

Position Paper

August 2023

Platform Work Directive Trilogue

On 2 February 2023 the European Parliament adopted in first reading its position on the proposal for a Directive on improving working conditions in platform work. The Council of the EU adopted its general approach on 12 June 2023. With trilogue negotiations scheduled to conclude by the end of 2023 Bitkom would like to underline its key positions for the inter-institutional talks:

Summary

- **The Directive must provide the legal clarity and certainty** required to be effectively implemented and enforced by Member States.
- **The definition of “digital labour platform” should clarify that the “recipient” is the end-customer of the service** with view to avoid unnecessarily capturing a broad range of scheduling tools that are not related to “gig economy” or “flexible work”.
- **A rebuttable presumption of employment should be linked to the fulfilment of clear criteria and should never be triggered quasi-automatically.** In order to ensure that genuinely self-employed persons are not affected by the presumption, Article 4 should include legally binding criteria backed by European case law.
- **The Directive should foresee a suspensive effect until the end of legal proceedings in case the presumption of employment is challenged in a rebuttal process.** Otherwise in case of a successful rebuttal, reversals of contractual relationships between platforms and persons performing work through platforms would lead to significant administrative and financial burden for companies, member states and persons performing work through platforms themselves.
- **Chapter III on “automated monitoring and decision-making systems” (AMDS) should carefully be considered to avoid any potential overlaps and inconsistencies with existing and upcoming regulation** (GDPR, P2B Regulation as well as the upcoming AI Act and planned legislation on algorithmic management at the workplace). Therefore, **we suggest (1) carving out applications that benefit workplace health and safety and/or the public, such as safety-enhancing technology related to heavy machinery or road safety; and (2) dropping the transparency obligations that would go well beyond the scope of transparency required of other employers in the economy that might also use AMDS.**

In detail

Need for legal certainty

Overall, Bitkom believes that the Platform Work Directive will become a success **if and only it provides the legal clarity and certainty required to be effectively implemented and enforced by Member States, especially in cross-border situations where divergence between Member States can undermine clarity of workers' rights.** Legal certainty is necessary for persons working through platforms to ensure the genuine self-employed can continue to work this way and for companies for which legal certainty is a precondition when considering expansion and investments. The Directive should also lead to **an effective level playing field** amongst digital labour platforms that operate within the internal market.

As we enter the phase of trilogue negotiations, Bitkom would like to reiterate its **concerns with the Parliament's position** which was adopted in February. The Parliament opted for a quasi-automatic presumption of employment, a rebuttal process which is not precise and **risks the reclassification of millions of genuinely self-employed** across Europe as well as **extensive obligations on the use of algorithms** which overlap with existing and upcoming European regulations. The EP rebuttal process and criteria practically change the national employment definitions. That might create great legal uncertainty for sectors outside platform work as well. Such an approach **does not provide the required legal certainty and clarity** to ensure a successful implementation of the Directive.

Definition of digital labour platform (DLP)

In academic and economic study of “platforms,”¹ and indeed in other legislation targeted at “platforms,”² policy experts draw an important distinction between multi-sided platforms – that is, a platform that connects multiple demand inputs (customer requests) with multiple supply inputs (worker availability to meet those requests) – and one-sided platforms, which connect only one demand input to multiple supply inputs (e.g., an online tool for a single client to schedule contracted services) or vice versa (e.g., an online tool for many clients to schedule services with a single contractor). The Commission, Parliament, and Council text appear to address this with the requirement that DLP’s “*provide service at the request of the recipient.*” While “recipient” is undefined, references in the Commission text appear to indicate that the “recipient” should be the end-customer of the service. **This should be further clarified to avoid unnecessarily capturing a broad range of scheduling tools that are not related to “gig economy” or “flexible work” that the EU institutions seek to address with this Directive.**

¹ VAT in the Digital Age, vol. 2, prepared for European Commission; VAT in the Digital Age Final Report Volume 2 V Pdf (europa.eu)

² E.g., DAC7, see DAC7 Impact Assessment at Page 5; LexUriServ.do (europa.eu)

In Article 2(2), the Commission also proposed to limit the DLP definition to providers of a service for which the organisation of the work does not constitute “*merely a minor and purely ancillary component*”. This clarification in the Commission proposal was an important one, considering the very broad definition of DLPs in Article 2. The Council’s suggestion to remove this clarification would be at odds with the intention to pass regulation focused on ‘digital labour platforms’, the primary functionality of which is to match the supply and demand of labour available in the market. It could inadvertently bring into scope providers of other online services.

Rebuttable presumption of employment

A rebuttable presumption of employment should be linked to the fulfilment of clear criteria and should never be triggered quasi-automatically. For the sake of legal certainty and to ensure that genuinely self-employed persons are not affected by the presumption, Article 4 should include legally binding criteria backed by European case law.³ Moreover, the process should be based on a case-by case-examination of the facts of the employment relationship.

The Directive should keep focusing on its original aim to improve the working conditions of persons working through platforms, to prevent false self-employment in work through platforms and to facilitate the correct determination of employment status. The Directive must ensure that self-employed persons performing work through platforms, the vast majority of whom wish to remain self-employed, are not affected by the presumption or de facto dragged into long legal challenges of their status. Entrepreneurship should be encouraged, and the freedom of establishment respected. To this end we welcome the Council’s efforts to clarify the criteria that would trigger the application of the presumption (Articles 4 and 5).

