



Policy Paper

EU PLATFORM WORKERS' DIRECTIVE A TEST FOR REGULATING THE FUTURE OF WORK

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Executive summary

- In December 2021, the Commission launched a proposal for a directive on improving working conditions in platform work. The initiative has three goals: to address the misclassification of employment status; improve transparency, fairness and accountability of algorithmic practices; and improve the transparency of platform work, including in cross-border situations.
- The platform economy presents great social challenges, and national actions have led to fragmentation, endangering the level playing field and making EU-level legislative action much needed. The directive is equally seen as an important test case for regulating atypical work and algorithmic management in the future.

Elements

- **1. Misclassification of work:** The directive aims to reclassify false self-employed through a legal presumption, meaning that if certain criteria are met, workers will be deemed employees. The reclassification of workers to employees is both the most important and most controversial part of the directive. A strong presumption mechanism causes fear that it might lead to a mass reclassification of workers. In contrast, a tight mechanism risks institutionalising and legalising bogus self-employment while putting genuinely self-employed workers under platforms' subordination.
- **2. Algorithms:** The directive would be the first to regulate algorithmic monitoring and decision-making in the workplace, which is often opaque and greatly affects workers. The regulation addresses the protection of personal data and will also potentially provide transparency in automated decision-making (ADM) and require the human monitoring of ADM.

- **3. Social relations:** The new directive could significantly strengthen the role of collective representation, providing representatives with new information and consultation rights.
- **4. Enforcement:** Lastly, the text aims to increase the transparency and traceability of platform work, which would facilitate enforcement through, amongst others, the compulsory registration of the platforms in the member states.

Recommendations

- **Enforcing a strong presumption mechanism:** A strong presumption mechanism that either sets the bar at one criterium of control or removes the presumption criteria altogether is the best way to ensure the correct classification of workers. To be efficient, the presumption has to be accompanied by a suspension mechanism and a compulsory registration of platform work contracts with the competent social security agency guaranteeing enforcement.
- **Algorithms:** The directive should go beyond the GDPR provisions on protecting personal data. The text must also provide transparency in ADM and include provisions to erase and restrict data gathering. In addition, the directive has to provide the right to data mobility, a human review of automated decisions, and ban ADM for critical decisions. Lastly, the directive's scope should be extended to include all workers.
- **Social relations:** The current directive can be improved by explicitly mentioning trade unions and including measures to promote work councils. This way, workers would have the opportunity to exert influence in important decisions.

Conclusion

It remains to be seen whether the final directive will pass the test and set the scene for defending the social acquis for the future of (atypical) work. The Commission presented an ambitious proposal, which has been severely weakened under the Czech presidency. The presumption mechanism was tightened, and provisions on algorithmic management weakened. In addition, it is uncertain how well the directive will be enforced by the member states. The case of the Švarc law in the Czech Republic has shown how difficult it is to ensure compliance in practice.

Introduction: the platform workers directive, a test case for the future of work

In December 2021, the European Commission launched **an ambitious proposal for a directive** to improve the working conditions of platform workers¹. It aims to provide the much-needed regulation for the emerging platform economy, which poses great challenges to labour law and employment relations². With the initiative, the Commission wants to tackle the misclassification of employment status, improve the transparency, fairness and accountability of algorithmic practices and improve the transparency of platform work, including in cross-border situations³. The Commission estimates that between 1.72 million and 4.1 million people will be reclassified as workers with the new directive. If the legislation is adopted, it would also be the first to regulate the use of algorithms in work⁴.

The collaborative economy presents a **new triangular business model** in which online platforms facilitate matching supply and demand in a large range of services, including accommodation, food delivery, car rides and online crowd-work⁵. The platform economy is diverse. In addition, its flexible nature and the varying degrees of control platforms exercise over their workers blur the traditional distinction between employees and self-employed⁶. Yet, this division is

¹ Eures. 2022. EU proposes directive to protect the rights of platform workers. Available at: https://eures.ec.europa.eu/eu-proposes-directive-protect-rights-platform-workers-2022-03-17_en.

² Barrett et al. The Future of Legal Europe: Will We Trust in It? Available at: <https://link.springer.com/content/pdf/10.1007/978-3-030-68253-8.pdf>.

³ European Commission. 2021. Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0762&from=EN>.

⁴ Ponce Del Castillo and Naranjo. 2021. Regulating algorithmic management. Available at: <https://www.etui.org/sites/default/files/2022-08/Regulating%20algorithmic%20management-An%20assessment%20of%20the%20ECs%20draft%20Directive%20on%20improving%20working%20conditions%20in%20platform%20work-2022.pdf>.

