistent case law could impose a specific viewpoint on this matter, there is no general application. Each litigation is handled on a case-by-case basis, thus the specific facts of the case determine how it is resolved. In addition to the unpredictability of the results of the platform worker litigation, such claims entail significant time and financial expenditures, deterring any endeavor.<sup>62</sup> Nonetheless, scholar V. B. Dubal argues that "*litigation continue to play an important deterrence role, both drawing public attention to these practices and dissuading some firms from embracing the independent contractor business model.*"<sup>63</sup> Therefore, litigation can still be a very useful deterrent tool that also raises awareness of the situation regarding the inadequate working conditions of platform workers.

However, when determining if a platform worker is an employee or self-employed, the "traditional" multifactorial tests<sup>64</sup> applied in many states may produce various outcomes. These multifactorial tests are criticized by academics for the reason that these tests are applied by courts in a very flexible manner, are known to be malleable, complex, and fact dependent.<sup>65</sup>

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<sup>60</sup> Kamila Naumowicz, 'Some remarks to the legal status of platform workers in the light of the latest European jurisprudence' (2021) *Studies on Labour Law and Social Policy* 28, nr 3: 177–189.

<sup>61</sup> Valerio De Stefano and A. Aloisi, *European Legal framework for digital labour platforms*, European Commission, 2018, ISBN 978-92-79-94131-3, doi:10.2760/78590, JRC112243.

<sup>62</sup> *Ibid* <sup>(54)</sup>.

<sup>63</sup> Veena B. Dubal, 'Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy' (2017) *Wis. L. Rev.* 239, p. 747 <

[https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2597&context=faculty\\_scholarship](https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2597&context=faculty_scholarship) > accessed 13. November 2023.

<sup>64</sup> International Labor Organization, 'R198 - Employment Relationship Recommendation, 2006 (No. 198)' < [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312535](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535) > accessed 13. November 2023, para 9.

<sup>65</sup> *Ibid* <sup>(54)</sup>.

Predictions of the outcomes of cases involving platform workers are therefore inherently uncertain.

As written by the C. Heißl in her comparative analysis on jurisprudence of national courts of the Member States confronted with cases of alleged misclassification of platform workers, it is rather difficult to draw overall conclusions about the prevailing patterns in national jurisprudence, especially given the diversity of platforms and the periodic reforms of their structures and working models, the lack of jurisprudence on some types of platforms, but also the inconsistency of judicial assessment in a number of EU countries.<sup>66</sup>

### Conclusion

This chapter analyzed gaps and challenges in the current protection of online platform workers within the EU. From the analysis made above, I came to the conclusion that the most frequently addressed and discussed challenges related to online platform work in the EU include employment status (misclassification), (lack of) representation and insufficient social protection.

People who work through platforms describe challenges of their work related to uncertainty, unpredictable working hours, a lack of regular income and job stability.

On top of that, there is a fragmentation of legislation of the EU Member States which leads to differing court rulings on the specific matters.

All in all, the most important challenges facing platform workers remain largely unresolved, but at the same time there is a growing demand to address these challenges to avoid uncertainties gig economy currently faces.

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<sup>66</sup> Christina. Heißl, ‚Jurisprudence of national Courts confronted with cases of alleged misclassification of platform workers: comparative analysis and tentative conclusions’ European Centre of Expertise in the field of labour law, employment and labour market policies (ECE) (2022, European Commission).

## CHAPTER III.

### **Proposal to improve the working conditions of people working through digital labor platforms**

On December 9<sup>th</sup>, 2021, the European Commission proposed a package, or in other words a set of rules to enhance platform workers' working conditions and to encourage the EU's digital labor platforms to grow sustainably.

In the press release of the European Commission, it was written that these new rules were designed to ensure that people working through digital work platforms are able to enjoy the labor rights and social benefits to which they are entitled. The proposal was intended to give additional protection to the use of algorithmic management (i.e. automated systems that support or replace management functions at work). The main aim of the package was to create a common set of EU rules that would provide greater legal certainty and allow digital work platforms to fully benefit from the economic potential of the single market and level the playing field.<sup>67</sup>

As previously mentioned, the Commission has put forth a communication outlining EU policy and actions regarding platform work, a proposal for a directive intended to improve platform worker conditions, and draft guidelines illustrating how EU competition law should be applied to collective agreements of self-employed seeking to improve their working conditions. In addition to this package, the Commission has called on relevant actors such as national authorities, social partners and others to take action. Additionally, the package intends to create the groundwork for the development of future international standards for top-notch platform work.

When looking at the background of this draft package, it is essential to mention that the digital platform economy is growing rapidly, and it was therefore inevitable to regulate this particular form of work in order to safeguard labor protection for these workers.

With the growing popularity of online platform work came not only new ways of working but also new challenges. It became harder and harder to correctly classify people's employment

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<sup>67</sup> Ibid (31,32).

status, which led, and still leads, to a lack of labor rights and social protection for these people. According to the European Commission, it is estimated that between 1.7 and 4.1 million people could be reclassified as workers as a result of the proposed directive.<sup>68</sup>

This chapter will thoroughly analyze the text and measures introduced in the package, namely a communication setting out the EU approach and measures on platform work, a proposal for a Directive on improving working conditions in platform work and draft guidelines clarifying the application of EU competition law to collective agreements of solo self-employed people seeking to improve their working conditions, the criticism of the proposed Directive and lastly, current legislative process.

### 1. Communication setting out the EU approach and measures on platform work<sup>69</sup>

The Communication in the Communication stipulates many reasons why there is a need to act in the area of online platform work. Such reasons include for example that platform employment is a constantly evolving field of work, the digital platform industry is expanding swiftly, platform work is not uniform and the opposite of homogenous, more clarity is required regarding the employment status of those who work through digital labor platforms and that social dialogue in the form of collective bargaining remains very limited.

After hearing the social partners and relevant stakeholders, trade unions and employers' organizations generally agreed with the overall objectives set by the Commission and the need to address them. Representatives of workers have called for bold action to address misclassification and the ability to start a social conversation about algorithmic management. Digital labor platforms demanded clearer regulations and a framework to maintain fairness without impeding innovation and job growth have. Individuals engaged in digital labor emphasized how much they appreciate the freedom and opportunity that working on platforms provides, but they also want their social rights to be upheld and strengthened.<sup>70</sup>

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<sup>68</sup> European Commission, 'Improving working conditions in platform work: Factsheet' (December 2021) available at < [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_6605](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605) > accessed 25. October 2023.

