The initiative of the European Commission for improving working conditions in platform work

Monika Schlachter*

By December 2021, the European Commission presented a Proposal for a Directive on improving working conditions in platform work. Such activity was expected for quite some time. Platform work has been probably the most intensely debated element of "new work" at national and international level. Hopes and fears associated with digitization culminated in this work form due to a mostly unregulated operation of a business of broad conception and great heterogeneity.

Keywords: platform work, European Commissions initiative

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Az Európai Bizottság 2021 decemberére irányelvjavaslatot terjesztett elő a platform munka munkafeltételeinek javításáról. Ez a jogalkotási javaslat már jó ideje várható volt. A platform munka valószínűleg az "új munka" legintenzívebben vitatott eleme nemzeti és nemzetközi szinten. A digitalizációval kapcsolatos remények és félelmek ebben a munkaformában csúcsosodtak ki.

Kulcsszavak: platform munka, Európai Bizottság javaslata

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This contribution takes the opportunity for congratulating professor Tamas Prugberger at the occasion of his 85th birthday. Colleagues participating in this special issue are united in acknowledging a scholar, academic teacher and friend who has, nationally and internationally, continuously contributed to comparative labour law for most of his academic life. In discussing new challenges to the world of work, Tamas Prugberger suggested solutions maintaining an optimistic approach even in difficult times. The academic field needs more of that: ad multos annos!

* Prof. Dr. Dres. h. c. Monika Schlachter is Director of the Institute for Labour Law and Industrial Relations in the EU and Professor for International and European Labour Law at Trier University, Germany; and holds an honorary doctorate from the University of Miskolc.

1. Introduction

By December 2021, the European Commission presented a Proposal for a Directive on improving working conditions in platform work (COM (2021) 762 final). Such activity was expected for quite some time: Platform work has been probably the most intensely debated element of "new work" at national and international level. Hopes and fears associated with digitization culminated in this work form due to a mostly unregulated operation of a business of broad conception and great heterogeneity. The business model of labour platforms is ICT-based, relying on algorithmic management for allocating, organizing, and evaluating work (EU-Commission, Study to gather evidence on the working conditions of platform workers, final report March 2020). Working conditions and remuneration are frequently low[1], specifically due to the high number of unpaid hours put in for activities such as waiting for assignments or assuring tasks through platforms[2]. Algorithmic monitoring and control of platform work is intense, and collective representation faces many factual and legal problems. Taken together, such problems gave rise to several court cases[3] with different outcomes in different countries.

Platforms themselves did rarely respond to such concerns, as they denied responsibility. Much rather, they presented themselves as merely connecting supply and demand for (goods and) services online[4], acting as intermediaries between service provider and end- user. The Commissions' approach to platform work changed, too: initially, the intensely debated contractual status of service providers on platforms was understood as lying exclusively in the regulatory competence of Member States[5]. In the process of implementing the European Pillar of Social Rights[6], however, the regulatory package on platform work was debated at length and finally conceived at Union level. The Proposal on improving working conditions presented here is broadly framed, containing labour rights and social policy as much as data protection and digitization. This contribution anyhow concentrates on the contractual status of platform workers.

2. Contracts concerning platform work

2.1. Digital Labour Platforms. Persons performing platform work are understood as individual persons in a contractual relationship with a digital labour platform. The

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[1] Agnieszka Piasna/ Wouter Zwysen/ Jan Drahokoupil, *The platform economy in Europe*, European Trade Union Institute: ETUI working paper 2022, 42.
[2] International Labour Organization: ILO, World employment and social outlook (2021).
[3] A comparative overview by: Christina Hießl (ed.), *Case law on the classification of platform workers*, 2021; for Germany: Judgement of the Bundesarbeitsgericht: BAG, 1.12.2020, 9 AZR 102/20; Fairwork Deutschland, Ratings 2021: Arbeitsstandards in der Plattformökonomie).
[4] Organisation for Economic Co-operation and Development, An introduction to Online Platforms and their Role in Digital Transformation: OECD, 2019.
[5] Communication of the European Commission: COM (2016) 288 final.
[6] Official Journal oft he European Union: OJ 2017, C-428/10; Klaus Lörcher/ Isabelle Schömann. *The European Pillar of Social Rights*, ETUI-Report 139 (2016).