⁵ Inglese. 2019. Regulating the Collaborative Economy in the European Union Digital Single Market. Available at: [Regulating The Collaborative Economy In The European Union Digital Single Market \(Marco Inglese\) \(z-lib.org\).pdf](https://www.z-lib.org/pdf/Regulating%20The%20Collaborative%20Economy%20In%20The%20European%20Union%20Digital%20Single%20Market%20(Marco%20Inglese)%20(z-lib.org).pdf).

⁶ *Ibid.*

fundamental in determining social benefits, wages and working hours⁷. Trade unions fear that digitalisation will significantly reduce employment protection and deteriorate working conditions⁸. While the problem of false self-employment is not new⁹, the emergence of the platform economy represents a new challenge, which has been described as a turbo Švarc system¹⁰.

“The misqualification of labour has become increasingly relevant beyond the platform economy, and non-standard work will continue to grow in the EU.”

Platform work still constitutes a relatively small part of the economy. According to a large-scale survey conducted in 2018, platform work is the secondary or primary occupation for only 2.8 per cent of Czech workers (a majority of whom perform online work)¹¹. However, the misqualification of labour has become increasingly relevant beyond the platform economy, and non-standard work will continue to grow in the EU¹². Additionally, algorithms will become more important for labour management in the future¹³. To guarantee social protection and decent working conditions for European and Czech workers, it is crucial that the EU’s social acquis keeps pace with the digitalisation of the single market¹⁴. In this respect, the new directive is considered an important **test case for regulating the future of work**

⁷ *Ibid.*

⁸ Drahokoupil. 2017. Nové formy a způsoby organizace práce umožněné digitálními technologiemi a jejich genderové dopady. Available at: https://www.researchgate.net/profile/Renata-Kyzlinkova-2/publication/336238809_Nove_formy_zamestnavani/links/5d95eab8a6fdccfd0e729089/Nove-formy-zamestnavani.pdf.

⁹ Since the 1990s the Czech government and trade unions have tried to fight bogus employment under the Švarc system, with mixed results.

¹⁰ The Švarc system is a Czech term that describes the situation in which people work under the subordination of an employer but are officially self-employed. It was named after an entrepreneur who used the system for his business in the early 1990s.

¹¹ Urzi Brancati, Pesole and Fernández-Macías. 2020. New evidence on platform workers in Europe. Available at: jrc118570_jrc118570_final.pdf.

¹² Hooker and Antonucci. 2022. Improving the EU Platform Work Directive proposal: a contribution from emerging research findings. Available at: https://www.ose.be/sites/default/files/publications/2022_Hooker_Antonucci_OpinionPaper28.pdf.

¹³ European Committee of the Regions. 2022. Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work - Opinion of the European Committee of the Regions. Available at: <https://data.consilium.europa.eu/doc/document/ST-11328-2022-INIT/en/pdf>.

¹⁴ Kelly-Lyth and Adams-Prassl. 2021. The EU’s Proposed Platform Work Directive. Available at: <https://verfassungsblog.de/work-directive/>.

in the EU¹⁵. While the current proposal has to overcome several important pitfalls, it presents a first step in the right direction¹⁶.

To get an overview of the challenges, solutions and initiatives surrounding platform work, this policy paper will address the following questions:

- *Why is action at the EU level necessary?*
- *What should action at the European Union level consist of?*
- *To what extent does the Directive, in its current form, adequately address the challenges associated with platform work?*

Online platforms and the precarisation of work

The emergence of platform works gives rise to various social problems to which the current labour laws cannot respond appropriately. Firstly, the vast majority of platform **work is low-waged**¹⁷. Fierce competition and payment via piece rates with unpaid waiting time put a serious strain on wages throughout Europe¹⁸. In the Czech Republic, trade unions have expressed their concern that a part of the platform workers barely earns a minimum wage¹⁹.

Additionally, the ambiguous status of most platform workers deprives them of **social security benefits** like sick- and maternity leave, injury insurance and pensions to which employees are entitled²⁰. Yet, platforms often indirectly subject

¹⁵ Kilhoffer et al., 2020. Study to gather evidence on the working conditions of platform workers. Available at: [KE0120054ENN.pdf](#).

¹⁶ Kelly-Lyth and Adams-Prassl. 2021. The EU's Proposed Platform Work Directive. Available at : <https://verfassungsblog.de/work-directive/>.

¹⁷ Crowd work is generally paid less than offline work.

EPRS. 2021. Online platforms: Economic and societal effects. Available at : [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU\(2021\)656336_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU(2021)656336_EN.pdf).

¹⁸ Hooker and Antonucci. 2022. Improving the EU Platform Work Directive proposal: a contribution from emerging research findings. Available at : https://www.ose.be/sites/default/files/publications/2022_Hooker_Antonucci_OpinionPaper28.pdf.