<sup>69</sup> European Commission, 'Communication from the Commission to the European Parliament, The Council, The European Economic And Social Committee and The Committee Of The Regions: Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work' (9. December 2021) COM(2021) 761 final.

<sup>70</sup> Ibid <sup>(33)</sup>.

The Communication states that the starting point for existing employment and social rights is employment status, which is exactly why the rebuttable presumption of employment is one of the main elements of the proposed Directive.

In the area of algorithmic governance, the Commission has created a new set of rights, which will guarantee that labor inspectorates, workers, and their representatives are better informed about the effects of automated monitoring and decision-making systems on working conditions. The Commission has expressed its support for social dialogue in the platform work through capacity building activities for social partners to initiate social dialogue on algorithmic governance in the context of the new information and consultation rights proposed in the Directive.

The Commission also stated that it is fully aware that algorithms will continue to shape work beyond digital working platforms as technological developments accelerate and expressed the need to continue to monitor the situation and consider further action if necessary.<sup>71</sup>

To supplement the measures proposed in the Directive, the Commission in its Communication extends an invitation to collaboration among Member States, digital labor platforms, and social partners in order to strengthen and enhance the proposed guidelines and Directive. These stakeholders should ensure improved transparency for the digital labor platforms operating in their territory regarding the national rules governing the classification of employment status; facilitate the development of small and medium-sized digital labor platforms, for example by providing access templates, including relevant and sufficiently comprehensive information on the applicable legal framework; and advise and guide those working through digital labor platforms on the fiscal, social security, and/or labor law obligations of their platform activity.<sup>72</sup>

And what about co-legislators? What was their opinion on the topic? Notably, the European Commission makes a reference in the Communication about the initiative report of the European Parliament, with the aim to address challenges in platform work. In this report, the European Parliament requests that significant steps should be taken to address the potential risk of employment status misclassification and to address algorithmic management issues in the

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<sup>71</sup> Ibid (69).

<sup>72</sup> Ibid (69).

context of platform work.<sup>73</sup> As for the Member States and the Council itself, the Employment and Social Affairs Council's conclusions from December 2020 revealed that the Member States recognize the need for more legal clarity regarding the rights and responsibilities of individuals who work on digital labor platforms. They also identified the uncertainty surrounding these individuals' employment status as a major concern. Most of the delegations contended that if social protection and working conditions were to be improved, there was no need to establish a specific category of workers for online platform workers.<sup>74</sup>

Like the Ministers at the Council of the EU, the European Parliament report called for platform workers to be classified either as workers or as genuinely self-employed. Depending on their actual situation, with the burden of proof on the party deemed to be the employer to prove that there is no employment relationship in accordance with the national definitions set out in the legislation or collective agreements of the Member State concerned, should the workers challenge the classification of their employment status in a judicial or administrative procedure.<sup>75</sup>

Besides, also the European Economic and Social Committee called on the Commission and the Member States to draw up guidelines to help clarify the employment status of platform work, to clarify the concept and move towards unification in order to achieve decent work in the platform economy and to ensure that all workers have access to a set of rights and protections regardless of their employment status or type of contract, thereby ensuring that some operators cannot gain a competitive advantage by failing to fulfil their duties and responsibilities.<sup>76</sup>

## 2. A proposal for a Directive on improving working conditions in platform work<sup>77</sup>

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<sup>73</sup> European Parliament, "Report on Fair working conditions, rights and social protection for platform workers – new forms of employment linked to digital development". 2019/2186(INI) <

[https://www.europarl.europa.eu/doceo/document/TA-9-2021-0385\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0385_EN.html) > accessed 13. October 2023.

<sup>74</sup> The Council of the EU, "Video conference of employment and social policy ministers, 3 December 2020"

<https://www.consilium.europa.eu/en/meetings/epsco/2020/12/03/> > accessed 13. October 2023.

<sup>75</sup> Ibid <sup>(38)</sup>.

<sup>76</sup> European Economic and Social Committee, "Fair work in the platform economy (Exploratory opinion at the request of the German presidency)" SOC/645-EESC-2020 < <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/fair-work-platform-economy-exploratory-opinion-request-german-presidency> > accessed 13. October 2023.

<sup>77</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM(2021) 762 final.

The most important part of the package introduced is the proposal for a Directive on improving working conditions in platform work. In the political guidelines, President Ursula von den Leyen committed to "*looking for ways to improve the working conditions of platform workers.*" By addressing the changes that the digital transformation has brought to labor markets, the proposed Directive should thereby fulfill this commitment and support the implementation of the European Pillar of Social Rights Action Plan. Member States of the EU, social partners, and civil society at the Porto Social Summit in May 2021 welcomed this initiative and commitment of the European Commission.<sup>78</sup>

The proposed Directive is based on Article 153(1)(b) of the TFEU, which confers on the Union the power to promote and complement the activities of the Member States in the field of improving working conditions. In this specific field, the article 153(2)(b) TFEU allows the European Parliament and the Council to adopt, in accordance with the ordinary legislative procedure, directives laying down minimum requirements for their progressive implementation, taking into account the conditions and technical rules adopted in each Member State.<sup>79</sup>

The proposed Directive is also based on Article 16(2) TFEU because it addresses the situation of persons working for platforms as regards the protection of their personal data processed by automated monitoring and decision-making systems.<sup>80</sup>

This Directive plans to cover all types of platform workers, from those doing crowd work to those offering ride-hailing services or cleanings, in contrast to the majority of national legislative attempts that solely target certain groups of platform workers<sup>81</sup>.

There were three main objectives of this Proposal, namely to guarantee that those employed by platforms have access to the relevant labor and social protection rights and have, or are able to obtain, the appropriate employment status in respect to their real relationship with the digital labor platform; to make sure algorithmic management in the context of platform work is

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<sup>78</sup> Political Guidelines for the Next European Commission 2019-2024. 'A Union that Strives for More. My Agenda for Europe.' < <https://www.europarl.europa.eu/resources/library/media/20190716RES57231/20190716RES57231.pdf> > accessed 13. October 2023.

<sup>79</sup> Ibid (24) art. 153 TFEU.

<sup>80</sup> Ibid (24) art. 16(2) TFEU.