Proposal applies to those digital labour platforms "organizing platform work" performed In the EU, Art. 1 para. 4. Its applicability is restricted to platform work organized in multi-person (mostly triangular) relationships between a recipient of the service, the digital labour platform organizing the work, and the service provider, i. e. an individual performing platform work either online or in a certain location[7]. From the definitions (in Art. 2) it follows that the involvement of more than three parties would be covered so that platforms directing riders to restaurants for delivering meals to a client (= 4 parties) are covered while less than three parties are not. That could exclude intra-company platforms addressing their offers to their own employees exclusively from the Proposal's scope, as in such cases no distinct other recipient of the service is present. Such outcome would anyhow be insufficient: Own workers have an employment relationship with the undertaking running the platform so that their employment rights are guaranteed, but they do not enjoy protection from algorithmic management. The Proposal created such regulations on algorithmic management not mirrored by equivalent EU-labour law, so that workers excluded from the scope of the Proposal would find no equivalent protection elsewhere.

As platform work takes place in a multi-person relationship, the legal nature of that relationship is decisive for the rights and obligations of the parties. The Proposal is not defining the nature of the contractual relationships; all contracts continue to be defined by the parties. However, platforms may not establish that they operate merely as agents between service recipients and providers while being actually involved in the provision of the work itself. Otherwise, the mere labelling of the relationship could prevent acknowledging the organization of the work provided[8], thereby leaving the platform work outside the scope of application of the Proposal. The Court did also not approve as decisive the mere designation of the platforms' business model[9] but took a closer look at the service actually provided. According to Recital No. 18 of the Proposal, a platform restricted to providing means through which a recipient can reach a service provider or vice versa would not be covered. A platform offering to the recipient that they would select specific service providers for specific tasks, review their performance, organize the payment of fees or calculate the prices, is, however, organizing the work.

Proving that the work is indeed organized by the platform may need additional arguments, though. The applicability of the Proposal is not dependent on meeting all necessary preconditions of an employment contract; the Proposal is conceived for including platform work even if it takes place outside employment relationships (Art. 10). In this perspective, the Proposal is identifying specific work relationships falling under its' scope much rather than the persons coming in the scope. Despite referring to an employment relationship, the Proposal does not aim at defining a persons' status as a worker or employee. Much rather, their actual work provided is decisive, independent from the contract it is technically based on. For establishing

[7] EU Commission, Digital labour platforms in the EU, mapping and business models, final report, May 2021.
[8] Court of Justice of the European Union: CJEU, 20.12.2017, C-434/15, Elite Taxi.
[9] CJEU, 10.4.2018, C-320/16, Uber France, paras. 22, 24.

the relevant working relationship, platforms are required to organize the work of the service provider. That means that they must have a significant role in establishing how the service meets the demand of the user, which may (Recital No. 18) include the processing of payments. Regularly, the influence of platforms on how, when and by whom the work is provided is decisive. Such influence is not disappearing due to using contract terms allowing platform workers to log onto the platform according to their own choosing and determine their hours of availability, or due to allowing workers to contract with third parties. Algorithmic tools controlling the allocation and quality of future engagements, a potential account suspension or even termination may factually replace a direct request by the platform.

Once platforms charge either of the other parties merely for providing a business contact, the fees would be smaller and the platform has no part in or responsibility for the services potentially contracted. Once platforms charge for additional services such as allocating reliable and qualified service providers for the respective tasks, monitor or review their performance, and announce instant and continuous availability of reliable and competent providers at any time, this business model goes far beyond establishing a business contact. The added value of the platforms' service to the end-user implies organizing the platform work. Such organization will regularly include algorithmic management, either by automated monitoring or evaluation systems and/ or automated decision making systems (Art. 6).

