



A Thematic Working Paper for the Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies:

Exploring ways to improve the working conditions of platform workers: The role of EU labour law

Session 1: Policy and legal developments regarding platform work: where do we stand?

Platform Work in the EU: Lessons learned, legal developments and challenges ahead

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November 2020



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This publication has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020). For further information please consult: <http://ec.europa.eu/social/easi>.

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1 Introduction: EU labour law at the beginning of the decade

Platform work is a new form of employment that emerged over the last decade. In this form of work, digital infrastructure facilitates the matching between the demand and supply of specific services and organises their performance by means of guidelines, customer reviews, algorithmic governance and other mechanisms. The scale, pace and volume of this emerging phenomenon has added new impetus to discussions in several fields of law, including public, antitrust, tax and IT law. In the face of the concomitant trends that are reshaping the labour market (globalisation, tertiarisation, outsourcing and flexibilisation, to name but a few), the manifold challenges the digital transformation poses have also reignited heated disputes about such crucial issues as (i) the suitability of traditional methods for defining the legal status of workers; (ii) the allegedly narrow scope of the application of labour regulations; and (iii) whether existing labour and social security paradigms can adapt to changes in the labour market.

Scholars have given a great deal of attention to one of the models of platform work, namely on-location work on demand. Consequently, there is scant knowledge on workers who resort to digital platforms to perform cognitive tasks remotely (i.e., 'crowdworking'). With a few exceptions, this approach is reflected in the adopted regulatory measures, in case law and in most of the social partners' initiatives.

The overarching theme of this paper is to address possible policy gaps and further implications for EU labour law by exploring the lessons that can be drawn from recent policy and judicial developments. This study deliberately takes some central issues for granted for two main reasons. On the one hand, a selection of developments is necessary due to space constraints. On the other, numerous studies have refocused the crux of the discussion, have resolved some points of controversy and moved the debate forward. As a result, ongoing research can now focus on a pressing goal, namely the assessment of the regulatory suitability of existing social institutions, with the aim of providing realistic and effective solutions for all actors involved in the platform economy.

This paper is organised as follows. Aside from discussing the key lessons gleaned from previous studies on platform work, **Section 2** briefly touches upon the trends and initiatives in policymaking in France and in Italy. Moreover, it presents and reviews the main outcomes of litigation at the domestic level, with a focus on the role played by algorithms. This section also assesses the impact of the Covid-19 pandemic. After introducing the Pillar of Social Rights (EPSR), **Section 3** critically analyses two key achievements at the EU level, namely the Directive on transparent and predictable working conditions and the Recommendation on access to social protection for workers and the self-employed. **Section 4** assesses the elasticity of the triad of Directives regulating atypical employment. It is argued in this section that the narrow construction of the Directives' personal scope of application represents an obstacle. An adaptive and purposive approach of the Court of Justice of the European Union (CJEU) could, however, result in the classification of platform workers as falling within the scope of the social *acquis* in some fields. Finally, **Section 5** concludes by offering concrete proposals.

2 Policy and legal developments across the European Union

There has been intense activism at both the EU and national levels in response to the advent of platform work and its regulation. In general, local initiatives specifically tailored to this form of work are still very sporadic, and policy interventions are lagging. At the same time, we are witnessing a flood of litigation before domestic courts on the legal status of platform workers, generating widespread interest.

2.1 National trends and initiatives in policymaking

Considering the pragmatic nature of this article, it only examines two legislative solutions in detail. In France and in Italy, where a binary distinction between employment and self-employment still applies (although the Italian framework has introduced intermediate solutions such as 'parasubordinate' work), policymakers have implemented two policy options. On the one hand, the 2016 French law refrains from taking a definitive stance on the legal status of workers by defining a special regime: platforms must respect a set of obligations relating to insurance and training towards 'dependent' self-employed platform workers. In the same vein, the 2019 French reform encourages the adoption of codes of practice defining mutual rights and obligations for platform workers. On the other, the Italian government has expanded the full coverage of mandatory employment protection for a subset of self-employed workers who are not genuinely autonomous (when work performance is organised by the principal).

In 2016, the French Parliament adopted the *El Khomri* law. This initiative specifically targets self-employed platform workers (*travailleur indépendant*) who use one or more digital platforms to provide personal services¹. Only economically and technically dependent workers engaged by the platforms, which determine the properties and set the price of the service, fall within the law's scope of application. Article 60 of the law confers specific rights on this group of workers, including protection against accidents at work, the right to vocational training and collective rights (right to strike). Although this intervention should not be considered a legal presumption, the indirect result was the creation of a category of autonomous workers eligible for limited protection. According to Daugareilh et al. (2019), the El Khomri Act can be regarded as 'an attempt to create a third status without actually naming it'. The prevention of abuse and reduction in litigation over the proper classification of workers can be considered a side effect of the creation of such an intermediate category of 'vulnerable self-employed platform workers'. In 2019, the French Parliament adopted a new law (*Orientation des mobilités*), providing for the right of VTC (private hire vehicle) drivers, delivery couriers as well as other platform workers to refuse certain orders, to disconnect from the app and to be informed about the price before taking a call². The law furthermore allows platform operators to draft a social responsibility charter. The attempt to prevent misclassification claims, however, was deemed unconstitutional by the French Constitutional Court. In 2021, the law is set to recognise platform workers' delegates for consultations with platforms on voluntary codes of practice and negotiations at the sectoral level (Palli, 2020).

The new Italian law approved in November 2019 is among the very few legislative initiatives directly addressing platform workers. In November 2019, Legislative Decree No. 101/2019 was amended and became Law No. 128/2019³. The new law comprises two main schemes. The first covers workers whose personal performance is organised by the client 'also by means of digital platforms', while the second scheme defines a set of labour protection measures for 'self-employed couriers delivering goods by means of two-wheeler vehicles in urban areas' (a rather specific category).

The first section amended a rule introduced by the 2015 Jobs Act reform package. According to the new wording of Article 2 of Legislative Decree No. 81/2015,

¹ Law 2016-1088 (8/8/2016) on labour, the modernisation of social dialogue and securing of professional careers. See new Art. L. 7341-1 and Art. L. 7342-1 of the French Labour Code.

² Law 2019-1428 (24/12/2019) on mobility orientation (LOM). See also Conseil constitutionnel, Décision n° 2019-794 DC 20/12/2019.