¹⁹ Soňa Veverková. 2022. Enhancing the social partners and social dialogue in the new world of work in the Czech Republic. available at: [\[9781800888043 - The New World of Work\] Chapter 5 Enhancing the social partners and social dialogue in the new world of work in the Czech Republic \(1\).pdf](#).

²⁰ EPRS. 2021. Online platforms: Economic and societal effects. Available at : [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU\(2021\)656336_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU(2021)656336_EN.pdf).

their workers to **control through the use of algorithms**. Firstly, they influence workers' autonomy to organise their own work through algorithmic recommendation and restriction, which recommends some options while withholding other information²¹. Secondly, workers are evaluated through an algorithmic recording and rating system, which puts them under constant surveillance. The recording and rating system is problematic because it leads to a winner takes it all market, in which people with a higher ranking get offered more work and can further improve their rating. Because working less impacts one's rating and, consequently, the tasks one is offered, platforms restrict workers' freedom to organise their own working time²².

The precarious situation of platform workers is further worsened by the use of **reputation scores** that tie workers to one platform. Moreover, the **easy hiring and firing** through algorithms make it harder to voice discontent. The information asymmetry between workers and platforms further exacerbates power imbalances. For workers, it is unclear how algorithms determine who and when someone gets offered a job and how pay is determined. Meanwhile, platforms have access to a lot of data on their workers²³.

A need for EU action

To tackle the challenges mentioned above, there is broad consensus among the member states that legislative action is necessary²⁴. However, there are different opinions on what the scope of action should be. Recently, several member states have tried to tackle the issue on their own using various measures, including the introduction of a rulebook (Belgium), social dialogue systems with elected

²¹ Kellogg, Valentine and Christin. 2020. Algorithms at work: the new contested terrain of control. Available at: <https://par.nsf.gov/servlets/purl/10195395>.

²² *Ibid.*

²³ EPRS. 2021. Online platforms: Economic and societal effects. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU\(2021\)656336_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU(2021)656336_EN.pdf).

²⁴ Furlong. 2022. A work's guide to the Czech EU presidency policy agenda. Available at: <https://www.politico.eu/article/czech-presidency-council-of-the-eu-policy-agenda/>

representatives (France) and the reclassification of delivery countries (Spain)²⁵. In addition, several national courts have addressed platform work in light of labour conflicts. However, such **a national approach is problematic** as it leads to fragmentation and, therefore, legal uncertainty for workers and platforms. Additionally, it undermines the level playing field among member states as well as between online platforms and other businesses, and it puts downward pressure on labour standards²⁶. Finally, the national approach is problematic because member states often do not have access to relevant data for effective enforcement, especially in cross-border cases²⁷.

Towards EU regulation of platform work

While the idea that the platform economy has to be regulated enjoys broad support in the literature, there are different opinions on which approach is most desirable. The new directive should address various issues on four dimensions: Work, employment, social relations, and enforcement²⁸. The next part will look into the problems platform workers encounter on those different dimensions and how the new directive addresses them.

Employee dimension: Platform workers, a category apart?

The most pressing problem related to platform work concerns the **misclassification of self-employment**. Most platform workers are officially self-employed and do not have access to social security benefits like sick- and maternity leave, injury insurance and pensions²⁹. Yet, while platforms portray

²⁵ *Ibid.*

²⁶ European Commission. 2021. Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0762&from=EN>.

²⁷ Eurofound. 2020. Back to the future: Policy pointers from platform work scenarios. Available at: https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef20012en.pdf

²⁸ Kilhoffer et al., 2020. Study to gather evidence on the working conditions of platform workers. Available at: [KE0120054ENN.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef20012en.pdf).

²⁹ EPRS. 2021. Online platforms: Economic and societal effects. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU\(2021\)656336_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU(2021)656336_EN.pdf).

“There is an intense debate in the literature on whether the reclassification of platform workers to employees is possible and even desirable.”

themselves merely as matchmakers, they often have considerable power over workers, casting doubt on whether most platform workers are de-facto self-employed. In fact, the European Commission estimates that up to 5.5 million platform workers in the EU could be at risk of employment status misclassification³⁰. Yet, there is an intense debate in the literature on whether the reclassification of workers to employees is possible and even desirable. The emergence of the platform economy has blurred the strict dichotomy between employee and employer. Because platform workers have specific characteristics, assigning them to one category is difficult³¹.

Against this backdrop, some have suggested creating an **intermediate category** for platform workers that is adapted to the flexible nature of platform work³². Yet, experiences in Italy and Spain show that creating a third category can be a risky undertaking. In Italy, it has led to mass arbitrage, moving former employees into a less protective category. In Spain, on the other hand, the requirements for obtaining the third category status were made so strict that only very few workers qualified³³. To guarantee adequate protection to platform workers, the reclassification of bogus self-employed into employees is, therefore, to be preferred.