2.2. Platform work. The Proposal is applicable to work organized by a digital labour platform if it is performed on the basis of a contractual relationship between this platform and the person providing the work. The precondition of a contract as such presents no major obstacle to the applicability of the Proposal to platform work. It will be regularly fulfilled once a person intending to undertake platform work is registering at that platform. By using the platforms' digital infrastructure, the person automatically accepts a contractual relationship according to the general terms and conditions set by the platform. The proper classification of the contract remains, however, debatable. The Proposal states its applicability to contracts with both, "persons performing platform work" (Art. 2 para. 4), and "platform workers" (Art. 2 para. 3), the latter representing a special sub-type of the former.

2.3. Platform Worker. Platform workers are defined by having concluded an employment contract according to the law, collective agreements or practice in the relevant Member State "with consideration to the case-law" of the CJEU. This notion was used already by earlier EU instruments[10]. It is characterized by creating a hybrid concept of employment contract between referring back to national law as a first step of interpretation and applying the autonomous EU- concept as its limitation. This allows national law to apply a broader, more inclusive notion of employment contract than the Court, but not a narrower concept. In the latter case, the definition as used by the Court would prevail. Therefore, the Proposal stands with the

[10] E.g. Art. 1 para 2 Directive 2019/1152/EU; Art. 2 Directive 2019/1158/EU; for the difficult procedure necessary for establishing this compromise compare: Bartlomiej, Bednarowicz, *Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union*, Industrial Law Journal, 48 (2019), 604, 609, 612.

traditional concept of employment contracts adopted by the Court from the Lawrie-Blum decision[11] onwards, establishing subordination of the work provider as the determining factor of an employment contract[12]. Specifically for platform work, however, such approach is too narrow in that it gives too little weight to the algorithmic command and control-structure of platforms[13] which some national courts already understood as being decisive[14]. The hybrid definition of platform worker described above would accept but not demand that national legal systems pursue a concept based on the decisiveness of algorithmic management. National regulations may pursue a broader definition of employee for defining platform work, but not a narrower one than the CJEU.

2.4. Determination of the employment status. The Proposal aims at ensuring that the workers' employment status is correctly classified. For providing both parties to the contract with legal certainty about this status (Art. 3), Member States must put a legal procedure in place for verifying it. Regularly, national legal systems would already have a procedure for status determination in place, because the status as employee is preconditional for most national labour law and social security rights. The Proposal specifies that, additionally, the relevant procedure must provide the primacy of facts, i.e. the actual performance of contractual obligations prevails the verbal classification of the type of contract. Where actual subordination of the worker exists, the contract is an employment contract even if it explicitly states that the worker will be self-employed (Art. 3 para. 2). The primacy of facts- approach is fully compliant with international law such as ILO-Recommendation 198 No. II 9, and would allow Member States to put more weight on the specificities of algorithmic management of platform work than on contract clauses stipulating independent decisions by the service provider. However, the reference to the hybrid definition of worker status is repeated again in Art. 3 para. 1.

In practice, most persons working on platforms are considered self-employed, and many may prefer this status over a contract of employment. For those who would benefit from a worker status, proving its preconditions shall be alleviated by the Proposal. It introduces a legal presumption for classifying their contractual relationship as employment contract, if the platform controls the performance of work and the person performing the work (Art. 4 para.1).Such presumption aims at persons miss-classified as self-employed while actually working under the command and control of the platform, i.e. as an employee. Work organized by a digital labour platform under conditions that do not fit the subordination test for an employment contract may nevertheless take place under actual working conditions demanding social protection[15]. While the presumption might help diminishing the rise of bogus

[11] CJEU, 3.7.1986, No. 66/85.

[12] CJEU, 10.2.2022, C-485/20, HR – Rail; note: Mark Freedland/ Nicola Countouris, *Some Reflections on the 'Personal Scope' of Collective Labour Law*, Industrial Law Journal, 46 (2017), 52, 59 et sequ.