<sup>81</sup> Ilaria Morsello, 'Addressing Platform Worker Misclassification: State of the Art and Developments in the EU and in the US', (2022) Stanford-Vienna TTLF Working Paper No. 93 < <https://law.stanford.edu/wp-content/uploads/2022/09/TTLF-WP-93-Morsello.pdf> > accessed 25. October 2023.



equitable, transparent, and accountable; and last but not least, to strengthen the enforcement of the applicable laws for individuals working for online platforms, especially those operating on a cross-border level, and to increase transparency, traceability, and knowledge of advancements in platform work.<sup>82</sup>

To be more precise, one of the main Commission's proposals in the originally proposed Directive for improving the conditions of the online platform workers was to reclassify platform workers whose working conditions more closely mirror those of employees than those of the self-employed. To achieve this, regardless of the wording of workers' contracts, workers' working conditions should be assessed against a set of five criteria ("subordination criteria") designed to determine whether the platform workers are operating effectively as employees.<sup>83</sup> Despite the fact that the definition of the employment relationship varies throughout Member States, common characteristics include employee subordination to or reliance on an employer. In order to adapt this current definition to the new platform work reality, the Commission has developed these criteria that draw heavily from important case law from Member State jurisprudence, in particular from the supreme courts of France, Italy, and Spain.<sup>84</sup>

These "subordination criteria" were created to evaluate the level of control platforms have over employees' wages, appearance and performance during worktime, working-hours, but also capacity to work for other platforms.<sup>85</sup>

The proposal provides that all self-employed platform workers whose conditions meet two out of the five "subordination criteria" that are listed in Section 2.1 will be reclassified as employees unless the platform proves to the contrary.<sup>86</sup>

Secondly, the Commissions' proposal covered the new data-driven technologies (algorithms) that platforms use. As the Commission recognizes that algorithms can occasionally supervise employee behavior and working conditions in the same way as a human manager and that these managing ways are often non-transparent, the proposal includes measures to make this 'algorithmic management' subject to the same rules as employers in order to preserve workers' rights to non-discrimination, transparency, responsible decision-making, privacy and data, as

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<sup>82</sup> *Ibid* (77).

<sup>83</sup> *Ibid* (77) p.3.

<sup>84</sup> Judgement No. 374 Mr X v. Uber France and Uber BV [2020], see also Judgement No. 1737 Mr B. v. Take Eat Easy, [2018], Glovo. Rider v. Glovo App 23, S.L. [2020], Cass. n. 1663/2020 (Foodora) [2020].

<sup>85</sup> *Ibid* (77) recital 25.

<sup>86</sup> *Ibid* (77) section 2.1, see also Kullmann M. (2022) 'Platformisation' of work: An EU perspective on Introducing a legal presumption, *European Labour Law Journal*, 13(1), 66-80.

well as their health and safety. The proposed Directive also includes the introduction of appropriate channels for hearing and requesting review of decisions taken or supported by automated systems. These algorithmic management rules would be applicable to all platform users, regardless of whether they are self-employed or employees. They may facilitate better-informed negotiations and bargaining between the respective platforms and workers, which may also open the door to changing the subordination requirements.

It follows, that in addition to more efficient access to remedies against automated decisions, online platform workers and their representatives will benefit also from increased transparency and comprehension of algorithmic management techniques, which should enhance working conditions of such workers. As it is stated in the proposal, these rights will be based on and expand on existing safeguards in relation to the processing of personal data by automated decision-making systems established in the General Data Protection Regulation (GDPR), together with the proposed duties of providers and users of artificial intelligence (AI) systems with regard to transparency and human supervision of certain AI systems in the proposed AI Act.<sup>87</sup>

Last but not least, the proposal of the Commission acknowledged that de facto enforcement, traceability, and transparency issues, especially in frequent cross-border scenarios, impede platform workers' access to social security in addition to de jure exclusions. In order to address this problem, the Commission's proposal imposed obligations for platforms to report workforce statistics to labor and social protection agencies or authorities. This would, according to the Commission, improve authorities' awareness of which digital labor platforms are currently operating in the respective Member State, by providing those authorities with access to relevant elementary information about the number of people working through digital labor platforms, their employment status and their standard terms and conditions of employment. Thus, the aim of this measure is to assist the competent authorities in complying with the rights and obligations currently in force in the field of social protection and working conditions of platform workers.<sup>88</sup>

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<sup>87</sup> Ibid (77) p. 3-4.

<sup>88</sup> Ibid (77) p. 4.

3. Draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons<sup>89</sup>

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between undertakings which restrict competition. The European Court of Justice (CJEU) has acknowledged in its jurisprudence that the EU competition laws do not apply to collective bargaining between workers and employers. Nonetheless, genuine self-employed workers are regarded as "undertakings" in accordance with EU competition law, and any collective agreements they may form (including collective bargaining agreements) face a chance of violating Article 101 TFEU.<sup>90</sup>

Building on existing case law, the proposed Guidelines describe the situations in which the self-employed are comparable to workers and therefore not covered by Article 101 of the Treaty on the Functioning of the EU (TFEU).<sup>91</sup>

The draft Guidelines also clarify that some agreements should not give rise to Commission intervention under Article 101 TFEU, for example where self-employed workers find it difficult to influence their working conditions because they have a weak bargaining position.<sup>92</sup>

The proposed Guidelines encompass a broad spectrum of individuals who work as self-employed: people who are economically dependent or work side-by-side with other workers in the online and offline world, people who work through platforms or, those who negotiate their working conditions with counterparties who have some degree of economic weight, and those who take part in collective bargaining agreements in conformity with national labor laws and the Copyright Directive.<sup>93</sup>

Consequently, the draft Guidelines aim is to seek to guarantee that consumers and small and medium-sized enterprises (SMEs) will continue to benefit from competitive prices and innovative commercial models, including in the digital economy, while ensuring that

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<sup>89</sup> European Commission, „Annex to the Communication from the European Commission: Approval of the content of a draft for a Communication from the European Commission: Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons“ (9.december 2021) C(2021) 8838 final.

<sup>90</sup> C- 413/13 NV Kunsten Informatie en Media v. Staat der Nederlanden [2014] EU:C:2014:2411.

<sup>91</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art. 101 TFEU, Guidelines paras 9, 21.

<sup>92</sup> Ibid <sup>(89)</sup> p. 35.

<sup>93</sup> Ibid <sup>(89)</sup> p. 24-31.

competition law does not impede collective agreements to improve the working conditions of certain self-employed persons, who may have little control over their working conditions.<sup>94</sup>

There are also other noteworthy points to mention with regards to this Guidelines.