While there is broad political support for tackling misclassification, there is fear that low requirements will lead to the mass reclassification of workers to

³⁰ European Commission. 2021. Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0762&from=EN>.

³¹ E.g. the triangular relationship between platform, consumer and service provider, and the flexible nature of platform work

³² Cherry and Aloisi. 2018. A Critical Examination of a Third Employment Category for On Demand Work (Comparative Perspective). Available at: <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1372&context=faculty>.

³³ *Ibid.*

employees, posing an existential threat to the business model of platforms³⁴. Unsurprisingly, the requirements under which workers can be deemed employees present the most controversial part of the directive and were changed multiple times over the course of the negotiations³⁵.

Evaluating the current proposal on the employment dimension

The directive aims to tackle the misqualification through a **(rebuttable³⁶) presumption of employment**. This means that when certain criteria are met, workers are deemed employees unless the platform proves otherwise (see Table 1). For the determination of the employment status, the current proposal looks at the actual work performance, irrespective of the contractual agreement³⁷. The role of algorithms is also explicitly taken into account (Article 3(2)). While it is difficult to predict the impact of the directive across the member states given the national procedural autonomy³⁸, the presumption certainly is a step in the right direction. Firstly, it facilitates the establishment of an employment status for workers who might otherwise find it hard to prove a subordinate relation³⁹. Additionally, it will improve the legal certainty for workers and platforms and facilitate collective bargaining and enforcement by authorities⁴⁰.

³⁴ Bourgery-Gonse. 2022. Balanced deal on platform workers rules reached, leading MEP says. Available at : <https://www.euractiv.com/section/sharing-economy/interview/balanced-deal-on-platform-workers-rules-reached-leading-mep-says/>.

³⁵ *Ibid.*

³⁶ Meaning that the presumption can be challenged by the platform in court.

³⁷ Rosin. 2022. Towards a European Employment Status: The EU Proposal for a Directive on Improving Working Conditions in Platform Work. Available at: <https://doi.org/10.1093/indlaw/dwac011>.

³⁸ Meaning that the presumption can be challenged by the platform in court.

³⁹ Risak. 2018. Fair working conditions for platform workers. Available at: <https://euagenda.eu/upload/publications/untitled-144772-ea.pdf>

⁴⁰ Kullmann. 2021. 'Platformisation' of work: An EU perspective on Introducing a legal presumption. Available at: <https://journals.sagepub.com/doi/full/10.1177/20319525211063112>.

Table 1: Article 4(2): Presumption criteria

Article 4(2): Presumption criteria for the existence of control: 3 out of 7 conditions have to be met

- **1. Determination of remuneration**
- **2. Requirements on performance, conduct, and appearance, such as wearing a uniform (often these take the form of non-binding recommendations⁴¹)**
- **3. Overseeing the performance of workers**
- **4. Restricting the possibility of working for someone else**
- **Restriction of workers' freedom**
 - o **5. Ability to limit worker's discretion in choosing one's working hours**
 - o **6. Ability to limit worker's ability to accept or refuse a task**
 - o **7. Ability to limit the use of subcontractors and substitutes⁴²**

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Yet, while its introduction should be welcomed, some scholars have warned that the **rebuttable presumption is too weak**⁴³. In order to work well, the indicators triggering the legal presumption should be easily detectable⁴⁴. However, the

⁴¹ Rosin. 2022. Towards a European Employment Status: The EU Proposal for a Directive on Improving Working Conditions in Platform Work. Available at: <https://doi.org/10.1093/inclaw/dwac011>.

⁴² Bourgery-Gonse. 2022. Czech Presidency hones in on platform workers' personal data protection. Available at: <https://www.euractiv.com/section/sharing-economy/news/czech-presidency-hones-in-on-platform-workers-personal-data-protection/>.

⁴³ Rosin. 2022. Towards a European Employment Status: The EU Proposal for a Directive on Improving Working Conditions in Platform Work. Available at: <https://doi.org/10.1093/inclaw/dwac011>.

⁴⁴ *Ibid.*

Commission proposal employs the criterium of “the existence of a subordinate relationship”. This represents a disproportionate difficulty for workers, who often have limited insights into how the platform organises work, especially when it relies on algorithms⁴⁵.