[13] CJEU, 22.4.2020, C-692/19, Yodel.

[14] For Germany: BAG, 1.11.2020, 9 AZR 102/209.

[15] Jeremias Prassl/ Martin Risak, *Uber, TaskRabbit and Co: platforms as employers? Rethinking the legal analysis of crowdwork*, Comparative Labour Law and Policy Journal, 37 (2016), 619; Mark Freedland/. Nicola Countouris, ILJ, 46 (2017), 52, 68.

self-employment, the longstanding dichotomy between socially protected employees and the unprotected self-employed is upheld, how to establish adequate working conditions for platform work remains unanswered.

Art. 4 para 2 of the Proposal lists five criteria for establishing the level of "controlling the performance of work" preconditional for an employment relationship, but establishing merely two of them already suffices for a presumption in this direction Recital 24 of the Proposal explicitly mentions that direction and control should be considered key elements of the legal subordination defining an employment relationship. Therefore it is to be assumed that the relevant criteria would serve as factual basis for indicating control. However, only three of those criteria are materially connected to controlling the performance of work intensely enough to establish subordination of the service provider: Setting rules of appearance and conduct of service providers towards service recipients (point b), supervising work performance (point c), and imposing restrictions on the choice of working hours, the acceptance of tasks or the use of substitutes (point d) might indicate the subordination of the service provider under the directions of the platform. Even if the level of subordination established through the indicators might not be sufficiently intense for actually proving the existence of an employment relationship, it might suffice as factual basis for a rebuttable presumption in this direction.

The same is not true for the remaining two criteria: determining the level of remuneration (point a) and restricting the possibility of building a client base or of working for third parties (point e) is not related to controlling the performance of work. Not even the second alternative, controlling the person providing the work, could be decisive here: by such regulations the platform doesn't interfere with the personal freedom of the service provider. Such clauses do not control the person in their capacity of fulfilling contractual duties but in their capacity as an independent actor on the market for services. It thereby annihilates their chances for commercially utilizing their own work, so that they may not determine their own conduct on the market independently[16]. Service providers who cannot decide whom to serve and at what prices are not independent actors on the market (undertakings) but merely dependent elements of the business of the institutions determining those conditions. They are to be classified as "false self-employed". As these two criteria are not connected to organizing and controlling the performance of work or the freedom of the person performing it, they establish factual and economic dependency of the person performing the work. In accepting those two criteria as indicators for an employment relationship, the Proposal effectively moves beyond defining subordination exclusively by the provision of personally dependent work; economic dependency of the service provider is equally accepted for indicating subordination. This might cause further difficulties for legal systems classifying the category of economically dependent workers as self-employed. However, a practical solution for this problem is provided by Article 5: both contracting parties have the possibility to rebut the presumption of an employment relationship between them,

[16] CJEU, C-413/13, FNV Kunsten, para. 33.

even if two (or more) of the criteria listed in Art. 4 para. 1 are fulfilled. Once all parties are satisfied with the classification of their contractual relationship as "self-employed", the Proposal is not interfering.

2.5. Legal Consequences. As a consequence of obtaining the employment status, Member States are obliged to ensure that platform workers enjoy rights "deriving from EU law applicable to workers" (Art. 3 para.1). The proposal thereby seems to indicate that the status determination would be valid for EU labour law only, without consequences for national law. Despite their status as employee, such important labour rights as dismissal protection, statutory minimum wages or collective labour rights primarily determined at national level could then be legally withhold from platform workers. On the other hand, Recital 19 of the Proposal refers to Member States ensuring full compliance additionally with "national labour law, collective agreements and social protection rules" upon reaching the worker status. Should that Recital guide the interpretation of Article 3, Member States would be responsible for guaranteeing full labour rights and social protection at national and at EU level. Such interpretation could raise questions on the regulatory competence of the EU[17]. Would the EU be competent to oblige Member States to extend the personal scope of application of a right to additional beneficiaries even if the EU is lacking the competence to create such rights at EU level[18]? At the very least, the Proposal must provide a clear answer on the legal consequences intended by streamlining the text of the provision and the Recital.

