

# ed\*



Deutsche Sozialversicherung  
Europavertretung

June 2022

## Platform work: EU Commission focuses on social security

Innovative regulatory approach or rigid  
one-size-fits-all solution?



## Dear Readers,

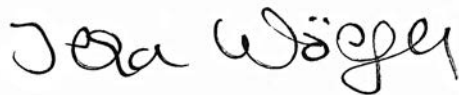
“Digital transformation is bringing about rapid changes that are impacting our labour markets”, stated Commission President Ursula von der Leyen in her political guidelines at the beginning of her term in office. In connection with this, she had made a voluntary commitment to examine how working conditions on online platforms could be improved. The EU Commission subsequently saw a need for action and proposed to create an EU-wide framework for access to social protection and labour rights for platform workers: They should have the same level of social protection as all other employed workers.

A good two years later, after thoroughly controversial discussions at European level and two consultations with the social partners, the European Commission has presented a package of measures to improve the working conditions of platform workers. A key component is a draft directive on improving working conditions in platform work, which was presented on 9 December 2021.

But are the proposed regulations also sufficient or perhaps too far-reaching? Do they provide enough flexibility for the different social security systems? Do they enable both adequate access to social and labour protections for platform workers and tap the innovative potential of digital labour platforms?

In our current issue of the ed\* special bulletin, we would like to explore these questions with you and give you an overview of the current discussion of the proposed directive.

We hope you enjoy reading.

A handwritten signature in black ink that reads "Ilka Wölfe". The signature is written in a cursive, flowing style.

Yours, Ilka Wölfe

# Platform work as an innovation and job engine?

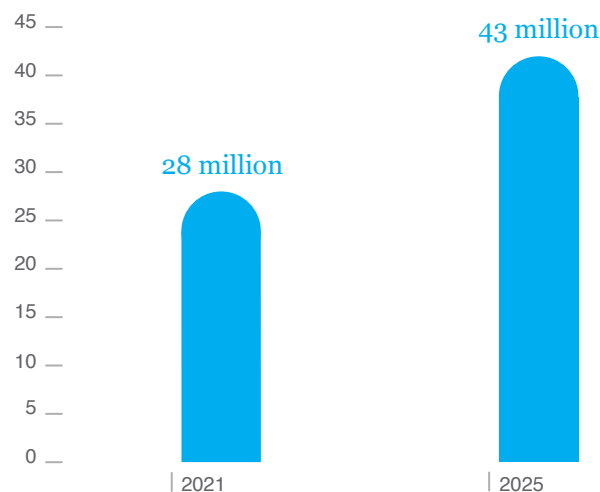
During the presentation of the European regulatory proposal, the European Commission emphasised the increasing importance of digital labour platforms, their innovative power and job-creating potential.<sup>1</sup> For digital labour platforms as market providers, for consumers and for people working in the platform economy, a wide range of opportunities were opening up that needed to be exploited in Europe.

In fact, platform work has increased rapidly in various industries since 2019. This development was accelerated by the COVID-19 pandemic. For example, more than 28 million people in the European Union (EU) now work via digital labour platforms. According to the European Commission, this figure could rise to 43 million by 2025.<sup>2</sup>

At the same time, this employment model raises new questions about labour and social protection, such as the distinction between self-employment and dependent employment. For this reason, it is particularly important to the European Commission to take into account employee rights and social benefits for platform workers in its regulations and to create uni-

form minimum standards at European level for this purpose. In doing so, it emphasises the claim of decent working conditions and access to social and labour protection: technical progress should not be at the expense of employees. When tapping the innovative potential, it must be ensured that this is done inclusively and fairly.

## Possible development of platform work in Europe



Source: PPMI 2021

<sup>1</sup> European Commission: proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, C(2021)762 final.

<sup>2</sup> Public Policy and Management Institute (2021). Study to support the impact assessment of an EU initiative on improving working conditions in platform work, pages 85 and 96 et seqq.