To make matters worse, **the criteria to trigger the presumption, as well as the wording of the text, were tightened by the Council in later versions of the proposal**, causing fear that the current directive might tip in favour of the platforms⁴⁶. Two out of five criteria had to be met in the initial proposal. The bar has now been raised to three out of seven criteria (Article 4a). These include remuneration, requirements such as wearing a uniform, overseeing performance, restricting the possibility of working for someone else, restricting workers’ freedom to choose their schedule, limiting the ability to accept or refuse a task, and limitation of the use of subcontractors and substitutes. While this might seem like a detail, it has significant consequences for the protection of platform workers. It means that a platform can, for example, determine workers’ wages and working time without hiring them as employees, as long as they fulfil the other five criteria. Consequently, de-facto employees would find themselves in a situation of subordination without the benefits and social protection provided by the employee status.

In addition, **a tight presumption mechanism risks leaving genuine self-employed under the subordination of platforms**. In an open letter to the European Parliament, self-employed platform workers spoke out in favour of a strong presumption mechanism to protect them from subordination. Self-employed workers depend on platforms to come in contact with their clientele,

⁴⁵ *Ibid.*

⁴⁶ Bourgery-Gonse. 2022. Czech presidency makes new attempt on platform workers directive. Available at : <https://www.euractiv.com/section/sharing-economy/news/czech-presidency-makes-new-attempt-on-platform-workers-directive/>.

which puts them in a weak position to negotiate the terms and conditions⁴⁷. Because platforms will make sure to stay just under the requirements that would trigger the presumption, a strong presumption would protect employees and self-employed workers active in the platform economy.

Meanwhile, the proposal moved in a different direction in the European Parliament. On December 13, the EMPL⁴⁸ committee of the European Parliament reached an agreement strengthening the Commission's proposal. In the compromise, the presumption criteria are removed completely, leaving it up to the workers, trade unions and national authorities to trigger the **presumption without conditions** if they consider it reasonable⁴⁹. Meanwhile, they created a non-binding list of criteria to motivate the rebuttal of the presumption and prove genuine self-employment⁵⁰. While this provision can potentially strengthen workers' rights, the more national approach also includes clear limitations and dangers. It is likely that the new provision will be beneficial for workers in those member states favouring stronger protection as they would not have to abide by the EU compromise constituted by the lowest common denominator⁵¹. However, the absence of binding criteria at the European level will likely weaken the position of workers in other states, including in Central and Eastern Europe. In addition, it

⁴⁷ Mazenc. 2022. Freelances, Indépendants, ne perdez pas votre liberté !. Available at : <https://www.change.org/p/freelances-ind%C3%A9pendants-ne-perdez-pas-votre-libert%C3%A9>.

⁴⁸ European Parliament's Committee on Employment and Social Affairs

⁴⁹ Bourgerie-Gonse. 2022. Balanced deal on platform workers rules reached, leading MEP says. Available at : <https://www.euractiv.com/section/sharing-economy/interview/balanced-deal-on-platform-workers-rules-reached-leading-mep-says/>.

⁵⁰ Bourgerie-Gonse. 2022. MEPs tighten platform worker protection in key committee vote. Available at : <https://www.euractiv.com/section/gig-economy/news/meps-tighten-platform-worker-protection-in-key-committee-vote/>

⁵¹ The member states that called for a strong presumption mechanism in the Council include Belgium, Slovenia, Spain, Italy, Luxembourg, Malta, the Netherlands, and Portugal

Bourgerie-Gonse. 2022. Eight EU countries push back against stricter conditions for platform workers' status. <https://www.euractiv.com/section/sharing-economy/news/eight-eu-countries-push-back-against-stricter-conditions-for-platform-workers-status/>

is uncertain whether the text will survive the vote in the plenary, as the EMPL members are usually more preoccupied with workers' rights.

Lastly, at the time of writing, it is unsure whether the **suspension clause** will be retained from the initial proposal⁵². The measure was proposed by the Commission to protect the employment status of workers during rebuttal proceedings. The clause stipulates that when the platform challenges the employee status of its workers, the presumption of employee status stays in place until a decision by the court has been made. While the provision could prevent platforms from prolonging the procedure and depriving workers of their employee status, especially Central and Eastern European member states, see it as overstepping the EU's competencies⁵³.

In conclusion, the criteria to trigger the legal presumption are both the **most important and controversial part of the directive**. It remains to be seen what the final mechanism will look like. The EP voted on a rather ambitious text on December 13. Meanwhile, the text in the Council could tip in favour of the platform camp, raising concern among trade unions that the directive might be detrimental to workers⁵⁴.

Work dimension: regulating surveillance and decision-making by algorithms

A second issue the directive aims to tackle is related to algorithmic management. The platform economy was "a cradle for automated decision-making"⁵⁵, which is a practice with a far-reaching impact on the allocation of tasks, surveillance and performance appraisal. The platform directive aims to regulate

⁵² Bourgerie-Gonse. 2022. Czech presidency makes new attempt on platform workers directive. Available at : <https://www.euractiv.com/section/sharing-economy/news/czech-presidency-makes-new-attempt-on-platform-workers-directive/>.