First, the draft Guidelines on the application of EU competition law have been subject to an eight-week public consultation seeking feedback from stakeholders, following which the Commission adopted them. The Guidelines are binding on the Commission in its subsequent interpretation and enforcement of EU competition rules.

Second, this Guidelines does not create any social rights or obligations, nor is it intended to change the definitions of 'worker' or 'self-employed', nor does it affect the possibility for self-employed persons to ask national authorities or courts to reclassify their employment status as 'worker'.

Third, it is important to keep in mind that these Guidelines solely specify how the Commission will implement EU competition laws in relation to collective bargaining agreements pertaining to certain self-employed working conditions. This will not affect the autonomy of the social partners or the prerogatives of the Member States in social policy.<sup>95</sup>

#### 4. Criticism of the proposal

Indeed, EU's package proposal was not left without criticism by scholars. According to I. Morsello, the establishment of a presumption of employment status for platform workers as proposed by the Directive is likely to be more problematic than the solution of providing special protection for platform workers for the reason that such approach might be harmful to both employees as well as platforms.<sup>96</sup>

To give an example, the author claimed that under this approach, platforms might not be able to pay social benefits to all workers who provide services through online platforms and thus would be forced to change their business models as they would have to adjust to fixed working hours, which would likely mean lower efficiency for platforms and less customer-friendly

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<sup>94</sup>European Commission, 'Draft Guidelines on collective bargaining of self-employed' (December 2021) < [https://competition-policy.ec.europa.eu/public-consultations/2021-collective-bargaining-2\\_en](https://competition-policy.ec.europa.eu/public-consultations/2021-collective-bargaining-2_en) > accessed 15. October 2023.

<sup>95</sup> European Commission, 'Questions and answers: Commission adopts Guidelines on collective agreements of self-employed people' (29. September 2022) < [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_22\\_5805](https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_5805) > accessed 15. October 2023.

<sup>96</sup> Ibid <sup>(81)</sup>.

services. At the same time, workers would likely lose their flexibility in terms of schedules and routes, order of tasks or ability to accept other work. Another problem for them may be the recruitment and termination process (hiring and dismissing process) in the view of the fact that it would require more bureaucracy, more contractual provisions to be signed, a selection process and so on.<sup>97</sup>

Another scholar I. B. Radić believes that primary reliance on the classification criteria will in practice lead to the activation of the presumption of the existence of an employment relationship for potentially very large numbers of platform workers. He agrees that some form of digital platform control over labor performance is present in a large number of platforms, and warns that if the proposed Directive were to be adopted, a number of court litigations could arise in which platforms would challenge the existence of an employment relationship.<sup>98</sup>

I would also like to mention views of the stakeholders, namely International Road Transport Union (IRU). Their position paper also criticized European Commission's proposal for a Directive on improving working conditions in platform work.<sup>99</sup> In their position they expressed that they understood the importance of the European Commission's initiative to address the misclassification of people working for digital labor platforms and expressed support for workers' rights, the importance of fair working conditions and access to the necessary labor and social rights protections for all workers, including platform workers. However, they mentioned the principle of subsidiarity, one of the guiding principles of EU lawmaking according to which decisions should be taken at the level closest to the citizen. IRU is of the opinion that the proposal to be an inappropriate legal instrument to deal with this issue as it is not in line with the principle of subsidiarity. That being so, they consider non-binding recommendation, interpretation, or guidelines respecting the principle of subsidiarity to be more adequate.

In the opinion of the IRU, the draft Directive contains an overly vague definition of online platforms and a very broad scope of application which does not take into account the differences existing in the platform market and the local nature of the platforms' activities. Furthermore, the proposed Directive sets out inaccurate criteria for determining the true nature of the

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<sup>97</sup> Ibid (81).

<sup>98</sup> Iva Bjelinski Radić, 'Critical Reflections on the European Commission's Proposal for a Directive on Improving Working Conditions in Platform Work' (2022) 72 Zbornik PFZ 1467.

<sup>99</sup> The International Road Transport Union, 'European Commission's proposal for a directive on improving working conditions in platform work' (IRU), (June 2022) AD/BR8242/SMR.

employment relationship, with which also agreed I. Morsello in her Paper and described these criteria as controversial because in her opinion, they would complicate rather than simplify the classification process. Finally, the IRU called for clarification of the role of the social partners. They consider it important to clearly define the role that the social partners will play in future implementation or discussions on this topic.

Scholars J. Hooker and L. Antonucci from European Social Observatory (OSE) in their research paper criticized that the proposal still failed to tackle social protection gaps for platform workers as the Commission rely on the reclassification of platform workers as employees, which they found to have limitations.<sup>100</sup> As claimed by the authors, neither text (the Commission proposal or Rapporteur's proposed amendments) fully responds to stakeholders' proposals to extend formal social protection to all platform workers regardless of their employment status, despite the fact that they have been mentioned in previous Commission consultation documents and supported by the responses to the consultation of trade unions and the social partners of civil society.

In the opinion of the OSE authors of the research paper, social protection is still the responsibility of the Member States, and so there is only a little room for intervention on these issues by EU legislators. That being the case, based on their findings, obtaining social protection for all platform workers will primarily depend on governmental initiatives. The authors believe that the European Pillar of Social Rights and other EU initiatives may serve as a roadmap for such social protection activities.<sup>101</sup>

##### 5. Current state of the legislative process

To give a background to the legislative process, in September 2021 the European Parliament adopted its own initiative resolution on "*Fair working conditions, rights and social protection for platform worker*" advocated for better working conditions and a minimum set of rights for online platform workers which included access to social assistance regardless of their employment status. In terms of platform workers' legal standing, the Parliament advocated for a rebuttable presumption of an employment relationship and a shift in the burden of proof for

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<sup>100</sup> Josie Hooker and Lorenza Antonucci, 'Improving the EU Platform Work Directive proposal: a contribution from emerging research findings, (2022) OSE Paper Series, Opinion Paper No. 28.