³ Law No. 128/2019 amending Decree 101/2019 on urgent measures for the protection of work.

employment and labour legislation applies to 'personal work organised by the other party' (*etero-organizzato*, a subset of arrangements, whereby the client organises any performance-related aspects). The original version expressly referred to location and time allocation as key factors. The new personal scope of employment protection has been expanded to include all "organisationally" dependent workers, regardless of their status, albeit indirectly (i.e. without modifying the relevant notions of the Civil Code). The rule has applied since 2019 when the client's unilateral intervention is also exercised through a digital platform. The provision has made it easier to prove the organisational power exercised by the principal. Collective agreements may include an opting out from this regime by designing a contractual and economic model that replaces the legislative scheme. The provision's potential has been confirmed by a judgment issued by the Supreme Court in January 2020, offering a far-reaching interpretation of the 2015 'Jobs Act' rules. Anyone deemed *etero-organizzato* is entitled to protection by all labour and employment laws, unless a collective agreement specifically states otherwise. The provision has a tangible remedial effect for dependent self-employed workers who have unreasonably been left outside the ambit of protection (Aloisi, 2020a).

The second section only covers 'self-employed riders', namely those who do not fall within the scope of the first section. This section lays down a mandatory written form for contracts. The social partners were expected to reach an agreement detailing remuneration levels within one year of the date of entry into force of this law. In the absence of such collectively negotiated schemes, wages are to be defined in accordance with the minimum standards established in national collective bargaining agreements for sectors similar to that of the business at stake, while per-drop payments are prohibited. In addition, an indemnity for work performed by riders during night shifts, public holidays or in adverse weather conditions, as well as mandatory insurance against work accidents and occupational diseases, have been established. The law includes provisions on data protection and anti-discrimination. In September 2020, the business association representing major food delivery platforms and a small trade union signed a contract aimed at eluding the application of the statutory provisions set forth in the two reforms. The agreement includes health and safety protection, training opportunities and collective rights, and specifies that riders are self-employed workers. Self-organised collectives, long-established unions and the Italian Ministry of Labour challenged this agreement. A new "Protocollo Riders" was signed in November 2020 by major unions in the transport and logistics sector. Riders are now classified as employees and have access to protection.

The two cases demonstrate that legal classification is of utmost importance, as it represents an essential gateway to protection. At the same time, certain legal options can overcome the classification dilemma by broadening the scope of some protective measures to include vulnerable self-employed workers. However, it is worth noting that the adoption of third categories can lead to widespread arbitrage, which is favoured by the existence of inexpensive alternatives to employment (Cherry and Aloisi, 2017).

2.2 Gaming the 'gate': national case law on platform workers

Platform work is an ideal testbed for an analysis of the suitability of the 'binary divide' between employment and self-employment that is found in many legal orders. The debate echoes long-lasting discussions on whether a dualistic logic (allowing for only a few exceptions in some countries) can provide adequate responses for a world of work in which unprecedented organisational arrangements are on the rise (Hatzopoulos, 2018).

Platforms engage with providers who are pre-emptively and predominantly classified as self-employed workers. This notwithstanding, many of them exert some degree of managerial prerogatives, albeit in a sophisticated and misleading manner, while avoiding the obligations associated with direct employment. In addition to casting doubts on the sustainability of a competitive edge resulting from cost-cutting practices—not to mention the issue of unfair competition against other operators in the same sector—this model deprives workers of labour-related protection, corollary social benefits and collective rights (De Stefano and Aloisi, 2018). The system does not contain any entitlements, such as overtime, paid holiday leave, maternity leave, sickness payments, compensation for wrongful termination and statutory (or collectively negotiated) minimum wages. Workers face legal and practical obstacles in exercising fundamental rights, such as freedom of association, collective bargaining or protection against discrimination. In some cases, their business models may have fuelled a rise in false self-employment. Platforms are embroiled in several lawsuits on the appropriate classification of workers. This section sketches an overview of the principal lines of reasoning developed by courts in several EU countries (BE, FR, DE, GB, IT, ES).

An ‘all-or-nothing’ approach is found in the legal framework of several countries in Europe and around the world. Based on this model, the preliminary judicial results are mixed, erratic or even utterly contradictory. Admittedly, it would be imprudent to generalise specific judgments, as they are fact-dependent. It is also important to bear in mind that this phenomenon is still in an embryonic stage, and that heterogeneous conditions exist across different types of platform work and among services offered.

When analysing what is at stake in pending litigations concerning the classification of workers, we find that the issue has been dealt with in two conflicting ways across Europe. The resolution of legal disputes brought before higher courts quite often lean towards recognition of an employment relationship. In a few cases, these disputes have resulted in the rejection of platform workers’ claims because of the supposed freedom they enjoy in deciding if and when they turn on the app and carry out a task or project (De Stefano, 2018a). This argument is far from persuasive, as it does not consider the capacities of digital tools when it comes to organising, monitoring and disciplining workers. To classify the nature of the activity, judges must assess the role of apps as ‘faceless bosses’ instead of focusing on flexibility and discontinuity only (Sachs, 2018).

In September 2020, the Spanish Supreme Court held that Glovo food delivery riders were employees, since the platform dictated working conditions; the platform unilaterally determined the rates, and the performance of such work was integrated in the business of the firm, which was also the owner of the digital infrastructure, a critical factor of production⁴. In November 2019, the *Tribunal Superior de Justicia de Madrid* held that the relationship between the platform Glovo and the riders was framed within the context of an employment relationship⁵. In June 2018, two rulings issued by the *Valencia Juzgado de lo Social* stated that Deliveroo riders were employees because they were subject to the tight control of the platform, which monitored their performance and determined the terms and conditions of the work, including the prices of the service⁶. A similar argument was made in a case decided by the *Barcelona Juzgado de lo Social*⁷. Recently, the French *Cour de Cassation* reclassified the contractual

⁴ Tribunal Supremo, Sala de lo Social, Case 4746/2019, 23/09/2020.

⁵ Tribunal Superior de Justicia de Madrid, Sección nº 01 de lo Social, 1155/2019 27/11/19.

⁶ Juzgado de lo Social nº 5 de Valencia, 197/2019 10/06/2019; Juzgado de lo Social nº 6 de Valencia 244/2018 01/06/2018.

⁷ Juzgado de lo Social nº 11 de Barcelona, Case 213/2018.

relationship between Uber and a driver as an employment contract⁸. The Court ruled that despite the workers' freedom to choose their own work schedule, the platform had the power to set the prices, to organise the performance of work, to monitor its execution and to impose sanctions on drivers. In 2018, the same court reviewed the Take Eat Easy ruling and concluded that the combination of real-time geo-tracking applications and disciplinary sanctions amounted to a degree of direction and control that warranted the establishment of employment status⁹. British courts reached the opposite decision in two cases involving drivers and couriers. The first case, dating back to 2016, placed Uber drivers in an intermediate category of 'worker' within the meaning of the Employment Rights Act, entitled to minimum wage and working time protection¹⁰. The Employment Appeal Tribunal argued that the platform exercised significant control over how drivers performed their work¹¹. By contrast, in 2018, the Central Arbitration Committee and the High Court denied food delivery workers statutory collective labour rights by virtue of a (purposely introduced and hardly practicable) substitution clause, defeating the criterion of personal work¹². In Italy, the Supreme Court applied employment protection *en bloc* to a group of Foodora riders in January 2020, as their performance of work was organised by the client¹³. Previously, the Milan Tribunal had decided that a Glovo rider was a self-employed person as he had the freedom to decide if and when to be available¹⁴. In November 2020, the Palermo Tribunal reinstated a Glovo rider and reclassified him as a full-time, permanent employee, paid according to the applicable sectoral collective bargaining (trade), since his autonomy was merely nominal¹⁵. In Germany, employee status was denied in two separate cases¹⁶. Moreover, in December 2020, the German Federal Labour Court stated that microtasks carried out by "crowdworkers" can be classified as an employment relationship¹⁷. A Belgian tribunal in 2019 stated that Uber drivers were self-employed workers¹⁸.