3. Algorithmic Management

The Proposal introduces new rights for persons performing platform work subject to algorithmic management. They must receive a document with all necessary information on automated monitoring and decision making systems "significantly affecting" working conditions (Art. 6). Furthermore, platforms must allocate sufficient resources for monitoring the impact of decisions supported or taken autonomously by automated systems. Human oversight of such systems' impact on working conditions must be provided (Art. 7) targeting explicitly health and safety concerns including mental health problems caused by digital surveillance (Art. 7 para. 2). Significant decisions such as suspending a persons' account or refusing payment for work performed must be stated in writing (Art. 8), and platforms must provide access to a contact person responsible for discussing and clarifying the facts, circumstances and reasons relevant for decisions taken. Such obligation answers the frequent complaints on platforms simply closing down individual accounts, effectively preventing individuals from accessing future engagements instead of applying regulations on terminating a contract with the service provider.

The obligations expand on Art. 22 GDPR on protection against automated decision making but limited to systems taking the respective decisions

[17] Rüdiger Krause, *Auf dem Weg zur unionsrechtlichen Regelung von Plattformtätigkeiten*, Neue Zeitschrift für Arbeitsrecht 2022, 521, 527.

[18] Art. 153 para. 5 TFEU.

autonomously, by stating their applicability also to decisions supported by automated systems. Recital 29 explains that more specific rules on data processing are necessary in situations of algorithmic management of work. As this explanation is valid not only for employed persons but for services provided under algorithmic management in general, Art. 10 extends the obligations (Arts. 6 and 7) to persons providing platform work outside an employment contract.

Conclusion

The Proposal aims at improving working conditions in platform work, and should be considered a positive step in this direction. Nevertheless, several problems remain unresolved. The contractual status of platform work is still categorized according to the dichotomy between subordination (contract of employment) and autonomy (self-employed) which doesn't fit for platform work under algorithmic management. Ensuring that workers' employment status is correctly classified is an improvement avoiding intentional misclassification and bogus self-employment. But many persons providing platform work who do not meet the preconditions of the legal presumption nevertheless need social protection. Extending the rights concerning algorithmic management also to them is definitely beneficial, but the Proposal shouldn't stop there. All platform workers need adequate social security, a fair termination process and the right to collective bargaining.

Bibliography

- Agnieszka Piasna - Wouter Zwysen - Jan Drahokoupil, *The platform economy in Europe*, European Trade Union Institute: ETUI working paper 2022, 42.
- International Labour Organization: ILO, World employment and social outlook (2021).
- Christina Hießl (ed.), *Case law on the classification of platform workers*, 2021;
- Organisation for Economic Co-operation and Development, An introduction to Online Platforms and their Role in Digital Transformation: OECD, 2019.
- Klaus Lörcher - Isabelle Schömann, *The European Pillar of Social Rights*, ETUI-Report 139 (2016).
- EU Commission, Digital labour platforms in the EU, mapping and business models, final report, May 2021.
- Bartlomiej Bednarowicz, *Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union*, Industrial Law Journal, 48 (2019), 604-623; https://doi.org/10.1093/indlaw/dwz021
- Mark Freedland - Nicola Countouris, *Some Reflections on the 'Personal Scope' of Collective Labour Law*, Industrial Law Journal, 46 (2017), 52-71; https://doi.org/10.1093/indlaw/dww041

- Jeremias Prassl - Martin Risak, *Uber, TaskRabbit and Co: platforms as employers? Rethinking the legal analysis of crowdwork*, Comparative Labour Law and Policy Journal, 37 (2016), 619;
- Rüdiger Krause, *Auf dem Weg zur unionsrechtlichen Regelung von Plattformtätigkeiten*, Neue Zeitschrift für Arbeitsrecht 2022, 521, 527.