## 80 per cent of digital labour platforms exclusively employ or place self-employed workers.

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### **Key challenge: platform work is not homogeneous**

A study on business models commissioned by the European Commission found that around 80 per cent of digital labour platforms exclusively employ or place self-employed workers. Only a minority works with employees. These are almost exclusively locally bound delivery services, a sector for which various courts in the Member States have repeatedly (re)qualified the status of employed persons in favour of a dependent employment relationship.<sup>3</sup> The predominance of employment by people classified as self-employed means that many workers in the platform economy fall through the

social safety net. For example, only a small percentage of platform employees have unemployment insurance. According to one study, 97 per cent of platform workers are not covered by unemployment insurance. Similar conditions are encountered in other branches of social insurance, such as coverage in the event of illness or old-age pension. An exception is insurance against accidents at work and occupational diseases: 23 per cent of digital labour platforms already offer appropriate coverage to their self-employed platform workers. However, the study expressly leaves open whether their level is comparable with that of insurance against occupational accidents for employees.<sup>4</sup>

<sup>3</sup> For example, on 19 April 2022, a French criminal court imposed the maximum penalty on food delivery service Deliveroo for deliberately misrepresenting its food delivery business as self-employed.

<sup>4</sup> Groen, Willem Pieter de; Kilhoffer, Zachary; Westhoff, Leonie; Postica, Doina und Shamsfakhr, Farzaneh (2021): Digital labour platforms in the EU - Mapping and business models, final report.

Only a minority works with employees.



Platform work poses a variety of challenges for social security.



## Platform workers often have inadequate social protection.

Similar findings can be seen in a study commissioned by the European Parliament, which concludes that platform workers also face a high risk of precarious employment, regardless of their employment status, and often have inadequate social protection.<sup>5</sup>

<sup>5</sup> Hauben, Harald (ed.), Lenaerts, Karolien und Wayaert, Willem (2020): The platform economy and precarious work.

Thus, platform work poses a variety of challenges for social security. In addition, it is uncertain whether the classification as self-employed is actually correct or whether platform workers are in a relationship of dependency, receive instructions and are controlled. The deficiencies in labour and social protection can also lead to distorted competitive conditions vis-à-vis other (traditional) companies that comply with the statutory obligations for employees and for which corresponding control mechanisms exist.

Against this background, the European Parliament has adopted a resolution on platform work. This highlights the often poor working conditions of platform workers, regardless of their employment status. Thus, in addition to providing a healthy and safer working environment through work and protective materials, MEPs also call on EU Member States to ensure platform workers have access to benefits in respect of unemployment, accidents at work, long-term care, disability and illness, as well as health and retirement benefits.<sup>6</sup>

### **Advantages for companies operating across borders**

Platform work is a new form of cross-border work that often defies national regulations. In order to exploit their potential while ensuring the social protection of employees, the need for a European regulatory framework was seen early on.

Ultimately, the digital labour platforms themselves will also benefit from a European regulation. Due to legal fragmentation, they have to comply with a large number of different national laws and court rulings, which affects their expansion in the EU market. Furthermore, fair competitive conditions, e.g. by avoiding bogus self-employment, are also in their interest. This creates a framework that enables competitive advantages to be achieved through innovation.

<sup>6</sup> European Parliament resolution of 16 September 2021 on "Fair working conditions, rights and social protection for workers employed on online platforms – New forms of employment in the context of digital development" (2019/2186 (INI)).



### **Concrete proposals of the European Commission – focus on determining the status**

In its proposal for a directive, the European Commission describes a series of minimum standards that are intended to provide both platform operators and workers with greater legal certainty. All platform workers working within the EU are to benefit from the new regulations, regardless of the respective location of the labour platform.

At the heart of the European regulations is the goal of strengthening the rights of platform workers. Determining their employee status plays a crucial role in this. To this end, the European Commission – based on the case law of the European Court of Justice (ECJ) – has laid down five control criteria that will in future help platforms and platform workers to determine whether their working relationship is an employer-employee relationship or whether it is rather a self-employed activity. They relate to the determination of the remuneration, binding regulations regarding appearance and behaviour, monitoring and review of work performance, restrictions on the independent organisation

of work and the acceptance of orders, as well as restrictions on the development of the company's own customer base. The actual work regulations and not the contractual agreements between platform workers and digital labour platforms should be decisive.

This is to be made on the basis of a legal presumption in order to allow quick determination of employment status. If two of the criteria established by the European Commission are actually present, it is presumed that an employment relationship exists. This would automatically entitle a platform worker to the social and labour rights of an employee.