The delimitation of the boundaries of the status of employment and of self-employment regularly poses problems. In a nutshell, employment is defined as the subordination of the worker to the management, which has the power to organise, monitor performance and sanction inadequate compliance with instructions in exchange for stability and security. By contrast, self-employed persons are excluded from the protective scope of employment, and may face serious hurdles in exercising their collective rights, as the resulting outcome of negotiations over pay and working conditions may be found to be in breach of competition law (De Stefano and Aloisi, 2019). However, the tests developed by courts can prove to be malleable, also in case of similar factual circumstances. In addition to this, platforms have started tweaking their terms and (unfavourable) conditions to craft an unclear legal situation. Employment status is often refuted, limiting the rights and costs associated with it. Concomitantly, we witness

⁸ Cour de Cassation, Chambre sociale, Arrêt 374 (19-13.316) 04/03/2020.

⁹ Cour de Cassation, Chambre sociale, Arrêt 1737 (17-20.079) 28/11/2018.

¹⁰ Employment Tribunal, Aslam, Farrar & O. v Uber, Case 2202551/2015, 28/10/2016.

¹¹ Employment Appeal Tribunal, Uber v Aslam, Farrar & O., Case A2/2017/3467, 30-31/10/2018.

¹² Central Arbitration Committee, Independent Workers' Union of Great Britain v RooFoods Ltd t/a Deliveroo, Case CO/810/2018, 14-15/11/2018.

¹³ Corte di Cassazione, Sez. Lavoro, Sentenza 1663/2020, 24/01/2020.

¹⁴ Tribunale di Milano, Sentenza 1853/2018, 10/09/2018.

¹⁵ Tribunale di Palermo, Sentenza 3570/2020, 24/11/2020.

¹⁶ Lag München, Case 8 Sa 146/19, 04/12/2019. LAG Hessen, Case 10 Ta 350/18, 14/02/2019.

¹⁷ Bundesarbeitsgericht, Case 9 AZR 102/20, 1/12/2020.

¹⁸ Tribunal de l'Entreprise francophone de Bruxelles, Case 311, 29/05/2018.

organisational patterns based on close direction, pervasive control and stringent disciplinary powers, both before the acceptance of a task or during the task's execution. These prerogatives closely resemble managerial powers that are legally enshrined in the employment relationship, without being surrounded by the regulation essential to mitigating and humanising them. Far more emphasis should be placed on mapping and understanding the transformation—or even the expansion—of the ways in which employers exercise their hierarchical powers, which now affect a wide range of workers (Ivanova et al., 2018). The scarce knowledge of the algorithmically-driven systems of organisation, appraisal and sanction impairs judicial analysis by redefining the notions of control and subordination (De Stefano, 2020).

Box 1: Essential and exposed. The impact of the pandemic on platform workers

The outbreak of the Covid-19 pandemic has hit all labour markets in the EU hard, but the transaction volumes of many of the delivery services offered by online platforms have increased. The pandemic has magnified the insecurity of all non-standard workers. While the crisis is still unfolding, the impact of Covid-19 has been disproportionate on precarious workers who are bearing the most serious brunt of the socioeconomic crisis. The emergency has also exacerbated some of the vulnerabilities associated with platform work. Workers feel unprotected, as they are constantly exposed to the risk of contagion. The pandemic is forcing many on-location workers to choose between economic hardship due to the absence of financial assistance schemes or the risk of infection to the detriment of their families and colleagues. Several reports detail a drop in unsteady incomes due to reductions in demand or an inability to work for a variety of reasons (Eurofound, 2020). Many workers have suffered a decrease in their already irregular working hours. Most measures to protect workers, from contactless delivery and payments to the distribution of personal protective equipment (masks and sanitising wipes), are merely preventive in nature.

Although praised as being 'essential', platform workers have fallen through the cracks of emergency measures and have limited access to unemployment benefits, health insurance and sick leave (The Fairwork Project, 2020). Moreover, the emergency measures introduced to protect platform workers were belated and insufficient. Specifically, many platforms avoided taking decisive action to minimise the risk of misclassification lawsuits. In a circular way, workers face the paradoxical consequences of their legal status, as platforms have provided their workers with instructions on good hygiene practices yet transfer all responsibilities to them. The pandemic has put socio-legal foundations under extreme strain, compelling policymakers to assess the suitability of the applicable regulative instruments (OECD, 2020). Some measures have extended traditional social protection to platform workers in a universalistic fashion following the outbreak of the pandemic, though only temporarily (Lane, 2020). This opportunity should be capitalised on to extend comprehensive protection to non-standard workers in an incremental, systemic and permanent manner. Will national regulators use the lessons from the pandemic to reshape the existing rules?

3 Building the European Pillar of Social Rights brick by brick

The Communication on the collaborative economy was released in early June 2016¹⁹. A central section is devoted to 'labour law and worker classification'. In January 2017, the European Parliament adopted a resolution on the European Pillar of Social Rights, in which it advocates 'for work intermediated by digital platforms [...], a clear distinction—for the purpose of EU law and without prejudice to national law—between those

¹⁹ Communication of 2 June 2016, A European agenda for the collaborative economy (SWD(2016) 184).

genuinely self-employed and those in an employment relationship, taking into account ILO Recommendation No. 198, according to which the fulfilment of several indicators is sufficient to determine an employment relationship²⁰. Later that same year, the Parliament adopted a resolution on a European Agenda for the collaborative economy²¹, calling on the Commission 'to examine how far existing Union rules are applicable to the digital labour market and ensure adequate implementation and enforcement'.

The EPSR²² was proclaimed at the Social Summit for Fair Jobs and Growth in Gothenburg, Sweden, on 17 November 2017. Commentators welcomed this vigorous expression of political commitment as a timely and essential initiative against the rise of anti-EU sentiment. The Commission is expected to continue delivering on this, even more so after President von der Leyen asked the Commissioner for Jobs and Social Rights 'to develop an action plan to implement the Pillar'²³. In January 2020, the Commission presented a communication which included a proposal to organise a 'Platform Work Summit' to discuss priority issues and solutions²⁴. The Summit did not take place due to the Covid-19 crisis, but a wide range of consultations was held with stakeholders in autumn 2020. In October, the Commission adopted its 2021 Work Programme, which includes a legislative proposal (based on Art. 153 TFEU) to improve the working conditions of platform workers and ensure adequate social protection²⁵.

