

Position Paper

European Parliament - EMPL Committee draft report concerning the proposal for a directive on improving working conditions in platform work

3 June 2022

Summary

The European Parliament Committee on Employment and Social Affairs is currently debating the draft report on the proposal for a directive on improving working conditions in platform work (2021/0414(COD)). The German digital association Bitkom would like to comment herewith on the proposed provisions and amendments that are most important to our members. Above all, Bitkom regrets that the proposal in its current form leads to more legal uncertainty for persons performing platform work and the platform industry as a whole by introducing a rebuttable presumption of employment based on unclear and imprecise criteria.

For a balanced and future-proof regulation of platform work, Bitkom believes that the following amendments in particular should be made:

- Narrowing down the definitions of “digital labour platform” and “platform work” to focus on the organisation of service work in the platform economy;
- Setting clear and precise criteria for the rebuttable presumption of employment focusing on potential bogus self-employment being backed by European case law;
- Ensuring that self-employed persons performing platform work, the vast majority of whom wish to remain self-employed, cannot automatically face reclassification without them opting-in to a challenge of their status;
- Suspending the application of the legal presumption during a rebuttal process (introduction of a suspensive effect);
- Restricting the obligations for transparency, human monitoring, and human review to automated systems.

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Bitkom amendment proposals in detail

Definitions of digital labour platform and platform work

Harmonised and clear definitions in the context of platform work could improve legal certainty throughout EU Member States. However, Bitkom believes that the definitions in the Commission proposal and even more so in the draft report of the European Parliament, recently released by rapporteur Gualmini, are too broad to provide legal certainty to persons performing platform work and the platform industry. In particular, the definitions of a “digital labour platform” and “platform work” need to be narrowed down to focus on the organisation of service work in the platform economy and not to include the simple use of digital tools in the modern world of work.

European Commission proposal for a directive	European Parliament EMPL Committee draft report amendment	Bitkom proposal for amendment
Article 2 - paragraph 1 – point 1		
<p>(1) ‘digital labour platform’ means any natural or legal person providing a commercial service which meets all of the following requirements:</p> <p>(a) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application;</p> <p>(b) it is provided at the request of a recipient of the service;</p> <p>(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;</p>	<p>(1) ‘digital labour platform’ means any natural or legal person using computer programs and procedures for intermediating, supervising or organising in any way the work performed by individuals, irrespective of whether that work is performed online or in a certain location;</p>	<p>(1) ‘digital labour platform’ means any natural or legal person providing a commercial service which meets all of the following requirements:</p> <p>(a) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application;</p> <p>(b) it is provided at the request of a recipient of the service;</p> <p>(c) it involves, as a necessary and essential component, the algorithm-based organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location;</p>
Article 2 - paragraph 1 – point 2		
<p>(2) ‘platform work’ means 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</p>	<p>(2) ‘platform work’ means any work organised or enabled 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</p>	<p>(2) ‘platform work’ means any work organised through a digital labour platform and performed in the Union by an individual on the basis of a direct contractual relationship between the digital labour platform and the individual, irrespective of whether a contractual relationship exists between</p>

the individual and the recipient of the service;	individual and the recipient of the service;	the individual and the recipient of the service;
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Criteria for the legal presumption

Bitkom strongly opposes the introduction of a rebuttable presumption of employment, which would not fix the issues related to the misclassification in employment status. This approach is not in line with the needs and wishes of persons working through platforms who highly value the flexibility provided by independent work and could ultimately lead to considerable legal uncertainty. Parties would still need to litigate before a court, which implies lengthy procedures and substantial costs. Bureaucracy and legal costs would not only burden undertakings but also Member States.

In Bitkom's view Article 4 must ensure that self-employed persons performing platform work, the vast majority of whom wish to remain self-employed, cannot automatically face reclassification without them opting-in to a challenge of their status.

The proposed criteria to trigger the presumption of employment are very broad, imprecise and do not capture the diversity of business models in the platform economy.¹ Some of these criteria are inherent to the way platforms function and/or seemingly in contradiction with European and national regulations. For example, if platforms provide safety equipment to persons performing platform work, this could lead to the reclassification of these same persons. Regulation should strike the right balance between an appropriate level of protection of persons working through platforms and the efficient supply of platform-based services.