However, it is possible for the digital labour platform to rebut this legal presumption in court or administrative proceedings, which would have the burden of proof. The proceedings shall not have suspensive effect on the application of the legal presumption. This is to ensure that access to labour and social protection is guaranteed at an early stage for platform workers who are genuinely in a sub/superordinate relationship in their work.

At the heart of the European regulations is the goal of strengthening the rights of platform workers.

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The EU Commission has laid down five control criteria for determining bogus self-employment for platform workers.



In particular, the European Commission's proposals for determining status on the basis of a legal presumption using five criteria, the reversal of the burden of proof and the non-suspensive effect of an objection to the status determination are the subject of controversial discussion.

With a limited number of fixed criteria, there is a risk that contracts between platform workers and digital labour platforms will be adjusted accordingly. Germany has already had negative experiences with the legal presumption based on five criteria for determining bogus self-employment.<sup>7</sup> These have led to an adjustment of the contractual arrangements, according to which virtually no more bogus self-employment has been established. However, this has not been reflected in actual employment. In Social Code IV, the legal presumption was therefore replaced by reference to the actual employment relationship.

This risk also exists for platform workers if they are in a subordinate relationship. In this case, it can be assumed that the platform workers have only a minor influence on the form of the contract and that the actual form of the employment relationship may deviate from the contractual provisions. As a result, the five criteria

for an employment relationship would not be met. The consequence would be that the legal presumption would not apply due to the formal fulfilment of the proposed criteria.

The European Parliament's draft report on the proposed directive, presented by the correspondent of the Committee on Employment and Social Affairs, Elisabetta Gualmini, also criticises the primary reference to the five criteria, expands it to eleven criteria and moves it to the preamble. The idea behind this is that the criteria cannot be exhaustive as platform work is diverse and subject to constant change. The criteria listed are, therefore, intended to form a non-exhaustive list of elements that competent authorities may refer to when assessing employee status.<sup>8</sup> The delivery service Wolt, on the other hand, criticises in its statement the five criteria of the proposed directive, which in its view are too vague and partly contradictory.<sup>9</sup> Wolt suggests replacing them with simpler and clearer criteria, such as the four criteria laid down by the ECJ in the "Yodel" case.<sup>10</sup> The German Bar Association advocates that the determination of employment status should be based on the actual employment relationship and welcomes the introduction of a legal presumption based on criteria that are as uniform as possible throughout the

## The determination of status based on the legal assumption using five criteria is controversial.

<sup>7</sup> Act to Promote Self-Employment of 1999, former Section 7(4) SGB (Social Security Code) IV. The Second Act on Modern Services in the Labour Market of 23 December 2002, eliminated the statutory presumption.

<sup>8</sup> European Parliament, DRAFT REPORT on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work (COM(2021)0762, 2021/0414 (COD)).

<sup>9</sup> Wolt (2022): Wolt's feedback on the European Commission's proposal for a Directive on improving working conditions in platform work ([https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12828-Improving-the-working-conditions-of-platform-workers/F2850683\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12828-Improving-the-working-conditions-of-platform-workers/F2850683_en); accessed on 24/2/2022).

<sup>10</sup> European Court of Justice: Judgement C692/19 of April 2022 – Yodel Delivery Network.

The aim is to ensure that social protection for platform workers is as uniform as possible throughout the EU and to exploit the innovation and employment potential of digital labour platforms.

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EU. However, a need for adjustment is seen in the criteria mentioned. These should be rechecked for their actual relation to the “control of work performance” and adjusted.<sup>11</sup>

The German social partners also see a need for improvement in the criteria mentioned. In addition, the Confederation of German Employers' Associations (BDA) criticises the fact that the burden of proof for the non-existence of an employment relationship lies with the digital labour platform. Thus, the platform would have the burden of proof of a so-called negative fact. However, proving this negative fact will be difficult or almost impossible in most cases. In addition, the BDA fears that these regulations will artificially create a new employment status, namely that of the “platform worker”.<sup>12</sup> The United Services Union (Ver.di), on the other hand, welcomes the fact that the burden of proof is to be borne by the digital labour platform, even if the platform workers do not classify themselves as employees. This would take into account the power asymmetry between platform and platform workers.<sup>13</sup>