Despite its more exhortatory than mandatory nature, the Pillar marks a new promising step in the process of strengthening the EU social dimension. Indeed, the EPSR provides guidance on how EU institutions should understand social rights and principles. It remains to be seen whether and how the Commission will further leverage the broad consensus on this initiative (Rasnača, 2017). EU institutions may inform future efforts to address the vulnerabilities experienced by 'atypical' workers, averting unfair competition and the erosion of labour protection. All eyes are now on implementation.

3.1 The new Directive on transparent and predictable working conditions: one small step forward

A direct follow-up to the EPSR is the new Directive (EU) 2019/1152 on transparent and predictable working conditions. Even though it is too early to evaluate the efficacy of the new measures laid down in the Directive, a preliminary assessment can be made. The most important rights platform workers could benefit from include: (i) limitations to the use and duration of casual contracts, (ii) ban on unnecessary exclusivity clauses, and (iii) possible definition of a rebuttable presumption of the existence of an employment contract or relationship with a guaranteed number of paid hours based on the hours worked in a preceding reference period. Another important aspect is that on account of the EPSR, the new Directive also serves as a tool to manifest and advance the EU social *acquis*, provided that Member States (MS) are keen to adequately

²⁰ European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)).

²¹ European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)).

²² Interinstitutional Proclamation on the European Pillar of Social Rights (2017/C 428/09).

²³ Ursula von der Leyen, *Mission letter to Nicolas Schmit*, Commissioner-designate for Jobs. Brussels, 10 September 2019.

²⁴ Communication of 14 January 2020, 'A strong Social Europe for just transitions' (COM(2020) 14). A Proposal for a Directive on adequate minimum wages in the European Union (COM(2020) 682) was released based on Article 153 TFEU on working conditions.

²⁵ Communication of 19 October 2020, 'Commission Work Programme 2021' (COM(2020) 690).

transpose it to achieve its ambitious goals.

The personal scope of the new Directive is already a matter of controversy. In fact, the minimum rights laid down in the Directive apply to 'every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State *with consideration to the case law of the Court of Justice*' (emphasis added)²⁶. As long as they fulfil the criteria established by the CJEU, domestic, on-demand, intermittent, voucher-based and platform workers, trainees and apprentices fall within the scope of this Directive and are entitled to a set of minimum rights²⁷. This 'hybrid' formula, which has led to disagreement between the co-legislators, combines MS' autonomy in defining the legal determinants of an employment relationship (a practice limiting a uniform application of the EU social *acquis*) with a consideration for the CJEU's case law (Bednarowicz, 2019). The risk is that MS could opt for a 'conservative' personal scope. Yet a broad interpretation of the Directive's protective aims could lean towards the inclusion of non-standard workers in a purposive way (Risak and Dullinger, 2018). Platform workers would benefit most from the basic measures laid down in the Directive. Interestingly, the legal classification of workers could represent both a battlefield and an opportunity for successful dialogue between courts at different levels.

Workers whose work patterns are 'entirely or mostly unpredictable' (Art. 10) must be informed about the variable organisation of their work and of the number of guaranteed paid hours. They also have a right to be informed on how they will be paid for any additional hours worked, when exactly their work will commence within a reasonable notification period and the timeframe within which an agreed assignment can be cancelled. These provisions purport, to some extent, to re-standardise on-demand work by designing a stable availability window, within which workers cannot be penalised for refusing to show up and must be compensated if a previously agreed slot is cancelled. In a sense, this set of rules sends a clear message about the need to avoid a downward spiral, accelerated by increasingly popular business models that shift business risks to casual workers.

The set of minimum requirements relating to working conditions is particularly noteworthy. Some of them seem to have been conceived to prevent abuse in the most volatile segments of the platform economy. Simultaneous engagements with other employers are allowed, i.e. the worker will not be treated adversely, and at the same time, incompatibility clauses must be limited (Art. 9). Considering the balanced rationale of enhancing transparency and predictability while maintaining a reasonable flexibility of non-standard employment, these concessions are problematic on two grounds. On the one hand, several platforms include non-exclusivity clauses—which often remain on paper—to reinforce their legal arguments on the supposed flexibility enjoyed by the worker. On the other, legitimising the practice of taking multiple jobs could lead to further work intensification. Workers agree to work on multiple tasks, assignments and projects because they are left with no choice if they are to earn a meaningful level of pay. The worker's questionable voluntary choice should not find technical encouragement and tolerance.

The Directive envisages a set of rules aimed at preventing and fighting abuses, which may include limitations to the use and duration of on-demand contracts—in line with

²⁶ The same formula is used in Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers.

²⁷ Regardless of the number of hours worked, workers who have no guaranteed working time, including zero-hours and some on-demand contracts, should fall under the scope of the Directive.

similar provisions included in the framework agreement on fixed-term work—or a rebuttable presumption regarding the existence of an employment contract or employment relationship (Art. 11). This is a strong legal instrument—already in force in some MS—to deter employers from implementing casual work without restraints. There are two main approaches to designing such an instrument: (i) a broad presumption that all relationships are of a subordinate nature and that a worker making a claim is not required to produce evidence supporting the allegation; (ii) a reversal or reduction in the distribution of the burden of proof for workers based on one or several factual indicators in a specific case, in line with ILO R198 according to which ‘Members should [...] consider the possibility of [...] (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present’²⁸.

3.2 Council Recommendation on access to social protection for workers and the self-employed: too early to judge

According to Behrendt and Anh Nguyen (2018), ‘[w]orkers in non-standard forms of employment are often not covered, or only partially covered, by social protection systems, particularly employment-based schemes’. The traditional system—premised upon the ‘archetypal’ full-time, open-ended relationship or contract between a worker and a single employer over a long-time span—is under-inclusive and fails to be adaptable when it comes to providing income over the life-cycle and mitigating the risks of poverty and social exclusion among the self-employed and their families.

