Editorial

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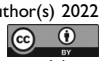

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Towards better working conditions for persons performing services through digital labour platforms

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Online platforms created new ways for people to make a living. Not only did they make it easier for small producers and resellers to find potential clients via online marketplaces; they also created online markets for the provision of services. The example that usually comes to mind when thinking of this latter type of online platforms is Uber, but there is an enormous number of such platforms, and they are active in very different fields: passenger transport, food delivery, translation, programming, proofreading, web design, etc. About 500 labour platforms appear to be active in the EU.[1]

These platforms generally present themselves as mere online intermediaries, offering a place where supply and demand for services can meet. They also stress the freedom of the service provider to organize its own work, to work when, where and as many hours as desired. In their view, this implies that the persons providing services via their platform are self-employed and not employees. Several studies indicated that 9 out 10 platforms classify their workers as self-employed.[2] Another study found that most of these workers 'are genuinely autonomous in their work and can use platform work as a way to develop their entrepreneurial activities'.[3]

1. Commission Staff Working Document Impact Assessment Report, Accompanying the document Proposal for a Directive of the European Parliament and of the Council to improve the working conditions in platform work in the European Union, SWD(2021) 396 final/2, p. 9; 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, SWD(2021) 397 final, p. 3.
2. Eurofound, *Exploring Self-employment in the European Union* (Publications Office of the European Union, 2017), p. 10; W. De Groen et al., *Digital Labour Platforms in the EU: Mapping and Business Models* (2021).
3. According to the Commission Staff Working Document, SWD(2021) 397 final, p. 2: 'There are around 28 million people who are estimated to work through platforms in the EU. 22.5 million of these people are believed to be correctly

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Nevertheless, about 5 million persons are estimated to be wrongly classified as self-employed. Moreover, more than 100 cases have been brought in the EU to dispute the classification of persons providing services through platforms as self-employed.[4] Finally, even those who are rightly classified as self-employed are not always satisfied with their working conditions.[5]

On 9 December 2021, the European Commission published a package of instruments aimed at improving the working conditions of persons working through platforms:

- Draft Directive on improving working conditions in platform work;[6]
- Draft Guidelines clarifying the application of EU competition law to collective agreements of solo self-employed people seeking to improve their working conditions;[7]
- Communication on Better Working Conditions for a Stronger Social Europe: harnessing the full benefits of digitalization for the future of work.[8]

This editorial contains a few remarks about the main contributions of the first two documents. The third document, which mainly explains the Commission's package and calls on to Member States, social partners and digital platforms to take measures to support the improvement of the working conditions of persons performing platform work, will not be further discussed.

The package's centrepiece is a Draft Directive with three main objectives:

1. to ensure that people working through platforms have – or can obtain – the correct employment status in light of their actual relationship with the digital labour platform and gain access to the applicable labour and social protection rights;
2. to ensure fairness, transparency and accountability in algorithmic management in the platform work context; and
3. to enhance transparency, traceability and awareness of developments in platform work, and improve enforcement of the applicable rules for all people working through platforms, including those operating across borders.

While the two latter objectives are undoubtedly important, it is the first objective that responds to the most pressing social need, since the classification of a person as an employee of the platform (instead of a self-employed person) opens the door to the full package of labour and social protection rights. Before delving further into the mechanism proposed to facilitate access to the status of an employee of the platform, the terminology used in the draft Directive requires attention.

classified, either as workers or as self-employed (the vast majority, as the latter). 5.5 million of the total 28 million people, however, may be at risk of misclassification.'

4. Commission Staff Working Document, SWD(2021) 397 final, p. 2. The document also mentions 15 administrative decisions.
5. See e.g. Commission Staff Working Document Impact Assessment Report, SWD(2021) 396 final/2, p. 5.
6. Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM(2021) 762 final ('Draft Directive').
7. Annex to the Communication from the Commission, Approval of the Content of a Draft for a Communication from the Commission, Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, C(2021) 8838 final.
8. 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, COM(2021) 761 final.

For the purposes of the Draft Directive, 'platform work' is defined as 'any work organised through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform and the individual, irrespective of whether a contractual relationship exists between the individual and the recipient of the service' (Article 2(1)(2)). A digital labour platform 'means any natural or legal person providing a commercial service', where the latter meets three cumulative requirements:

(a) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application;
(b) it is provided at the request of a recipient of the service;
(c) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location' (Article 2(1)(1)).