<sup>101</sup> Ibid <sup>(100)</sup>.

the employer. The resolution further advocated for essential and transparent information concerning their working conditions and the calculation of fees, establishing minimum requirements for safety and health at work, the right to adequate training, access to data and benefit from data protection as well as non-discrimination.<sup>102</sup>

The Council's position was a bit earlier and published their recommendation on access to social protection for workers and the self-employed in November 2019. The Council emphasized that several worker categories including those working through temporary agency contracts, traineeships, seasonal workers, on-demand workers, platform workers, and short-term part-timers, are not adequately covered by social protection schemes in some Member States.<sup>103</sup>

In March 2023, the European Economic and Social Committee (EESC) expressed its views in an opinion in which it supported the Commission's aim to introduce a common approach to the legal classification of workers but noted that the proposed classification criteria did not reflect the dynamic and swift evolution of the digital market. According to the EESC, the presumption of employment should apply for the benefit of individual workers who provide their work or services under the specific functions of direction.

Furthermore, the EESC noted that the rights relating to algorithmic management should be applicable to all situations where algorithmic management is used in the context of employment and that additional provisions should be included to give effect to the right to review an automated decision. Moreover, the EESC emphasized that all platform workers should be entitled to information, consultation, and collective bargaining, and that article 14 of the proposed Directive should specifically mention trade unions, which are entitled to engage in such negotiations.<sup>104</sup>

The deadline for scrutiny by national Parliaments has been set for 8 March 2022, where 8 Member States (BE, LU, MT, NL, PT, RO, SI, ES) have expressed regret in their joint statement

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<sup>102</sup> Ibid <sup>(39)</sup>.

<sup>103</sup> The Council, 'Council Recommendation on access to social protection for workers and the self-employed' (2019/C 387/01) < [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2019.387.01.0001.01.ENG&toc=OJ:C:2019:387:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.387.01.0001.01.ENG&toc=OJ:C:2019:387:TOC) > accessed 17. October 2023.

<sup>104</sup> European Economic and Social Committee, 'Opinion: Working conditions package – platform work' (March 2022) SOC/709.

that the rebuttable legal presumption of employment, as agreed in the general approach, is weaker than that originally proposed by the Commission.<sup>105</sup>

To give also views about other Member States, Sweden in their reasoned opinion from April 2022 commented that the proposal does not comply with the principle of subsidiarity and constitutes a direct threat to the Swedish labor market model, because the proposal is based on the presumption of employment proposed in Article 4, which abolishes the Swedish concept of “employee”.<sup>106</sup>

In June 2022, the European Committee of the Regions (COR) criticized in their opinion “*Improving working conditions in platform work*” the proposal's omission of any specific mention of local and regional authorities, arguing that it is often these authorities who are charged with implementing labor laws and determining the status of workers. Besides, the COR welcomed the rebuttable presumption, but stated that meeting just one of the requirements (as opposed to the Commission's suggestion of two) should be adequate in order to establish the existence of an employer, and expressed its opinion that the list of requirements is not exhaustive.<sup>107</sup>

In June 2023, EU labor ministers at the Employment and Social Affairs Council (EPSCO) endorsed a general approach on the Platform Workers Directive. A total of 22 MS approved the text of the Council’s general approach, while only five namely Estonia, Germany, Greece, Latvia and Spain abstained from the vote. The countries that were part of that joint declaration from March 2022 agreed not to stand in the way “*in order to keep the legislative process on track*”.<sup>108</sup> The Council is currently negotiating with the European Parliament in trilogue, to find provisional agreement to be approved by both European Parliament and the Council.

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<sup>105</sup> The Council of the European Union, ‘Joint Statement concerning Proposal for a Directive on improving working conditions in platform work’ 10107/23 ADD2 < <https://data.consilium.europa.eu/doc/document/ST-10107-2023-ADD-2/en/pdf> > accessed 23. October 2023.

<sup>106</sup> European Parliament, ‘Reasoned opinion of the Swedish Parliament on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work’ (6. April 2022) < [https://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/parlements\\_nationaux/com/2021/0762/SE\\_PARLIAMENT\\_AVIS-COM\(2021\)0762\\_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2021/0762/SE_PARLIAMENT_AVIS-COM(2021)0762_EN.pdf) > accessed 23. October 2023.

<sup>107</sup> European Committee of Regions, ‘Opinion: Improving working conditions in platform work’ (June 2022) < <https://data.consilium.europa.eu/doc/document/ST-11328-2022-INIT/en/pdf> > accessed 17. October 2022.

<sup>108</sup> Théo Bourgery-Gonse, ‘EU countries nail down common position on platform workers directive’ (12. June 2023, Euractiv) < <https://www.euractiv.com/section/gig-economy/news/eu-countries-nail-down-common-position-on-platform-workers-directive/> > accessed 23. October 2023, see also Council’s General Approach < <https://data.consilium.europa.eu/doc/document/ST-10107-2023-INIT/en/pdf> > accessed 23. October 2023.



At the time of writing this Thesis in late 2023, the last trilogue of the year was scheduled for mid-December during the plenary session of Parliament in Strasbourg. During this trilogue, the European Commission, the Council and the European Parliament reached a preliminary agreement on the draft Directive.

The provisional agreement reached addresses misclassification, with the agreement that workers will be legally considered employees of a digital platform (and not self-employed) if their relationship with the platform meets at least two of the five criteria set out in the Directive. These criteria are following: upper limits on the amount of money workers can receive, supervision of their performance, control over the distribution/ allocation of tasks, control over working conditions and restrictions on choosing working hours, restrictions on their freedom to organize their work and rules on their appearance or conduct. The preliminary agreement must now be approved by the Council and Parliament.<sup>109</sup>

Regarding algorithms, the agreement reached ensures that workers are informed about the use of automated monitoring and decision-making systems. Furthermore, it prevents digital work platforms from processing particular types of personal data through automated monitoring or decision-making systems. Prohibited data include for example private conversations, personal beliefs or biometric data. Under the Directive, these systems must be monitored by qualified personnel who are afforded special protection from adverse treatment. Additionally, human supervision is also guaranteed in the case of important decisions such as the suspension of accounts.<sup>110</sup>

### Conclusion

This chapter thoroughly discussed new proposal package prepared by the European Commission to address current working conditions of the online platform workers within the EU. This package includes a proposal for a Directive on improving working conditions in platform work accompanied by the Communication setting out the EU approach and measures

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<sup>109</sup> The Council, , Rights for platform workers: Council and Parliament strike deal' (Press Release) < <https://www.consilium.europa.eu/en/press/press-releases/2023/12/13/rights-for-platform-workers-council-and-parliament-strike-deal/> > accessed 19. December 2023.