Access to social protection is denied for several forms of under-protected work. In some MS, those working in the platform economy may be excluded from some social security schemes (in particular, accidents at work, sickness and unemployment benefits) because of their employment status. Moreover, platform workers may not meet the minimum criteria to access contribution-based benefits in case of need (such as qualifying periods, waiting periods, minimum working periods and duration of benefits) due to the intermittent and low-income nature of their engagements. Non-standard workers are ideal beneficiaries of policies aimed at reinforcing the social safety net to protect individuals against the economic implications of social risks, such as illness, old age, accidents at work and unemployment – a need that has become even more apparent during the Covid-19 pandemic. Moreover, these workers would benefit considerably from measures preventing and alleviating poverty and upholding a decent standard of living. The challenge for the future is to reinvent this model by adopting more flexible solutions based on the transferability and inter-operability of acquired social rights instead of implementing exemptions and exclusions, which may end up turning non-employment formats into low-cost alternatives. International institutions, such as the ILO, recommend moving towards a system based on the universality of protection and accessibility, transferability of the benefits accrued, transparency and predictability of entitlements, promotion of gender equality, adequacy and the sustainability of schemes.

The Recommendation²⁹, which does not apply to social assistance and to minimum income protection schemes, invites MS to tailor the rules to the situation of the specific groups while maintaining a general principle of universality. MS have committed themselves to ensuring effective, adequate coverage for all workers and for the self-employed. When it comes to platform workers, MS are expected to ensure access to

²⁸ Paragraph 11, R198 – Employment Relationship Recommendation, 2006 (No. 198).

²⁹ Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01).

adequate social protection in numerous ways. For instance, MS are requested to review the rules governing contributions and entitlements to ensure that they do not constitute undue obstacles to access to benefits for those who perform work of an exceedingly low duration which generates overly limited earnings. Concomitantly, a possible response could be the incorporation of non-standard workers, who combine different engagements, into existing schemes. Multiple contributions to overlapping schemes, which today represents a common shortcoming, must be avoided. On a positive note, the creation and maintenance of interoperable public databases can increase transparency, verifiability and compliance. MS are encouraged to ensure that entitlements are preserved, accumulated and/or transferable across all types of statuses and industries throughout the person's career. It is important for efficient, adaptable, transferable and user-friendly solutions to be implemented for all forms of employment that diverge from the classical scheme, especially for those engaged in the 'grey area'. In this respect, 'data-driven' solutions could represent an opportunity to enhance formalisation and reduce administrative complexity, as they can be used to facilitate registration and collection while avoiding fraud and errors (La Salle and Cartoceti, 2019)³⁰.

4 The elephant in the room. The EU social *acquis* in the 'first round' of legislation on atypical employment

Platform workers do not necessarily need new regulations but rather a more effective enforcement and an unambiguous legal framework. EU institutions have a long tradition of involvement in atypical employment. Thus, every new initiative must entail a careful impact assessment of existing schemes and, possibly, their application or revision.

The EU social *acquis* on atypical employment represents the most regulated province in the region of non-standard work. As recognised by Bell (2012, building on Countouris, 2006), the risk is a stark polarisation between 'typified-atypical' workers and 'new' or 'very' atypical working templates. This is also because the three Directives examined below have been followed by a long phase of inaction; the momentum of integration in the social field has weakened. However, despite their inevitable shortcomings, the three Directives regulating atypical employment at the EU level represent good practices in terms of both legislative technique (in the first two cases, they gave binding force to an agreement previously signed by EU social partners) and substantive norms.

4.1 Part-time, fixed-term and temporary agency work Directives: new wine in old bottles?

Platform work resembles some non-standard forms of employment. (The work activity is divided into small tasks and performed as multiple ad hoc transactions, and at least three parties are involved in a single operation). Commonly referred to as Directives on 'atypical' work, the three different initiatives established a set of guiding principles that were later implemented at the domestic level. All of the Directives institute a general principle that workers who fall within their scope are not ill-treated and discriminated; however, the lowest common denominator agreed on by all MS is based on a minimalist approach. While each Directive lays down some specific provisions, the rationale behind these policies seems to be recourse to equal treatment 'as a means to improve quality of these forms of employment' (Bell, 2012). There are conflicting views on the Directives' meaning and merit, yet the objectives of the first two Directives are manifest and twofold. On the one hand, they attempt to remove discriminatory obstacles, thus

³⁰ See also Proposal to revise the Directive on Administrative Cooperation (Directive 2011/16/EU) (COM(2020) 314 final).

encouraging voluntary part-time work (PT) and contributing to the flexible organisation of work to the benefit of both employers and employees³¹. On the other, the goal is to also limit abuse of renewals of (successive) fixed-term contracts (FT)³². Regarding temporary agency workers (TAW), the objectives include the strengthening of legal protection and improving the quality of work of temporary agency workers, with the aim of supporting the creation of jobs and the development of flexible arrangements³³. Therefore, when it comes to assessing their relevance for platform workers, caution is essential: the three Directives on atypical employment cannot be treated as a monolith. In fact, a promotional intervention for PT work is balanced by the abuse prevention purpose of the Directive on FT work. Similarly, the intervention on TAW was meant to harmonise the protection of 'temp' workers (through the equal treatment principle), contributing to job creation and to the development of flexible forms of work.

There is another way of looking at this area of law, namely from the perspective of the so-called comparable worker, which 'has proved to be the Achilles heel of EU equality law in general' (Countouris, 2016). In particular, the Framework Agreement on PT work prohibits part-time workers from being treated less favourably than full-time workers, while the Framework Agreement on FT work lays down the principle of equal treatment between fixed-term and permanent workers. In the case of workers who have concluded a PT contract, the primary 'comparator' is a full-time worker in the same establishment with the same type of employment contract or relationship³⁴. Likewise, for fixed-term workers, the main comparator is a worker with an employment contract or relationship of indefinite duration in the same establishment. When there is no comparable full-time or permanent worker in the same establishment, the Directive mentions that comparison shall be made with reference to the applicable collective agreement or, where none has been concluded, in accordance with national law, collective agreement or practice (Clause 3 (2) of the two Framework Agreements). According to the Directive on TAW, the working and employment conditions of agency workers need to be 'at least' the same for the duration of their assignment as those that would apply to workers directly recruited for the same job in the user firm (not necessarily hired on a full-time contract) (Art. 5(1)). The Directive specifies that 'basic working and employment conditions' relate to: (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; and (ii) pay (Art. 3(1))³⁵.

In principle, a comparison can easily be drawn where the platform operates to the benefit of firms employing a stable workforce. Regrettably, in an 'asset-light' undertaking based exclusively on platform workers, the 'benchmarking activity', which is an essential part of the equality test, can be extremely complex and burdensome, thus making the identification of a comparator gruelling, especially when collective agreements are not sufficiently inclusive and up to date. This situation may unduly affect

³¹ Council Directive [97/81/EC](#) of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

³² Council Directive [1999/70/EC](#) of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

³³ Directive [2008/104/EC](#) of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

³⁴ However, the Directive on part-time work allows MS, after consulting their social partners, to exclude casual work from the personal scope of application for objective reasons.