Regulations on labour and social protection are structured very differently in Europe. This is pointed out by the Austrian Social Insurance in its opinion. Austria has the additional

employment status of a person similar to a regular employee. This employee is independent, but economically dependent on a client without being integrated into the client's operational organisation. Accordingly, the Austrian social security system calls for a more flexible approach, that is more respectful of national legislation and focuses on a qualitative assessment of the specific situation.<sup>14</sup>

The German Social Insurance system welcomes the proposed directive. It is essential that the legal presumption is based on the actual employment relationship. It is also important that the current and future case law of the ECJ must be taken into account in a binding manner. The aim of a European regulation must be to reduce differences in status determination between countries. The aim is to ensure that social protection for platform workers is as uniform as possible throughout the EU and to exploit the innovation and employment potential of digital labour platforms.

On European level it is discussed whether the criteria set out in the proposed directive are sufficient to reflect the actual employment relationship. This is because the national criteria, which are usually much more detailed, are also required for this purpose. Subject of the debate is also that

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<sup>11</sup> Deutscher Anwalt Verein (2022): Statement of the German Bar Association by the Labour Law Committee on the EU Commission's proposal for a directive to improve working conditions in platform work ([https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12828-Improving-the-working-conditions-of-platform-workers/F2822820\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12828-Improving-the-working-conditions-of-platform-workers/F2822820_en); accessed on 24/2/2022).

<sup>12</sup> BDA: Proposed directive creates special labour law regime for platform economy, March 2022.

<sup>13</sup> Ver.di: Am langen Arm der Plattformen, Ver.di publik 3/2022.

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<sup>14</sup> Umbrella organisation of the Austrian Social Insurance: Feedback from umbrella organisation of the Austrian Social Insurance ([https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12828-Improving-the-working-conditions-of-platform-workers/F2848699\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12828-Improving-the-working-conditions-of-platform-workers/F2848699_en), accessed 24/2/2022).



Human resource management that relies on automated systems should not be used to make a final decision.



in the event of an objection, the burden of proof is to be borne by the digital labour platform and that an objection does not have a suspensive effect on the application of the presumption. The aim of this regulation is to speed up the determination of employment status and to ensure rapid access to labour and social protection for platform workers.

### **Machines as managers – data use raises questions**

It is not only the social security of platform workers that is being discussed in the Member States and Europe. The digital transformation has also created new opportunities for algorithmic management. However, in addition to the potential for innovation, this comes with issues of surveillance, data use, equality, and discrimination against platform workers. Thus, a new regulatory need has arisen for algorithmic management, a form of human resource management that relies on computer systems. This not only allows monitoring of the workflows of platform workers. The data collected by the computer systems can also be analysed and used to assess their productivity. However, this must not be at the expense of the health and safety of platform workers, especially since both the database and the underlying algorithms may be subject to errors.

The proposed directive, therefore, provides for regulations to ensure that no final decision is made by automated systems. What is essential is the transparent, non-discriminatory, trustworthy and ethical use of algorithms towards all platform workers, regardless of their employment status. Thus, the proposed directive follows the objective set out in the Communication on the Digital Compass 2030 to lay down ethical principles for human-centric algorithms.<sup>15</sup>

This includes increased transparency in their use to monitor work performance as this has a direct impact on working conditions and occupational health and safety. Also, the processing of personal data, such as on the health of the platform worker, is restricted. Digital labour platforms should assess risks of automated monitoring and decision-making systems for the safety and health of platform workers and introduce appropriate prevention and protection measures. Another key aspect is the right to challenge automated decisions.

<sup>15</sup> Commission Communication: Digital compass 2030: the European path to the digital decade, C(2021)118 final.

## A central goal is the transparent, non-discriminatory, trustworthy and ethically justifiable use of algorithms.

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Most comments support the regulatory proposals on data use and algorithmic management. According to the submitted draft report of the European Parliament, moreover, all elements of the algorithm for evaluating the performance of platform workers are to be subject to collective bargaining. A clause for awarding subcontracts was also added to prevent circumvention of the directive.

The transparent, non-discriminatory, trustworthy and ethically justifiable use of algorithms vis-à-vis all platform workers is also a core objective of the German Social Insurance. Therefore, the proposed information requirement of the digital labour platform is supported. This applies, because of the direct impact on working conditions and health and safety at the workplace, in particular to the information requirements on automatic systems that are used to monitoring of work performance and other decisions. Overall, in line with the Digital Strat-

egy and the European Pillar of Social Rights, these regulations create an appropriate framework for innovation while maintaining a healthy, safe and suitable working environment and data protection, as set out in Principle Ten of the European Pillar of Social Rights.