⁵³ *Ibid.*

⁵⁴ ETUC. 2022. Ministers should reject Czech platform proposal. Available at : <https://www.etuc.org/en/pressrelease/ministers-should-reject-czech-platform-proposal>

⁵⁵ Kelly-Lyth and Adams-Prassl. 2021. The EU's Proposed Platform Work Directive. Available at : <https://verfassungsblog.de/work-directive/>.

the use of algorithms in determining remuneration, tasks and dismissal⁵⁶. Firstly, the directive stipulates the **right to transparency** on automated monitoring and decision-making mechanisms. This includes the categories, grounds and parameters used to make decisions (Article 6)⁵⁷. Additionally, the Commission proposal makes the **human monitoring** of the impact of automated decision-making mandatory (Article 7). It requires both a human review and a written statement to justify certain automated decisions (including suspensions from the platform or the refusal of pay) (Article 8). Platforms would also have to introduce preventive measures to prevent algorithms from negatively affecting workers⁵⁸. Importantly, the right to transparency and the obligation of human monitoring **apply to all platform workers**, including self-employed workers (Article 10). Lastly, the current text also **prohibits the processing of data that is not work-related**, including private texts (Article 6).

“Under the Czech presidency, the provisions on algorithmic management were also severely weakened, limiting the provisions to those of the GDPR framework.”

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Unfortunately, under the Czech presidency, **the provisions on algorithmic management were also severely weakened**, limiting the provisions to those of the GDPR framework. That means that, in the latest version (December 2022), the regulation on algorithms would only include the prohibition of using personal data for the management of the platform⁵⁹. Members of the Commission rightfully

⁵⁶ Bourgery-Gonse. 2022. EU Commissioner: Council should revert to platform workers’ directive original text. Available at: <https://www.euractiv.com/section/gig-economy/interview/eu-commissioner-council-should-revert-to-platform-workers-directive-original-text/>.

⁵⁷ Both for employees and self-employed

⁵⁸ Bourgery-Gonse. 2022. EU Commissioner: Council should revert to platform workers’ directive original text. Available at: <https://www.euractiv.com/section/gig-economy/interview/eu-commissioner-council-should-revert-to-platform-workers-directive-original-text/>.

⁵⁹ *Ibid.*

reacted with concern, stating that algorithmic management goes much deeper than this⁶⁰. Indeed, algorithms greatly impact workers and working conditions. Therefore, it is crucial that the new legislation also includes provisions increasing transparency on ADM and a human review of important decisions like exclusion from the platform⁶¹.

To guarantee decent working conditions, it is crucial that the Council returns at least to the provisions as described in the Commission's proposal. More ideally still, the text should be strengthened beyond the Commission's initial text. While the EC's commitment to increase transparency in the use of algorithms constitutes a first step in increasing accountability, it is not enough⁶². The text described the right to information, explanation, review and rectification of decisions (Articles 3 and 4). Yet, **the rights to erase and restrict data and the right to data mobility** were not explicitly mentioned. Furthermore, there was no prohibition on processing data and profiling through fully automated systems, only the right to provide information about the practices⁶³. The text did also not include a ban on the automated termination of accounts, which constitutes de-facto dismissal⁶⁴. Lastly, its substantive scope was narrow, leaving **non-platform workers** unprotected. This is problematic as algorithmic management is not limited to the platform economy. The proposal should therefore be expanded to all workers.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Hooker and Antonucci. 2022. Improving the EU Platform Work Directive proposal: a contribution from emerging research findings. Available at : https://www.ose.be/sites/default/files/publications/2022_Hooker_Antonucci_OpinionPaper28.pdf.

⁶³ Ponce Del Castillo and Naranjo. 2021. Regulating algorithmic management. Available at : <https://www.etui.org/sites/default/files/2022-08/Regulating%20algorithmic%20management-An%20assessment%20of%20the%20ECs%20draft%20Directive%20on%20improving%20working%20conditions%20in%20platform%20work-2022.pdf>.

⁶⁴ *Ibid.*

This is something which Spain has already introduced in its algorithmic management rules⁶⁵.

Social relations dimension: considerable improvements for collective representation

In addition to the misclassification of workers and regulation of ADM, the new directive could also **significantly strengthen the role of collective representation**, providing representatives with new information and consultation rights⁶⁶. For example, Article 6(4) of the directive provides representatives with direct access to information about automated decision-making. This would make it significantly easier to gather evidence and challenge unfair algorithmic practices in the future⁶⁷. In addition, article 9 of the directive reaffirms the right to collective consultation under EU law, and Article 15 requires the establishment of an unmonitored platform communication channel for labour organising. As such, the text would considerably improve representatives' information and consultation rights, which can encourage future social dialogue and collective bargaining.