While the Parliament is in favour of removing all presumption criteria creating a quasi-automatic presumption of employment for persons working through platforms, including genuine self-employed, the Council text is a net improvement. However, more can and should be done. **We urge EU institutions to define clear and precise criteria during trilogue negotiations to protect the rights of genuine self-employed.** The original criteria include both useful indicators of employment (restricting the freedom to organise one’s work e.g. by limiting discretion to choose working hours or to use subcontractors; restricting the possibility to perform work for any third party), and broad and poorly-worded criteria that are not unique indicators of either employment or self-employment (requiring respect towards specific rules, supervising the performance of work, determining remuneration).

Furthermore, Bitkom calls on EU institutions to introduce a suspensive effect until the end of legal proceedings. Otherwise in case of a successful rebuttal, reversals of contractual relationships between platforms and persons performing work through platforms would lead to significant administrative and financial burden for companies,

³ For more details on the criteria please consult the Bitkom Position paper on the European Parliament - EMPL Committee draft report concerning the proposal for a directive on improving working conditions in platform work
03.06.22_Bitkom-Position_paper_EP-EMPL-Draft_Report.pdf

member states and persons performing work through platforms themselves. In addition, the (provisional) change of status of persons performing work through platforms would also deprive them of the right to work under flexible conditions during the rebuttal process. To this end Bitkom welcomes the Council's approach on this matter.

Bitkom would also welcome further legally binding clarifications that voluntary benefits provided by digital labour platforms to self-employed as well as compliance by platforms with national laws and collective agreements will not be used as a determining factor to establish the existence of an employment relationship.

This clarification is necessary as there have been situations across Europe where national judges interpreted such compliance as a proof of employment.

Furthermore, digital labour platforms should be further encouraged to provide more protection and benefits to platform workers, including by sitting down with unions and other representatives of persons working through platforms and entering into collective bargaining agreements.

Examples in the Nordic countries or in France show that **social dialogue can also strengthen the position of self-employed persons performing work through platforms.** The relevant European Commission Guidelines (on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons) also put forward proposals in this respect.

Finally, social protection of self-employed persons should be strengthened at national level. The same rules must apply to all self-employed, whether they work in the traditional economy or through online platforms. To this end, the Council Recommendation on access to social protection for workers and the self-employed (2019/C 387/01) should be implemented.

Use of intermediaries, including subcontractors

The original Commission proposal defines “platform work” as work carried out based on a contractual relationship between the DLP and the individual working through the platform. The Council suggested adding that the contract could be between the platform and “*the individual or an intermediary*”. The ‘intermediary’ is defined as “*any natural or legal person who establishes a contractual relationship, including by subcontracting, with a person performing platform work or a digital labour platform for the purposes of making platform work available through that digital labour platform.*”

This amendment could have far-reaching unintended consequences.

The original intention of the directive was to set out rules for employment classification of those who work through platforms. **It is unclear why the legislators would bring into scope those who are employed by subcontractors, whether and how the directive could impute this employment relationship on the digital labour platform.**

These workers do not face the same challenges that policy makers intended to address with the directive: (1) work performed through platform, with limited to no human oversight and interaction with managers; (2) self-employed status; (3) work typically performed part-time, next to full-time employment. Instead, this is likely to create an overly complex regulatory environment for both DLPs and contractors, and significant uncertainty for employees of contractors.

Automated monitoring and decision-making systems (AMDS)

Bitkom strongly encourages EU institutions to **further discuss Chapter III related to the use of data and algorithms** which has received little attention so far. Most provisions in this Chapter are already included in several existing and future regulations (GDPR, P2B Regulation as well as the upcoming AI Act and planned legislation on algorithmic management at the workplace) and overlap.

The EU institutions are primarily concerned to ensure: (1) transparency around the collection and use of data by AMDS; (2) human involvement in making important decisions in the employment relationship (e.g. pay, promotion, bonus, termination); and (3) limiting the processing of sensitive data, e.g. biometrics. This topic is not specific to persons that perform work through platforms. The EU is working on the separate AI Act, which will regulate the use of workplace technology for all workers across the Union. In addition, the Commission is planning to table new legislation on algorithmic management at the workplace. Therefore, this section of the proposal should carefully be considered to avoid any potential overlaps and inconsistencies with existing and upcoming regulation. If it were adopted in its current form as part of this directive, it would provide more extensive rights to workers falling within the scope of this directive than all other workers.

Therefore, we suggest (1) carving out applications that benefit workplace health and safety and/or the public, such as safety-enhancing technology related to heavy machinery or road safety; and (2) dropping the transparency obligations that would go well beyond the scope of transparency required of other employers in the economy that might also use AMDS.

In addition, we would welcome further clarifications from institutions when it comes to access to information provided by platforms. While we understand the need for transparency the requested amount of information must be proportionate and adapted to the needs of its recipient.

Finally, the Council rightly recognises and clarifies that platforms can continue processing workers' data beyond contractual necessity for legitimate purposes that are in line with GDPR. Allowing platforms to process this data is essential to their functioning effectively, and to meet consumers' needs and quality of service expectations.

Bitkom represents more than 2,200 companies from the digital economy. They generate an annual turnover of 200 billion euros in Germany and employ more than 2 million people. Among the members are 1,000 small and medium-sized businesses, over 500 start-ups and almost all global players. These companies provide services in software, IT, telecommunications or the internet, produce hardware and consumer electronics, work in digital media, create content, operate platforms or are in other ways affiliated with the digital economy. 82 percent of the members' headquarters are in Germany, 8 percent in the rest of the EU and 7 percent in the US. 3 percent are from other regions of the world. Bitkom promotes and drives the digital transformation of the German economy and advocates for citizens to participate in and benefit from digitalisation. At the heart of Bitkom's concerns are ensuring a strong European digital policy and a fully integrated digital single market, as well as making Germany a key driver of digital change in Europe and the world.

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