³⁵ The Directive provides for a set of derogatory measures that can be implemented at the national level after consulting social partners and as long as an adequate level of protection is guaranteed.

platform work, as has been the case for casual workers in the recent past³⁶. However, the 'delegation' included in the Framework Agreements on PT and FT could contribute to converging platform workers' terms and conditions with those of workers employed under standard contracts in the same sectors (e.g. trade, logistics and services). This possibility could pave the way to genuine solidarity among long-established trade unions, which could take action to improve platform workers' working conditions by embodying the abstract position of the comparator in new collective agreements.

The next question is whether the personal scope of the three Directives is broad enough to encompass platform workers. The Directives suffer from some of the limitations deriving from the rigid dichotomy between employment and self-employment. Both protocols apply to PT and FT workers under an employment contract or relationship as defined in law, collective agreements or practice in each MS (Clause 2(1)). This requirement conflicts with the common classification imposed by platforms, which qualify workers as self-employed persons. In many EU jurisdictions, this question is one that must be objectively determined with reference to the reality of the working arrangement based on a long list of symptomatic indexes. Misclassification can be rectified by courts, and platform workers may fall under the personal scope of the Directives in case of successful litigation (Garben, 2017). However, this process can be expensive and time-consuming while the outcome may be unpredictable.

Box 2: Is the TAW Directive a suitable model for platform work?

The Parliamentary Resolution on a European Agenda for the collaborative economy states that 'many intermediating online platforms [are] structurally similar to temporary work agencies (triangular contractual relationship between: temporary agency worker/platform worker; temporary work agency/online platform; user undertaking/client)', and calls on the Commission to examine the extent to which Directive 2008/104/EC is applicable to specific online platforms (para. 46). Some scholars have proposed an analogous intervention for workers in multiparty arrangements, predominantly—albeit not exclusively—focusing on 'crowdwork' (i.e. services that are completed remotely and delivered online) (Ratti, 2016). Critics, however, have noted shortcomings of this approach, as it is fraught with seemingly insurmountable difficulties. In the various sectors of location-dependent platform work, this would mean creating dozens of commercial contracts between the online platform and the final costumers. In a way paradoxically, this would also expand the sources of managerial prerogatives exercised over workers, thus intensifying the regime of 'control without responsibility'.

The relationship between parties can be described as a triangular one, and the role of the platform could be equated with that played by a traditional 'broker'. The fully-fledged and automatic application of the Directive raises many problems, however, both from a practical and legal perspective. Indeed, the Directive aims to offer minimal protection to temporary agency workers by establishing the principle of equal treatment and identifying temporary work agencies as employers. It is worth noting that this legal template is characterised by the existence of two different contracts: a commercial one binding both the agency and the final user as well as an employment contract (or relationship) between the agency and the worker. Thus, for the purpose of the application of the Directive, the contentious legal status of platform workers is still

³⁶ In a case concerning an 'on-demand contract', the CJEU ruled that there was no 'comparator' in the enterprise because all of the full-time workers had fixed hours and were required to perform work without being allowed to refuse it. Case C-313/02, *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG* [2004] ECLI:EU:C:2004:607.

relevant. Despite the judicial attempts to broaden the personal ambit of application due to a wide and flexible interpretation of the notion of 'worker' (further discussed below), only workers under a contract of employment or who are in an employment relationship with a temporary work agency fall under the scope of the Directive on TAW (Art. 3(1)). Nevertheless, national employment law systems do not have 'unfettered discretion in deciding who is to be seen as a worker and what a contract or relationship amount to' (Countouris et al., 2016). Moreover, in the original model, a worker is assigned to a user undertaking to temporarily work under the supervision and direction of the latter. From a functional perspective, this would reduce the intervention exercised by the platforms, as many of them currently directly organise and control the workforce. Lastly, a licensing system is often in place: agencies must meet several operational and financial requirements. The stringent regulation of the sector is leading to opposition among incumbent temporary work agencies, already heavily digitalised, that feel their business is imperilled by those platforms that are competing deceitfully.

Although there may be some organisational similarities, mainly due to the trilateral interaction, the respective characteristics nevertheless reveal that TAW and platform work are two different formats. Against that backdrop, the application of the TAW scheme to platform work is not straightforward. This policy solution may not 'resolve the questions as to who the contractual partners are or under what contract the work is performed. Furthermore, it does not facilitate enforcement of the rights of platform workers' (Risak, 2018). Besides this, from a tactical standpoint, one may find it difficult to understand why a worker should bring a claim to be reclassified as a worker for the purpose of the TAW Directive with the sole purpose of benefitting from a regime to which a (modest) equality principle applies rather than demanding a 'straightforward' reclassification. It is often neglected that the Directive in question cannot apply to situations in which the end user is not engaged in economic activities. Many 'requesters' act as private persons, and may not have any other employee, thus undermining the process of comparison. To conclude, although requiring some digital platforms to operate as temporary work agencies could prove arduous, it is a workable option. This would not, however, be a panacea for platform workers (Potocka-Sionek, 2020). Therefore, the sacrifice of stretching the existing regulation on TAW is not worth it.

Overall, the EU regulatory solutions for atypical employment indicate that classifying workers as employees does not entail a loss of business flexibility. There is no incongruity between labour regulation and unorthodox organisational patterns. It is not simply a case of institutions having to update these three Directives on atypical employment to meet the demands of certain digital platforms. Rather, it should be a process of adaptation of 'innovative' business models to the various flexible solutions offered by existing EU and domestic legal framework, and there are indications that this is already taking place in some industries (Josephs, 2020). It is therefore important to strive to go beyond this 'shoot first and ask questions later' logic. As argued elsewhere (Aloisi and De Stefano, 2020), the inherent flexibility of the employment contract or relationship, granted in particular by the abovementioned atypical formats, allows the full deployment of the managerial strategies and novel arrangements made possible by digital transformation. The goal should be a labour market where innovation is a synonym for not only flexible jobs, but also for sustainable and high-quality ones.

4.2 Any room for the CJEU to classify platform workers as 'workers'?

Platform work is now ubiquitous throughout the EU. This notwithstanding, the current state of exception risks morphing into a blank proxy for deregulation processes that disavow the existing legal system, nullifying any attempt to offer adaptable solutions that accommodate the needs of a changing labour market (Dubal, 2020). The purpose

of this final section is to examine the possibility of the CJEU classifying (some) platform workers as workers. Several strands of analysis are entwined. First, it is necessary to develop effective tools to increase familiarity with the functioning of platform-organised arrangements, considering the potential of management by algorithms. Second, based on this thorough assessment, it is crucial to wisely consider the factual circumstances of the performance by interpreting the notion of 'subordination' in an evolving way. Third, for the time being, this reasoning must be incrementally developed by adopting a sector-specific and case-by-case approach (Lenaerts, 2015)³⁷.