The draft report of the European Parliament rapporteur Gualmini proposes to delete all criteria from Article 4. It suggests instead to include an extended and indicative list of criteria in the legally non-binding part of the directive, namely in recital 25, which should guide competent authorities, when assessing on the rebuttal of the presumption. **The proposed wording of Article 4 paragraph 1 would thus lead to the general applicability of the presumption to all persons performing platform work, including the genuinely self-employed.**

For the sake of legal certainty and to ensure that genuinely self-employed are not affected by the presumption, a set of clear criteria should be enshrined in Article 4 focussing unambiguously on potential bogus self-employment being backed by European case law. For this purpose, the criteria laid down by the European Court of Justice in case C-692/19 ("Yodel") should be used.

¹ For example, the criteria "determining the level of remuneration" and "supervising the performance of work and quality control" make very little sense regarding platform models, in which based on a business-to-business (B2B) service, the only contracting party for the person performing platform work is the platform. See also Bitkom position paper: [European Commission consultation concerning the proposal for a Directive on improving working conditions in platform work | Bitkom e.V.](#)

In this order the Court identified four key elements in the determination of whether someone should be considered self-employed or a worker. In effect the ECJ deemed that an individual should not be considered a worker provided that they are free:

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
- to provide his services to any third party, including direct competitors of the putative employer; and
- to fix his own hours of ‘work’ within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer.

In addition, Member States may also add further criteria to the list while transposing the directive into national law, which would lead to diverging national approaches and legal uncertainty for platforms operating in multiple Member States as well as for cross-border platform work. If the number of criteria used by the competent national authorities to assess the rebuttal of the presumption increases, the fulfilment of several criteria should be required for the legal presumption of an employment relationship to apply.

European Commission proposal for a directive	European Parliament EMPL Committee draft report amendment	Bitkom proposal for amendment
Article 4 – paragraph 1 – introductory part		
<p>1. The contractual relationship between a digital labour platform that controls, within the meaning of paragraph 2, the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship. To that effect, Member States shall establish a framework of measures, in accordance with their national legal and judicial systems.</p>	<p>1. The contractual relationship between a digital labour platform, and a person performing platform work through that platform shall be legally presumed to be an employment relationship. To that effect, Member States shall establish a framework of measures, in accordance with their national legal and judicial systems.</p>	<p>1. The contractual relationship between a digital labour platform that controls, within the meaning of paragraph 2, the performance of work and a person performing platform work through that platform beyond what commercial relationships require shall be legally presumed to be an employment relationship. To that effect, Member States shall establish a framework of measures, in accordance with their national legal and judicial systems. The presumption shall not lead to automatic reclassification of persons performing platform work without them opting-in to a challenge of their status.</p>

Article 4 – paragraph 2		
<p>2. Controlling the performance of work within the meaning of paragraph 1 shall be understood as fulfilling at least two of the following:</p> <p>(a) effectively determining, or setting upper limits for the level of remuneration;</p> <p>(b) requiring 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;</p> <p>(c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;</p> <p>(d) effectively restricting 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;</p> <p>(e) effectively restricting the possibility to build a client base or to perform work for any third party.</p>	<p>deleted</p>	<p>2. Controlling the performance of work within the meaning of paragraph 1 shall be understood as fulfilling the following, except where it is required by applicable local law or regulations, collective agreements, or it is necessary to safeguard the health and safety of the recipients of the service, prevent fraud or is required for the essential functioning of the service:</p> <p>(a) effectively determining, or setting upper limits for the level of remuneration restricting, including through sanctions, the ability of an individual to accept or not accept the various tasks offered, or unilaterally set the maximum number of those tasks;</p> <p>(b) requiring 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 effectively restricting the ability of an individual to fix their own hours of ‘work’ within certain parameters and to tailor their time to suit their personal convenience rather than solely the interests of the putative employer;</p> <p>(c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;</p> <p>(d) effectively restricting the freedom of an individual, including through sanctions, to</p>