<sup>110</sup> Ibid <sup>(108)</sup>, see also < <https://www.europarl.europa.eu/news/en/press-room/20231207IPR15738/platform-workers-deal-on-new-rules-on-employment-status> > accessed on 15. December 2023.

on platform work and draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons.

The main objectives of this proposal are to address the challenges outlined in chapter II. of this Paper. These specifically include making sure that platform workers are appropriately classified and have access to relevant labor and social protection rights, platform workers are fairly, transparently, and accountably managed through algorithms, and that the laws that apply to platform workers, especially those who work across borders, are strictly enforced.

This proposal faces also criticism from various sides. OSE in their research paper claims that the proposal still failed to tackle social protection gaps. IRU on the other hand considers that the proposal is an inappropriate legal instrument to deal with this issue, taking into account the principle of subsidiarity. In addition, scholar I. Morsello claims that the presumption of employment status of platform workers as proposed in the Directive is likely to cause more problems than it solves.

At the time of writing this Paper, the proposed Directive was in the trilogue stage between the European Parliament, the European Commission and the Council of the European Union. In mid-December, the members of the European Parliament and the Council reached a provisional agreement on the proposed Directive, which now needs to be approved by the Council and the European Parliament.

## CHAPTER IV.

### **Alternative proposed reforms and policy recommendations**

Chapter III. dealt with the main proposed reform on the protection of online platform in the European Union. As mentioned above, this draft Directive has been the subject of a trilogue between the Commission, the European Parliament and the Council of the EU at the time of writing of this Thesis. It is largely a question of concessions from one to the other. Eventually, at the end of 2023, they managed to reach a preliminary agreement between the institutions. This proposal of the Directive now needs to be finally endorsed by both European Parliament and the Council.

When looking at the proposal of the European Commission from 2021 and the current state of the legislative process, it should also be taken into account that many of the currently discussed proposals want to be approved by the EU co-legislators as soon as possible, ideally before the end of the mandate of the European Parliament, which ends with the elections in June 2024. With the new Members of the European Parliament (MEPs), new Commissioners will be proposed by the Member States and the entire European Commission's cabinet will have to be heard and approved by the European Parliament. The new cabinet may potentially have different priorities to those presented by Ursula von der Leyen in 2020 and may not include the issue of improving labor conditions of online platform workers.<sup>111</sup>

For this reason, there is a need to investigate into other alternatives, apart from the proposed Directive, on how to improve protections of online platform workers in the EU and national legislations, should the proposal for a Directive aimed at online platform workers not be passed in the near future. This chapter will look into the frequently discussed and controversial introduction of the third category of the workers and establishment of the code of conduct by online platforms.

#### 1. Introduction of the third category of the workers

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<sup>111</sup> European Union, „Elections and appointments for EU institutions‘ < [https://european-union.europa.eu/institutions-law-budget/leadership/elections-and-appointments\\_en](https://european-union.europa.eu/institutions-law-budget/leadership/elections-and-appointments_en) > accessed 22. November 2023.

As it has been stated numerous times in this Paper, the classification of a worker is a crucial "gateway" to determining who is entitled to and covered by the protections of EU labor laws. In reaction to numerous litigations not only in the EU but also in the United States as well as due general misunderstanding regarding the proper classification of gig workers, a distinct "in-between" or "third," category of employment status has been established by labor and/or social security legislation in a number of EU member states, in addition to the classification of worker as an employee or self-employed.<sup>112</sup> Supporters of this idea often suggest that the creation of a third category would be a new innovation, appropriately designed and adapted to the era of working through digital platforms.<sup>113</sup>

Some member states, for example Italy, has in its legislation terms “employer-organized workers” and “employer-coordinated workers”, which are basically separate categories of self-employed persons with a ‘quasi-subordination’. These workers are protected to the certain extend by Italian national labor law. However, as the scholar M.A. Cherry pointed out, although the category of quasi-subordinates technically still exists in Italy, its scope is currently limited due to the existing abuse of this third category, because it was much cheaper for companies to employ a quasi-subordinate worker than an employee, since employees were entitled to more substantive protection under Italian labor law and companies wanted to reduce costs and avoid protecting all workers they need for the performance of the work.<sup>114</sup> Owing to the fact that "*no social security contributions had to be paid in their regard by the principal, at that time,*" quasi-subordinate workers were perceived as an affordable alternative to the established employment relationships in Italy.<sup>115</sup>

In Spain there exist a statute for self-employed workers<sup>116</sup>, which creates a third category of workers named as 'economically dependent self-employed workers' (hereinafter referred as “TRADE”). TRADE has been enhanced with a fairly comprehensive package of benefits and protections nearly matching those provided to the employees. In addition to other time-consuming administrative conditions and compliance standards, the 75 % economic

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<sup>112</sup> Ibid (48).

<sup>113</sup> Vin Guerrieri, ‘Uber Cases Could Spur New Employee Classification’, (2016) LAW360 BLOG.

<sup>114</sup> Miriam A. Cherry, A. Aloisi, A Critical Examination of a Third Employment Category for On-Demand Work (In Comparative Perspective) (2018) Scholarship Commons, Saint Louis University.

<sup>115</sup> Ulrike Muehlberger, ‘Dependent self-employment, workers on the border between employment and self-employment’ (Palgrave Macmillan London, 2007), see also S. Liebman, ‘Employment situations and workers’ protection’ < [https://ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/genericdocument/wcms\\_205366.pdf](https://ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_205366.pdf) > accessed 28. November 2023.

<sup>116</sup> Law No. 20/2007, Official Gazette, No. 166, 12 July 2007, pp. 29964–29978.

dependency criterion is a key factor in determining whether a worker is to be considered as a TRADE worker. As a consequence, it must be noted that becoming a TRADE worker in Spain is challenging and only a small number of workers have actually become classified as TRADE.

I will also mention the legislation of one Member State that caught my eye and has introduced some sort of third category of workers, namely Germany. In Germany, the legislation recognizes employees, independent workers but also “employee-like-person”. There are two decisive features in determining the status, namely that the worker is economically dependent and in need of social protection. Nevertheless, they cannot participate in works councils, and are often excluded from company pension plans and collective agreements.<sup>117</sup> In comparison with Spanish legislation, German law provides that “employee-like-person” shall work predominantly for one client and should be dependent on one client to the extent of 50 % of his/her income, which is a margin that has a lot in common with the Spanish TRADE.<sup>118</sup>

Consequently, only few countries in the EU have put in place legislation covering third category of workers. In Italy, the “quasi-subordinate” often leads to disputes and becoming a “third category” worker in Germany and Spain is challenging due to stringent regulations that the workers view as major obstacles.