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However, similarly to the provisions on algorithms, the rights **only apply to platform workers**. Yet, also in the broader economy, non-standard work is becoming more widespread⁶⁸. Additionally, the Commission proposal refers to the role of workers' representatives in collective bargaining but does **not explicitly mention trade unions** (Article 14). It is important that this is included to avoid

⁶⁵ Kelly-Lyth and Adams-Prassl. 2021. The EU's Proposed Platform Work Directive. Available at : <https://verfassungsblog.de/work-directive/>.

⁶⁶ *Ibid.*

⁶⁷ This practice is certainly not self-evident. On the contrary, the practice has been challenged by platforms in the past by, amongst others, Uber in the Netherlands.

⁶⁸ *Ibid.*

creating unions of convenience⁶⁹. Lastly, the proposal could also have contained support for the establishment of **work councils or board representation**. Despite the existence of formal representation, workers are often merely “the passive recipients” of changes made by the platform, including rating, pay, schedules and changes to the app⁷⁰. The establishment and regulatory empowerment of work councils could help recalibrate the power balance that exists between workers and platforms. The idea is not that radical; in 2018, the Berlin-based food delivery platform Delivery Hero set up a work council, which provided, amongst other things, employee representatives on the supervisory board¹.

Remedies and enforcement of the directive

Lastly, the new directive also aims to increase the transparency and traceability of platform work which would facilitate enforcement by the member states. To this end, the text introduces **the compulsory registration** of platforms in member states⁷¹. Additionally, platforms have to publish and regularly update information about the terms and conditions of their workers, and public authorities are given the right to request further information (Articles 12 and 16). This should lead to improved knowledge about the number of platform workers, their employment status and the terms and conditions under which they work; and help authorities to **monitor compliance** with labour rights and collect social security contribution⁷². In addition, member states will be required to provide access to

⁶⁹ European Economic and Social Committee. 2022. Opinion: Working conditions package – platform work. Available at: <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/working-conditions-package>.

⁷⁰ EPRS. 2021. Online platforms: Economic and societal effects. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU\(2021\)656336_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU(2021)656336_EN.pdf).

⁷¹ European Commission. 2021. Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0762&from=EN>.

⁷² Ponce Del Castillo and Naranjo. 2021. Regulating algorithmic management. Available at: <https://www.etui.org/sites/default/files/2022-08/Regulating%20algorithmic%20management-An%20assessment%20of%20the%20ECs%20draft%20Directive%20on%20improving%20working%20conditions%20in%20platform%20work-2022.pdf>.

effective and impartial dispute resolution and the right to redress (Article 13). They should also ensure that representatives can engage in administrative and judicial procedures, and have to establish guidance for enforcement authorities to proactively target non-compliant platforms (Article 4(3c)).

The proposal's success depends in part on the quality of its enforcement by national authorities and the strength of collective representation and

“Only a strong presumption mechanism will protect subordinate workers while also guaranteeing real freedom for the genuinely self-employed.”

unions in the member state. The new directive would considerably expand the role of workers' representation, and provides the competent authorities with some important additional tools from which workers could potentially significantly benefit. However, the case of the Švarc law has shown how difficult it can be to ensure efficient enforcement. In addition, the

Czech Republic has not expressed itself favourably towards the Commission's proposal; and during the council presidency, it has made several attempts to weaken the proposal. It, thus, remains to be seen to what extent the newly gained rights and tools will ensure compliance in the Czech Republic.

Recommendations for a more worker oriented directive

1. Enforcing a strong presumption mechanism

Firstly, it is crucial that the new directive keeps the **biggest possible distinction between employees and self-employed to avoid creating an intermediary and less protective employee category.** Platforms will adjust their terms so as to stay just under the criteria that would trigger the presumption. Therefore, only a strong presumption mechanism will protect subordinate workers while also guaranteeing real freedom for the genuinely self-employed.

On a practical level, the directive could set the bar at **one criterium of control** to trigger the presumption. An alternative is to remove the presumption criteria

altogether and instead create a checklist to guide the rebuttal in court, as proposed by the EP's EMPL commission. Both approaches will greatly facilitate the classification into employment status, thereby helping workers who otherwise might find it hard to prove their subordinate relationship due to an imbalance of information and resources. Secondly, it is crucial that the **suspension mechanism** stays in place, despite legitimate questions relating to the EU's competencies. Thirdly, it is important that the directive is **enforced** and that the platforms cannot bypass the provisions. To this end, the draft report of the EMPL committee might be the way forward. In contrast to the Commission's proposals, the text opts for "a proactive and collective method for reclassifying workers"⁷³. The approach would entail a compulsory registration of platform work contracts with the competent social security agency. They would, together with the labour inspection, ensure the correct status of workers.