Additionally, the concept of '[d]igital labour platforms (…) shall not include providers of a service whose primary purpose is to exploit or share assets. It shall be limited to providers of a service for which the organisation of work performed by the individual constitutes not merely a minor and purely ancillary component' (Article 2(2)). The addition is meant to exclude platforms such as Airbnb where the service offered by the service provider is in essence the provision of accommodation even when some additional tasks such as cleaning may be involved. The exclusion of this type of platforms makes sense. However, the wording of the exclusion is not clear; there is some confusion between the service provided by the platform and that provided by the individual using the platform to exploit or share assets.

The Directive furthermore distinguishes between 'persons performing platform work' and 'platform workers'. The first is a broader concept and refers to 'any individual performing platform work, irrespective of the contractual designation of the relationship between that individual and the digital labour platform by the parties involved' (Article 2(1)(3)). The second concept is narrower. The term 'platform worker' refers to 'any person performing platform work who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in the Member States with consideration to the case-law of the Court of Justice' (Article 2(1)(4)).

In order to diminish the cases of misclassification of people working through platforms as employees, the Draft Directive requires Member States to have appropriate procedures in place to verify and ensure the correct determination of the employment status of persons performing platform work. This determination must be guided 'primarily by the facts relating to the actual performance of work, taking into account the use of algorithms in the organisation of platform work, irrespective of how the relationship is classified in any contractual arrangement that may have been agreed between the parties involved' (Article 3(2)).

To further facilitate the determination of the employment status, the Draft Directive introduces a legal presumption that a person working through a digital labour platform classifies as an employee when the platform controls the performance of work.

The platform is considered to control the performance of work when it fulfils at least two of the following criteria, listed in Article 4(2):

(a) it effectively determines, or sets upper limits for the level of remuneration;
(b) it requires the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;

(c) it supervises the performance of work or verifies the quality of the results of the work including by electronic means;
(d) it effectively restricts the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
(e) it effectively restricts the possibility to build a client base or to perform work for any third party.

The presumption is rebuttable. Regarding the rebuttal, the Draft makes a distinction between cases where the digital labour platform seeks to rebut the presumption and cases where the person performing the platform work seeks to do that. If the digital labour platform argues that the contractual relationship in question is not an employment relationship, it bears the burden of proving this. If the person performing the platform work 'argues that the contractual relationship in question is not an employment relationship (…), the digital labour platform shall be required to assist the proper resolution of the proceedings, notably by providing all relevant information held by it' (Article 5). Although well-intended, this rule seems unnecessarily confusing and complex. Given that Article 16 requires Member States to ensure that national courts or competent authorities are able to order the digital labour platform to disclose any relevant evidence which lies in their control in proceedings concerning a claim regarding the correct determination of the employment status of persons performing platform work, there is no need to include a specific rule to this effect in the article concerning the rebuttal of the presumption. A simple rule providing that the party seeking to rebut the presumption of Article 4(1) and (2) bears the burden of proving that the relationship concerned is not an employment relation in combination with Article 16 seems to be sufficient to reach the aim of the current Article 5.

Also, persons performing platform work who are not reclassified as workers, will benefit from the Draft Directive, since most of the rules on algorithmic management (Articles 6–10),[9] transparency (Articles 11–12), remedies and enforcement (Articles 13–19) apply to all persons performing platform work, whether or not they classify as employees of the platform. This residuary category of persons may either be self-employed or have some kind of intermediary status introduced by certain national legal systems.

The Draft Guidelines clarifying the application of EU competition law to collective agreements of solo self-employed persons seeking to improve their working conditions further facilitates collective action by self-employed persons in order to improve their working conditions by relieving them from the risk that their collective agreements or actions may be held to infringe the cartel prohibition enshrined in Article 101 TFEU.