The scholar C. Heißl said in her Paper that considering the variety of circumstances and the legitimate skepticism voiced over the introduction of “intermediate” status for platform workers she is of the opinion that it can, in certain cases, preserve a steady, “regular” employment pattern where this is feasible and justified given the role of the platform in organizing and determining the service and its price, but also tolerating more casual patterns of work based on genuinely flexible individual agreements between worker and customer.<sup>119</sup>

As noted in chapter III, during the December 2020 Employment and Social Affairs Council, the conclusions highlighted the uncertainty in classifying platform workers, but most delegations

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<sup>117</sup> Wolfgang Daubler, Working People in Germany, 21 COMP. LAB. L. & POL’Y J. 77, 79 (1999-2000).

<sup>118</sup> Stefanie Sorge, ‘German Law on Dependent Self-Employed Workers: A Comparison to the Current Situation Under Spanish Law’, (2010) 31 COMP. LAB. L. & POL’Y J. 249, 250.

<sup>119</sup> Christina Heißl, , The legal status of platform workers: regulatory approaches and prospects of a European solution’ (2022) Italian Labour Law e-Journal Issue 1, Vol. 15.

argued that there was no need to create a specific category of online platform workers if social protection and working conditions were to be improved.<sup>120</sup>

## 2. Establishment of the code of conduct by online platforms

As we could see in this Paper, there is generally a lack of collective bargaining and collective agreements for online platform workers which could fight for improvement of their working conditions and social protections. Numerous academics have attempted to define collective rights more broadly in order to include non-standard workers, which would restrict the ability of employers to impose terms on employment and contracts unilaterally.<sup>121</sup>

In spite of that, Italy or Denmark have introduced collective agreements to tackle challenges concerning social protection and working conditions for individuals who work through platforms. The primary concerns of individuals employed through platforms concerning social protection and their working conditions are associated with risks of occupational diseases, accidents at work, and income replacement plans in the event of temporary shutdowns.<sup>122</sup>

To give a concrete example, in Denmark a digital platform “Hilfr” reached a collective agreement with the United Federation of Danish Workers which enables those who work through online platforms to choose their employment status and select between being an employee or self-employed. In addition, the Danish Chamber of Commerce reached an agreement with the trade union 3F in the food and parcel delivery sector, which gives workers regulated wage, pension, maternity pay, holiday pay and sick pay.<sup>123</sup>

Needless to say, Member States but also operating businesses should learn from best-practices of other states. However, what if they are unwilling or unable to do so? In the event that collective bargaining agreements are not in place, platforms should set forth explicit codes of conduct for its workers, along with documented procedures for such workers in order to share their problems and issues. Conversely, the online platforms should demonstrate the implementation of these codes.

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<sup>120</sup> Ibid <sup>(74)</sup>.

<sup>121</sup> Nicola Countouris and V. De Stefano, ‘New Trade Union Strategies for New Forms of Employment’ (ETUC 2019), Brussels. See also OECD, ‘Negotiating Our Way Up: Collective Bargaining in a Changing World of Work’ (2019), < <https://doi.org/10.1787/1fd2da34-en> > accessed 30. November 2023.

<sup>122</sup> Ibid <sup>(48)</sup>.

<sup>123</sup> Ibid <sup>(48)</sup>.

In 2017 (amended in 2022), the ILO produced Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy with the main aim to guide businesses on social policy and sustainable, ethical, and inclusive workplace practices that are useful for creating code of conducts. It should be evident from online platform codes of conduct that harassment and other unprofessional behavior are prohibited. Both the reporting process for code of conduct violations and the process for individuals to defend themselves against defamation should be clearly defined.<sup>124</sup>

In Germany, the German software testing platform “Testbirds” introduced a voluntary code of conduct for paid crowdsourcing named as “Crowdsourcing Code of Conduct”.<sup>125</sup> The code of conduct lays down a fundamental set of principles in an effort to foster fair cooperation and mutual trust among clients, service providers, and crowd-workers. Principles like "fair payment," "only serious tasks," and "open and transparent communication" were all part of this code of conduct.

In 2017, an "Ombuds office" was created by IG Metall, the signature platforms, and the German Crowdsourcing Association in order to uphold the Code of Conduct and mediate conflicts that may arise between workers and signatory platforms. This Ombuds office is composed of a board of five people, specifically one worker, one trade union representative, one platform employee, one Crowdsourcing Association representative, and a neutral chair.<sup>126</sup> This office settles disputes by consensus and within one year from the creation of the Ombuds office, it has settled more than a dozen disputes those workers had filed via its online form.<sup>127</sup>

The signatory platforms to the Crowdsourcing Code of Conduct have generally been supportive of the implementation procedural changes that improve workers' experiences and protect their rights. Some examples of these changes include making sure that workers have the right to challenge decisions about account closure or rejection of work.

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<sup>124</sup> ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) < <https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm> > accessed 05. December 2023.

<sup>125</sup> Crowdsourcing, ‘Code of Conduct’ < <https://crowdsourcing-code.com> > accessed 29. November 2023.

<sup>126</sup> G20 Employment Working Group, , Policy responses to new forms of work: International governance of digital labour platforms’ (2019) < [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms\\_713378.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_713378.pdf) > accessed 29. November 2023.

<sup>127</sup> Ombuds Office, , Crowdsourcing Code of Conduct - Ombuds Office: Annual Reports of the Ombuds Office < <https://ombudsstelle.crowdwork-igmetall.de/en/> > accessed 29. November 2023.

In light of the serious concerns about the lack of dispute resolution mechanisms available to workers on digital labor platforms, the bipartisan ombudsman office has become an important initiative. Yet it is also a clear example of 'virtual' labor market governance, with all activities, including board discussions and decisions, taking place online.<sup>128</sup> From this, Member States could learn from the best practices of other EU Member States and/or businesses. A Union-wide infrastructure or umbrella organization could be created to set minimum standards of behavior to which all market participants in the gig economy would have to adhere.

### Conclusion

This chapter discussed alternatives to the proposed Directive on improving working conditions in platform work in case the proposal will not be passed by the Council and the European Parliament by the end of the Parliament's mandate. Even if the proposed Directive will be passed, there will still be room for improvement of protections of platform workers and it is good to think about other recommendations that may be relevant in the future, given the rapidly changing market.