New technologies, which purport to create an emancipating new work reality, are often used to deepen hierarchy and control, despite the regulatory efforts to limit the unrestrained adoption of automated decision-making processes. We are witnessing the spread of deceitful and pervasive forms of control that are not matched by the activation of counterweights defined by the legislator or collectively negotiated by social partners. Though some alternative working patterns may not meet the rigid national requirements or formalities defined by law or case law, most situations are a neat fit with existing legal schemes³⁸. Indeed, this reality lies in stark contrast with the rhetoric of self-employment and entrepreneurship, as platform workers often have limited control over their working conditions. Moreover, when managerial prerogatives are exercised by means of digital tools, such as algorithms, geolocation devices or rating systems outsourced to clients, the worker's flexibility in deciding whether, when and where to provide the service should not exclude the possibility of the latter being reclassified as an employee with access to the protective regime of labour law (De Stefano, 2018b).

There is still widespread uncertainty over the classification of platform workers. The current binary divide does not prevent self-employed workers from being granted some basic labour and social rights; indeed, various legal systems afford a minimum amount of protection to self-employed persons. The existing model should not be regarded as exclusionary (Davidov, 2014). However, in most EU MS, the dominant notion of 'worker' is shaped by reference to the concept of 'subordination' (Giubboni, 2018). In the same vein, the EU concept of 'worker' is still associated with the technical and legal situation of subjection, which materialises when an activity is performed 'under the direction or supervision' of an employing entity. While the Directive on transparent and predictable working conditions is a step in the right direction, as it refers to the CJEU's evolving case law, much remains unknown about how the Court will approach the interpretation of the concept of 'worker' in an increasingly digitalised and dematerialised economy.

Notably, there is a trend towards a *Europeanisation* of the definition of worker. The purpose is to avoid endangering uniformity at the domestic level by restrictive transpositions excluding certain forms of work from the application of EU labour law. This trend has resulted in the development of an almost independent meaning of the term 'worker', which was originally established by the CJEU to expansively define the scope of the fundamental freedom of the movement of workers (Countouris, 2018)³⁹.

³⁷ Case C-256/01, *Debra Allonby v Accrington & Rossendale College* [2004] [ECLI:EU:C:2004:18](#) (explaining that 'there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied').

³⁸ There are strong indications of a command-and-control position held by the platform, resulting in a model more 'effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders'. Opinion of AG Szpunar, Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain, SL* [2017] [ECLI:EU:C:2017:364](#).

³⁹ Case C-66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] [ECLI:EU:C:1986:284](#). See also Case C-428/09, *Union syndicale Solidaires Isère v Premier ministre and Others* [2010] [ECLI:EU:C:2010:612](#).

For instance, in defining the scope of the application of Directive 2008/104, the Court has claimed that the personal scope of application of EU labour law tools 'ought to be, ultimately, a matter for EU law to define' (ibid.). The CJEU has repeatedly held that 'the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration, the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard'⁴⁰. This position corroborates the principle of the prevalence of substance over form (the 'primacy of reality' doctrine). What is more, according to settled case law, the control test can also be passed in case of tenuous elements of subordination (Nogler, 2009)⁴¹. Thanks to its institutional legitimacy, the CJEU has progressively adopted a wide-ranging, pervasive and relaxed notion of subordination, which 'does not require an employer to be constantly watching over the shoulders of a worker' (Countouris, 2018).

Moreover, in *Allonby*, the Court clarified that the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker [within the equal pay provisions of Article 157 TFEU] if his or her independence is merely notional⁴². The CJEU has emphasised the importance of the relationship beyond the formal appearances and terms of the contract. At the same time, it has strengthened its prerogative to 'surpass' the domestic classification in case it does not accurately reflect the reality of the work performance (sham self-employment)⁴³. However, recently confronted with a case in line with the platform model⁴⁴, while confirming the need to move beyond a formalistic approach based on the letter of the contract, the CJEU did not go so far as to provide useful elements to update the classical analysis.

In a case concerning the interpretation of the Directive on PT work, the CJEU held that while 'it is for the Member States to define the concept of workers who have an employment contract or an employment relationship' and to determine who falls within that concept, this process is 'subject to the condition that that does not lead to the arbitrary exclusion of [a given] category of persons from the protection offered by [the] Directive'⁴⁵. Indeed, as explained in the same ruling, 'the discretion granted to the Member States [...] is not unlimited. [...] Certain words used in that agreement may be defined in accordance with the national law and practices on condition that they respect the effectiveness of the Directive and the general principles of European Union law'. A lack of application of EU rules is 'liable to jeopardise the achievement of the objectives pursued by a Directive and, therefore, deprive it of its effectiveness' (para 35).

As has been rightly pointed out, '[i]t would seem harmful to the social objectives of the *acquis* if its scope of application could be unilaterally limited by Member States, excluding certain forms of work or workers regardless of the material conditions of their

⁴⁰ Case C-216/15, *Betriebsrat der Ruhrlandklinik v Ruhrlandklinik* [2016] [ECLI:EU:C:2016:518](#).

⁴¹ Case C-232/09, *Dita Danosa v LKB Līzings SIA* [2010] [ECLI:EU:C:2010:674](#).

⁴² Case C-256/01, *Debra Allonby v Accrington & Rossendale College* [2004] [ECLI:EU:C:2004:18](#); Case C 413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] [ECLI:EU:C:2014:2411](#).

⁴³ In line with R198 – Employment Relationship Recommendation, 2006 (No. 198) ('[t]he determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties').

⁴⁴ Case C-692/19, *B v Yodel Delivery Network Ltd* [2020] [ECLI:EU:C:2020:288](#). See Aloisi, 2020b.

⁴⁵ Case C-393/10, *Dermod Patrick O'Brien v Ministry of Justice* [2012] [ECLI:EU:C:2012:110](#).

employment' (Garben et al., 2017). In the near future, this pragmatic approach to the definition of a more autonomous meaning of the concept of 'worker' ought to be applied by transcending the areas where it has been traditionally adopted (internal market law, freedom of movement, equal pay, anti-discrimination, working time, pregnant workers and collective redundancies). The drafting of a cohesive, modern and ample notion of 'worker' could be presented by means of a new Directive amending the scope of the existing ones (or at least some of them) horizontally or through the CJEU's adaptable interpretation – an option that could prove to be future friendly. Such spillover should be encouraged to ensure that EU institutions embark on a new chapter of consolidating the social *acquis*, managing its achievements and adapting them to the fast-changing world of work. The gradual strengthening of this unified concept would foster a uniform and consistent application of EU law (Szpejna and Boudalaoui-Buresi, 2020), improving legal certainty and programmability for all sides.