2. Algorithms

Algorithmic monitoring and decision-making are widely used in platform work and have a far-reaching impact on the allocation of tasks, surveillance and performance appraisal. The new directive is the first to regulate algorithmic management specifically in the workplace. The initial Commission initiative aimed to increase transparency on the use of algorithms by platforms. However, under the Czech presidency, the text was severely weakened, only retaining the prohibition on the **use of personal data**. It is crucial that the final directive also includes provisions to increase the transparency of ADM and puts information directly at the disposal of workers and their representatives.

In addition, the directive should not only provide **transparency** but also include the **right to erase and restrict data**. Thirdly, the text should establish the right

⁷³ Hooker and Antonucci. 2022. Improving the EU Platform Work Directive proposal: a contribution from emerging research findings. Available at : https://www.ose.be/sites/default/files/publications/2022_Hooker_Antonucci_OpinionPaper28.pdf.

to **data mobility** so that workers can more easily change platforms if they wish. Currently, workers are often bound to a platform because they would have to build up their reputation again with another company. Fourthly, it is important that the **human review** of automated decisions is reintroduced and that the use of ADM is banned for critical decisions, so that workers cannot be dismissed without human intervention. Lastly, the scope of the directive should be extended so as to include protection from algorithmic management for **all workers**. While the decision to also include self-employed platform workers should be welcomed, algorithmic management is not limited to platform work. Therefore, workers should be protected beyond the platform economy.

3. Social dialogue

The new proposal significantly increases the role of trade unions and collective bargaining via **new information and consultation rights**. This should be welcomed, as collective representation is particularly weak in the platform economy. However, the proposal could be improved in two ways. Firstly, instead of referring to workers' representatives, the directive should **explicitly mention trade unions** to avoid the establishment of unions of convenience, which the employer controls⁷⁴. Secondly, workers exert little influence over important decisions despite their formal rights. Platforms make constant changes to the terms and conditions and the organisation of work. The promotion of **work councils** and employee representation in the advisory boards would provide workers with the opportunity to have an influence on important decisions. While the proposal might sound more radical, it has successfully been applied in platforms before.

⁷⁴ Committee on Employment and Social Affairs. 2022. 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 – C9-0454/2021 – 2021/0414(COD)). Available at : https://www.europarl.europa.eu/doceo/document/EMPL-PR-731497_EN.pdf.

Conclusion: will it pass the test?

While platform work still represents a small share of the economy, its emergence poses great challenges to labour law and employment relations in the EU, causing the need for legislative action. In addition, the characteristics of platform work, including the blurred distinction between employees and self-employed and the use of algorithms, are not limited to platform work but becoming increasingly widespread in the broader economy. Therefore, the new directive is seen as a test case for the future of work in the EU.

The Commission presented a promising and ambitious proposal that aims to tackle the misclassification of work, regulate algorithmic management and improve traceability and enforcement. If adopted, the directive could represent an **important first step** in guaranteeing social protection in a digitalising and “flexibilizing” labour market. The directive is also the first initiative that addresses algorithmic management in the workplace and considerably increases the role of collective representation, which is particularly weak in platform work.

However, the rather ambitious Commission proposal has been **severely weakened under the Czech presidency**. Especially the presumption mechanism, which is undoubtedly the most controversial part of the proposal, has been tightened in the successive compromises. If the member states favouring a stringent presumption manage to push through their preferences, the new directive risks institutionalising and legalising bogus self-employment, worsening the conditions for platform workers⁷⁵. In addition, the final provisions on algorithmic management might end up less ambitious than expected, failing to provide transparency, human review, and limitations on data gathering. Lastly, the effectiveness of the directive will depend on how the member states enforce it.

⁷⁵ Leila Chaibi. 2022. Communiqué de presse en amont du conseil EPSCO du Jeudi 8 Décembre 2022.

The case of the Švarc law in the Czech Republic has shown how difficult it is to **ensure compliance in practice.**

To conclude, **it remains to be seen if the final directive will pass the test** and set the scene for defending the social acquis for the future of (atypical) work. At the time of writing, the pro-worker member states form a blocking minority against the latest compromise in the Council. Meanwhile, the European Parliament has reached an ambitious agreement in the EMPL Commission, which completely removes the presumption criteria. It is hard to predict the final provisions of the directive. However, given its importance for both platform workers in precarious positions now and for the future of flexible and algorithmic work, it is crucial that the text provides a clear step towards more social protection and does not end up worsening the conditions of platform workers.

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