To sum up, only few Member States in the EU has introduced some sort of legislation covering third category of workers. In Spain and Germany, it is very difficult to become a "third category" worker as it has very strict requirements that are seen by the workers as significant hurdles. In Italy the introduction of "quasi-subordinate" workers led to arbitrage and disputes.

The second alternative analysed to address the issue of protection of platform workers was the creation of a code of conduct for online platforms to establish a set of principles to promote fair cooperation and mutual trust between clients, employees and platform workers. A great example is German "Crowdsourcing Code of Conduct" together with an "Ombuds Office", which settles disputes and is therefore also a response to the lack of dispute resolution mechanisms.

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<sup>128</sup> Janine Berg et al., 'Digital Labor Platforms: A need for international regulation?' *Revista de Economía Laboral* 16(2) (2019), 104-128.



## CONCLUSION

This Thesis has examined the extent to which EU labor law addresses the rights and protections of workers on online platforms in the gig economy as well as the question of what reforms would help ensure fair treatment of online platform workers.

In the first chapter of this Thesis has introduced to the reader to the topic of EU labor law in relation to the development of the gig economy and working in online platforms. It has revealed that the current wave of digitalization has played a crucial role in the development of the gig economy. In respect to the current EU labor law laws, I concluded that although prevalent EU legislation contains some reference to online platform workers, the current lack of specific legislation dedicated to these online platform workers puts them in a vulnerable situation affecting their access to social security which has a bad effect on their working conditions.

Chapter two was devoted to the challenges and gaps in the protection of online platform workers. It has disclosed the reader that there is still some debate over whether platform workers should be considered as employees or self-employed. After I conducted analysis of a number of scholarly articles, I concluded that the issue of misclassification of workers is linked also to the other problems and gaps in the protection of platform workers. Therefore, I agree with many scholars that misclassification is considered to be the key issue which, if resolved as a matter of priority at the EU level, would in turn help to resolve other problems such as inadequate social protection for workers, the fragmentation of legislation and case law between Member States as well as the under-representation of these workers and their limited bargaining power.

The third chapter closely scrutinized the European Commission's proposal for a Directive to improve the working conditions of people working through digital labor platforms. The Paper analyzed differing positions of the Council of the European Union and European Parliament as co-legislators compared to the original proposal of the Commission, but also explored other opinions of stakeholders and various institutions and their criticism. Moreover, it has looked at the current legislative process and stressed out that while writing this Thesis, the proposal was in trilogue between these co-legislators and it was unclear to say whether they would reach a final agreement on the text until the European elections in 2024.

Last but not least, chapter four discussed other possibilities and alternatives, apart from the proposed Directive to improve protections of online platform workers, more precisely on the introduction of third category for platform workers and establishment of the code of conduct for online platforms. When considering a third category of classification for platform worker, it could be considered riskier to apply it than to stick with the original "easy" or "obvious" choice. Thus, on the basis of an analysis of some Member States' legislation on the introduction of a third category of worker, while at first glance this might appear to be an effective solution to the problem, this is not always the case and I conclude that its usefulness appears to be very limited. Looking at the initiative to introduce a code of conduct for platforms and workers, I believe that this is a very good example of 'virtual' labor market governance, with a dispute resolution mechanism if necessary, and, moreover, it is something that could potentially be agreed by all stakeholders, it would be fair to them and, moreover, it would be based on best practices that have already been established in the Member States.

Consequently, the development of novel possibilities for employment is frequently linked to deficiencies in social protection of such workers, and in this case, also misclassification of workers. This emphasizes the pressing need to address coverage gaps and modify current social protection frameworks to accommodate the unique circumstances and requirements of these workers, in order to fulfill the universal human right to social security. Future social security systems will need to be built around a set of basic policy principles that guarantee appropriate, universal coverage as well as enough flexibility to accommodate changing needs of online platform workers in the European Union.

Although many EU Member States have already put innovative policies in place and adapted their legislation to the certain extent to deal with issues of inadequate social protection for online platform workers, however, more can and ought to be done to guarantee that social protection systems are adequate within the whole EU.

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## ABSTRACT

*In an ever-changing world, platform work continues to present a kind of 'social dilemma' not only for workers, businesses, social partners, but also for policy makers within the European Union. Their protection and rights are vaguely defined, and this often leads to misclassification of workers, which affects their working conditions. This Paper explores the main concepts such as gig economy and online platform worker, examines main challenges and gaps in respect of protections of platform workers in the current EU labor law legislation, but also discusses and criticizes the proposed Directive on improving working conditions of platform workers and proposes other alternatives to the proposed Directive, i.e. legislative and policy recommendations to strengthen the rights and protections of these workers, namely introduction of the third category of worker and establishment of the code of conduct by online platforms operating in the European market.*

**Keywords:** Platform work, Labor law, Gig economy, Employee/worker status, Working Conditions

*In einer sich ständig verändernden Welt stellt die Plattformarbeit weiterhin eine Art "soziales Dilemma" dar, nicht nur für Arbeitnehmer, Unternehmen und Sozialpartner, sondern auch für die politischen Entscheidungsträger in der Europäischen Union. Ihr Schutz und ihre Rechte sind nur vage definiert, was häufig zu einer falschen Einstufung der Arbeitnehmer führt, was ihre Arbeitsbedingungen beeinträchtigt. In diesem Papier werden die wichtigsten Konzepte wie Gig-Economy und Online-Plattformarbeiter untersucht, die wichtigsten Herausforderungen und Lücken in Bezug auf den Schutz von Plattformarbeitern in der aktuellen EU-Arbeitsgesetzgebung untersucht, aber auch die vorgeschlagene Richtlinie zur Verbesserung der Arbeitsbedingungen von Plattformarbeitern diskutiert und kritisiert und andere Alternativen zu der vorgeschlagenen Richtlinie vorgeschlagen, d. h. legislative und politische Empfehlungen zur Stärkung der Rechte und des Schutzes dieser Arbeitnehmer, nämlich die Einführung einer dritten Arbeitnehmerkategorie und die Einführung eines Verhaltenskodex durch Online-Plattformen, die auf dem europäischen Markt tätig sind.*

**Schlüsselwörter:** Plattformarbeit, Arbeitsrecht, Gig-Economy, Arbeitnehmer Status, Arbeitsbedingungen