Despite the centrifugal forces taking the upper hand and putting a freeze on the (political) process of harmonisation, European labour law cannot be considered an *à la carte* menu: a consistent application is recommended. This is a fertile line of law-making and judicial policy that should be developed without weakening the discretion granted to MS in designing their own measures in the social field. The pressing question is, therefore, how ready EU institutions are to take on this challenge based on the Social Policy Title. While platform work serves as a laboratory, the EPSR and its roll-out initiatives can also be used to address current constitutional imbalances between the different dimensions of the EU, namely the market, the social and the (newly arrived) digital dimension. The more technology advances, the more urgent the need to strengthen social institutions.

5 Final remarks and policy recommendations

Delivering positive outcomes for platform workers requires combined efforts. A coordinated and multi-pronged response is the preferable option when it comes to mitigating the risk of arbitrage and jurisdiction shopping in the EU. However, regulators need to resist the idea of a homogenous form of work deserving of one-size-fits-all interventions. Besides being prone to rapid obsolescence, tailor-made solutions could potentially perpetuate dualism between different forms of employment, leaving too many aspects inferiorly regulated (Deakin, 2014). This phenomenon must urgently be squared with existing legal frameworks before exploring *sui generis* regulatory responses, which are ultimately doomed to fail (Prassl and Risak, 2016; Huws, 2020). Indeed, many problems that platform workers face also affect other vulnerable forms of employment, in particular dependent self-employment and the growing family of casual work. The most pressing challenge is 'to adapt socio-legal model by adopting more encompassing, future-oriented and elastic solutions instead of addressing merely platform work' (Potocka-Sionek and Aloisi, 2021). A feasible solution could be the adoption of a Directive that ensures equal treatment between all forms of non-standard and standard work (Hauben et al., 2020).

At the institutional level, the newly created European Labour Authority (ELA) could be given specific assignments in this area to advance its role as a continental labour inspectorate. Undeclared work, often dovetailing together with platform work in some sectors, has already been established within the Authority's remit. This could also make it easier to address the implications of the cross-border character of some forms of platform work (Lhernould, 2020). It must be noted, however, that the situation is less concerning for location-dependent workers, as major importance is assigned to the notion of the 'habitual place of work' or 'habitual residence' in determining the applicable

law (Cherry, 2019)⁴⁶. In the face of mounting evidence of the expansion of the 'grey area' between employment and self-employment, leading to ambiguous legal situations and barriers to access social rights, labour inspectorates, which are often underfunded and understaffed, could take a more proactive role in enforcing existing rules at the domestic level. This could be achieved by fostering capacity building and training, developing new operative procedures, implementing pilot programmes and sharing best practices. To fight the propensity for deception, authorities could define a set of criteria to facilitate the detection of false self-employment.

The possibility of introducing a rebuttable presumption of the existence of an employment relationship is being considered to address the misclassification issue, in line with the new Directive on transparent and predictable working conditions and ILO R198. There are two main ways of implementing such a presumption: (i) presuming that all relationships are employment relationships and shifting the burden to prove otherwise on the principal – the radical option; (ii) easing the burden of proof by selecting one or several criteria that prove the existence of an employment relationship in a case before tribunals, labour inspection authorities or tax collecting offices – the moderate option. Since platform workers may 'lack the necessary information to be able to reliably judge their own status' (BMAS, 2020), the burden of proof for determining the existence of an employment relationship could be streamlined by identifying some key indicators of subordination. A more open and explicit reliance on the 'organisation by the other party', 'personal work' or 'business integration' factors could represent a viable solution in several EU jurisdictions. The burden of proving that an employment relationship does not exist would rest with the platform operator. This measure would help vulnerable workers claim their employment rights, thus counterbalancing the contractual parties' unequal bargaining power and contributing to legal certainty.

At the same time, the General Data Protection Regulation could be relied on to ensure the transparency, accuracy and fairness of rating, evaluation and classification systems and to ensure and redress mechanisms in cases of perceived capricious treatment, which are among workers' most urgent concerns (Silberman and Johnston, 2020)⁴⁷. Two lawsuits were filed in the Netherlands (Uber's European headquarters are based in Amsterdam) by UK-based former drivers claiming that algorithms automatically determined which drivers should be removed from the platform, with no meaningful human intervention in breach of Article 22 of the GDPR (Sawers, 2020). For those platform workers who are genuinely autonomous, the Platform to Business Regulation on promoting fairness and transparency for business users of online intermediation services can offer reliable safeguards⁴⁸, leading to a more competitive online ecosystem (CEPS et al., 2019). For all categories, the rating accrued on a platform, as well as the work history that led to that rating, must be transferable to avoid the lock-in effect. Moreover, it is important to ensure interoperability with the profiles on other platforms. Any exclusivity clauses must be banned or, in case they shall continue to be applied, to consider them as non-competition clauses, which must be properly compensated (Aloisi et al., 2019).

Social dialogue and collective bargaining are flexible solutions for promoting improved

⁴⁶ Regulation (EC) No [593/2008](#) of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

⁴⁷ Regulation (EU) [2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

⁴⁸ Regulation (EU) [2019/1150](#) of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

conditions for non-standard workers, as legislation and legal claims have been struggling to respond promptly and adequately to this rapidly evolving situation⁴⁹. The risk at present is that an inflexible interpretation of EU competition law could further exacerbate the situation of platform workers and many other casual workers, who are treated as 'undertakings' for the purposes of EU antitrust law and do not have the possibility of controlling their work processes, the price of their 'services' and their conduct in the market. Many scholars have sought to interpret the scope of collective rights expansively to cover non-standard workers, thus curbing the unilateral enforcement of contractual and working conditions (Countouris and De Stefano, 2020). Despite the legal impediments, many experimentations are emerging (Aloisi, 2019). It is therefore essential to ensure that those workers disenfranchised because of their employment status can effectively exercise the fundamental right to bargain collectively, recognised by international law instruments for 'workers' or 'everyone' without any distinction whatsoever. This can be achieved by updating the current legal framework at the EU level and, where appropriate, by adopting a modern interpretation of antitrust categories to allow for an improvement of the working conditions of larger segments of the labour force and to help promote inclusive and sustainable growth⁵⁰.

An adaptive interpretation and a well-designed application of the current rules are expected to strike a balance between safeguarding social rights, ensuring a level playing field for all operators and nurturing genuine innovation. This renewed institutional activism will hopefully trigger the implementation of a stronger EU social agenda promoting the rights of workers, regardless of their contractual classification⁵¹.

⁴⁹ European Social Partners (2020), [Framework Agreement on Digitalisation](#).

⁵⁰ Public [consultation on the Digital Services Act](#) (see section V of the consultation, on "Self-employed individuals and platforms").

⁵¹ European Pillar of Social Rights, Chapter II: Fair working conditions, Fifth Principle. See also Art. 31, Charter of Fundamental Rights of the European Union (2012/C 326/02).

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(*) I am extremely grateful to Amina Majed Adwan, Valerio De Stefano and Nastazja Potocka-Sionek for generating a great discussion and providing invaluable feedback.