### **Transparency and reporting requirements**

Furthermore, according to the proposed directive, the transparency and reporting obligations for digital labour platforms are to be expanded. This concerns all relevant data for status determination and includes information to be transmitted uniformly throughout the EU as well as additional clarifications and details on the data provided at the request of the labour and social security authorities.

For the industry association Bitkom, however, there is still a need to clarify how detailed the information obligations should be. Furthermore,

All elements of the algorithm used to evaluate platform workers' performance should be subject to collective bargaining.



Bitkom calls for exceptions to the transparency obligation to be defined, particularly with regard to features that constitute trade secrets or if the implementation of certain aspects of the obligation would place a disproportionate burden on the platforms.<sup>16</sup>

It is of fundamental importance for the German Social Insurance that the legal presumption for determining status is based on the actual employment situation. For this to succeed, extensive and meaningful information about the employment relationship is required on the part of the digital labour platforms. This includes, in particular, information on algorithmic management. This is the only way to clarify whether there is actually monitoring and review of work performance, and whether there are effective restrictions on independent work organisation and job acceptance. A high degree of standardisation, even of extensive requests for information, is a prerequisite for being able to make a quick assumption about employment status.

### **Belgium as a pioneer – mandatory coverage against occupational accidents**

The social protection of platform workers is also currently the focus of Belgian politics. Part of the labour market reform unveiled on 15 February 2022 are new requirements for determining the employment status of platform workers and their occupational health and safety.

When presenting the reform package, the Belgian government explicitly referred to the European Commission's proposal for a directive, but in deviation from it, the legal presumption is to be based on eight criteria. The presumption of dependent employment applies as soon as three of the eight criteria or two of the last five criteria listed, which correspond as closely as possible to the criteria of the European Commission's proposed directive, are met.

In addition, digital labour platforms should not be allowed to demand exclusivity from platform workers. Thus, self-employed platform workers can work for competing platforms at the same time.

In addition, mandatory coverage against occupational accidents is to be introduced for all platform workers, regardless of their employment status. This was important to the Belgian Ministry of Economic Affairs and Employment. It had recalled that a platform worker was at fifteen times greater risk of suffering an occupational injury than a worker in "traditional" employment.

The insurance coverage must be paid by the digital labour platform in this case. It remains to be seen what the legislative text will look like at the end of the process. At present, the Belgian proposal is only being submitted to the social partners for comment.<sup>17</sup>

**In contrast to the EU Commission, the Belgian government is presenting a reform package with eight criteria.**

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<sup>16</sup> Bitkom (2022): Position Paper - European Commission consultation concerning the proposal for a Directive on improving working conditions in platform work ([https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12828-Improving-the-working-conditions-of-platform-workers/F2847027\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12828-Improving-the-working-conditions-of-platform-workers/F2847027_en), accessed on 24/2/2022).

<sup>17</sup> DSV (2022): Belgium to implement proposed directive on platform work in advance (<https://dsv-europa.de/de/news/2022/02/belgien-will-richtlinienvorschlag-zu-plattformbeschaeftigung-vorab-umsetzen.html>; accessed on 23/3/2022)

## What happens next

Many stakeholders at the European level have welcomed the proposed directive, including the German Social Insurance. But as is so often the case, the devil is in the details. In this case, in the criteria underlying the statutory presumption. Certainly, this will be an important issue in the upcoming triologue process. This also applies to the demand made by the Austrian side for sufficiently flexible regulations for existing national legislation.

In contrast, the proposed regulations to ensure fairness, transparency, and accountability in algorithmic management receive much support. These are embedded in the European Commission's digital strategy and are included both in the digital principles according to the European Commission as well as in the legislative proposal on artificial intelligence.

The extent to which the proposed directive will succeed in ensuring adequate social and occupational protection for platform workers in practice cannot, of course, be assessed today. However, the transparency and reporting requirements are an important building block for being able to determine the actual employment relationship of platform workers.

German Social Insurance will accompany the further process by providing up-to-date information and assessments.

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