		<p>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 to perform the service which they have undertaken to provide except where such freedoms are explicitly prohibited or restricted by other legal, tax or regulatory requirements or by a collective bargaining agreement;</p> <p>(e) effectively restricting the possibility to build a client base or to perform work for any third party, including direct competitors.</p>
<p>Article 4 – paragraph 2 a (new)</p>		
		<p>2 a (new). Digital labour platform deciding – on a purely voluntary basis or in agreement with the persons concerned – to pay for social protection, accident insurance or other forms of insurance, training measures or similar benefits to self-employed persons working through that platform should not be regarded as exerting control within the scope of Article 4 paragraph 2 and therefore should not be considered as triggering the presumption of employment.</p>

Suspensive effect on the application of the legal presumption

As the presumption, once triggered, would not be suspended during the process of rebutting it (according to Article 5 in the EC proposal) many genuinely self-employed could face a (at least temporary) reclassification with significant consequences for persons performing platform work, for platforms and Member States due to unjustifiable administrative and financial costs.

Platforms would have to temporarily comply with the presumption and significantly adapt their systems in this process, requiring vast resources. In practice the (provisional) change of status of persons performing platform work means that platforms may temporarily shut down their business while they are rebutting the presumption, which could take months or even years. This would harm in particular the smallest platforms which may be forced to exit certain Member States. In case of a successful rebuttal, authorities would have to reimburse the costs to platforms, incurred in relation to the presumed employment status, which would lead to a significant administrative burden on both sides. Let alone the administrative and fiscal burden on persons performing platform work, who would also be deprived to work under flexible terms during the rebuttal process. Persons who used to be self-employed might see their status changed to employee only to be re-reclassified at the end of the rebuttal process as independent contractors. Against this background, **any potential presumption should be suspended during the process of rebutting it.**

European Commission proposal for a directive	European Parliament EMPL Committee draft report amendment	Bitkom proposal for amendment
Article 5 paragraph 2		
Where the digital labour platform argues that the contractual relationship in question is not an employment relationship <i>as defined by the law, collective agreements or practice in force in the Member State in question, with consideration to the case-law of the Court of Justice</i> , the burden of proof shall be on the digital labour platform. Such proceedings shall not have suspensive effect on the application of the legal presumption.	Where the digital labour platform argues that the contractual relationship in question is not an employment relationship, the burden of proof shall be on the digital labour platform. Such proceedings shall not have suspensive effect on the application of the legal presumption.	Where the digital labour platform argues that the contractual relationship in question is not an employment relationship as defined by the law, collective agreements or practice in force in the Member State in question, with consideration to the case-law of the Court of Justice, the burden of proof shall be on the digital labour platform. Initiating such proceedings shall not have suspensive effect on the application of the legal presumption in order to avoid its triggering and its subsequent rebuttal in cases of genuine self-employment.

Article 5 paragraph 3		
Where the person performing the platform work argues that the contractual relationship in question is not an employment relationship as defined by the law, collective agreements or practice in force in the Member State in question, with consideration to the case-law of the Court of Justice , the digital labour platform shall be required to assist the proper resolution of the proceedings, notably by providing all relevant information held by it.	Where 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.	Where the person performing the platform work argues that the contractual relationship in question is not an employment relationship as defined by the law, collective agreements or practice in force in the Member State in question, with consideration to the case-law of the Court of Justice, the digital labour platform shall be required to assist the proper resolution of the proceedings, notably by providing all relevant information held by it the person shall be considered as employee but not treated as such until the rebuttal process has been completed.

Obligations for transparency, human monitoring, and human review in relation to automated systems

The draft report of the European Parliament rapporteur Gualmini proposes to extend the obligations for transparency (Article 6), human monitoring (Article 7) and human review (Article 8) in relation to automated systems to semi-automated systems.

Such an extension would not only place an undue burden on platforms but is also unnecessary given the human involvement in the process. It would also go beyond the provisions of the General Data Protection Regulation and the future AI Act.

The provisions in articles 6, 7 and 8 should thus remain restricted to automated systems.

Bitkom represents more than 2,000 companies of the digital economy. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.