As opposed to employees,[10] self-employed persons offering goods and services are traditionally considered to be undertakings within the meaning of Article 101 TFEU;[11] the same goes for their 'employers'. Collective agreements between self-employed and their 'employers' (or the respective representatives) concerning working conditions which may appreciably restrict competition in the internal market and affect trade between the Member States are therefore prohibited, unless they can

9. Article 10(1) Draft Directive: 'Article 6, Article 7(1) and (3) and Article 8 shall also apply to persons performing platform work who do not have an employment contract or employment relationship'.
10. Case C-22/98 *Becu*, EU:C:1999:419, para. 26. See also Case C-179/90 *Merci Convenzionali*, EU:C:1991:464, para. 13.
11. Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v. Compañía Española de Petróleos SA* (CEPSA), ECR 2006 I-11987, ECLI:EU:C:2006:784, para. 45; C-413/13 *FNV KIEM*, EU:C:2014:2411, para. 27; Case C-35/96 *Commission v. Italy*, EU:C:1998:303, para. 35–38.

be justified under Article 101(3) TFEU. Agreements setting fixed fees, or minimum fees, to be paid to the self-employed by their 'employers' would be prohibited. Proving sufficient efficiencies to justify such agreements would be extremely difficult. Whether agreements with regard to other working conditions would infringe the cartel prohibition, would be more difficult to predict.[12]

By contrast, collective agreements concluded in pursuit of social policy objectives (such as better working conditions) and resulting from social dialogue between individual employers or employers' organizations on the one side and workers' organizations on the other side, are held to be outside the scope of Article 101 TFEU.[13]

In *FNV KIEM*, this rule was extended to the 'false self-employed'. The Court held that:

> it is only when self-employed service providers who are members of one of the contracting employees' organisations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers, are 'false self-employed', in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU. It is for the national court to ascertain whether that is so.[14]

The Draft Guidelines now go further and state that collective agreements between solo self-employed persons and digital labour platforms that, by their nature and purpose aim at improving working conditions, also fall outside the scope of Article 101 TFEU, even if the self-employed persons in question have not been reclassified as workers by national authorities/courts. The concept 'solo self-employed' is broader than that of 'false self-employed': it 'refers to persons who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labour for the provision of the services concerned'.[15] Like the rules on digital labour platforms, the rules of the Draft Guidelines do not apply to solo self-employed persons whose economic activity consists merely in the sharing or exploitation of goods or assets, or the resale of goods/services.

Given the comparability of collective negotiations on working conditions between digital labour platforms or associations thereof and employees or their associations on the one hand, and such collective negotiations between digital labour platforms and solo self-employed or their associations on the other hand, an equal treatment of both cases under competition law is understandable and highly welcomed by the concerned solo self-employed and those advocating their interests. It should, however, be kept in mind that Commission Guidelines are only able to bind the Commission itself, and not the national competition authorities, the national courts or the Court

12. See further CEPS, EFTHEIA and HIVA-KU Leuven, Study to Gather Evidence on the working Conditions of Platform Workers (Brussels, December 2019), p. 250.
13. Case C-413/13 FNV KIEM, para. 42; Case C-67/96 *Albany International*, EU:C:1999:430; Case C-115/97-C-117/97 *Brentjens' Handelsonderneming BV*, EU:C:1999:434; Case C-219/97 *Maatschappij Drijvende Bokken*, EU:C:1999:437. Confirmed by Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others* EU:C:2000:428; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, EU:C:2007:772; Case C-319/07 *P 3F v Commission*, EU:C:2009:435; Case C-222/98 *Hendrik van der Woude and Stichting Beatrixoord*, EU:C:2000:475; Case C-437/09 *AG2R Prévoyance*, EU:C:2011:112.
14. C-413/13 FNV KIEM.
15. 'European Commission consultation on draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons', *Practical Law Competition* (2021), https://uk.practicallaw.thomsonreuters.com/w-033-7198?transitionType=Default&contextData=(sc.Default).

of Justice. Furthermore, it is to be noted that the Commission's Draft Guidelines are is not limited to the application of the EU competition rules to solo self-employed working through digital labour platforms. It also covers other, partially overlapping, categories of solo self-employed.[16]

Although the legislative quality of the draft measures can definitely be further improved and they may still undergo substantive changes before they are adopted, the package of draft measures published on 9 December 2021 is definitively an important step towards better working conditions for persons performing services through digital labour platforms.

16. Given the format and the topic of this editorial, the desirability and implications thereof are not further discussed here.