A Timid Proposal

Eva Kocher 2023-07-18T15:51:54

With the Council position of 12 June on the proposal for a EU Directive on improving working conditions in platform work, a presumption of employment status for digital platform work is now becoming the subject of trilogue negotiations. A lot could be said about the proposal, the process, and the innovation that would come with an EU Directive on platform work as such (see also the blogpost by Silberman and the upcoming post by Barrio). This comment focusses on one central part of the proposal: the presumption of employment. The Commission's and Council's proposals suggest a well meant, but timid instrument. Given the already limited scope of te proposals in their definition of "digital labour platforms", only the Parliament's position that does not condition the presumption to any additional criteria is able to convince.

Employment and work organisation

The importance of an EU Directive on employment status and classification can hardly be overestimated. It concerns the scope of the term „employment contract" (Sec. 611a BGB) which ultimately defines the limits of labour law. It is based on the understanding that whoever works as part of another's organisation, should enjoy labour law protection.

Since the 1990s, phenomena of „new self-employment" have challenged traditional rules of classification. „New self-employment", i.e. activities in service and knowledge sectors which depend on relatively few material and personnel resources, have been performed by and assigned to "solo self-employed" individuals in often precarious situations. This entails possible circumventions of labour law and social security and therefore raises serious questions of social protection.

In the last 5-10 years, such debates on employment status classification have focussed on digital platform work. The identification of these kinds of platforms is not an easy task (as Silberman's contribution shows). In any case, they are different from platforms who "exploit or share assets" or "resell goods" (Art. 2(2) of the proposals). Examples are platforms that mediate online micro-tasks (such as crowdworking platforms like Amazon Mechanical Turk) or organise offline work (such as delivery platforms like Lieferando or transportation platforms like Uber). They often employ solo self-employed workers in highly precarious situations. Recently, the discussion has been limited almost exclusively to delivery and transportation platforms, sectors in which there are many and clear indications that workers must be classified as employees, which means they are "false self-employed". In a number of jurisdictions, this has already been established by courts.

However, the classification of digital platform workers has remained a contentious question. Employment classification in the labour law systems of the EU Member

States is mostly based on an understanding of hierarchy, looking for aspects of subordination, instructions, or control. in these aspects, digital labour platforms are often atypical. Most digital platform workers are formally free to choose when and how much they work. Nevertheless, they are usually dominated, if not by direct instructions and control, by automated feedback mechanisms, information asymmetry and invisible processes of assignment, which incentivise them to follow the platform's cues. In these cases, the workers have to be considered part of the platform's work organisation and therefore "employees".

The EU on employment status

At EU level, labour law is being harmonised in a fragmented way, with single Directives, in particular on the basis of Art. 153 TFEU. Some Directives use an autonomous concept of the employee, shaped by the case law of the ECJ; other Directives leave the definition of the employee status to the legal systems of the Member States. Classification is therefore not harmonised in a general way. When the European Commission, with its Green Paper of 2006 "Modernising labour law to meet the challenges of the 21 st century", first called for "greater clarity […] in Member States' legal definitions of employment and self-employment", the attempt was embedded in a general regulatory approach of „flexicurity"; it failed.

It was not until 2019 that the Commission made another attempt at regulating a general autonomous concept of employment status. The resulting Directive (2019/1152) on Transparent and Predictable Working Conditions*, however, once again refers to the law in each Member State, with only Recital 8 mentioning that* "domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices" could fall within the scope of the Directive – "provided that they fulfil those criteria".

On this background, the Commission's proposal for a Directive on improving working conditions in platform work, goes a long way, and it has been contested heavily, in particular from the side of digital platform operators. The European Parliament is in favour, but proposed major changes, and now finally, under the Swedish Presidency, the Council adopted its position on 12 June 2023.

The main substantive rules of the proposals can be found in two parts, one on employment status and classification (Arts. 3-5), and the other on algorithmic management (Arts. 6-10). This contribution focusses on employment classification, and asks: What is it about digital labour platforms that would justify special rules for employment status? And is the instrument the proposals choose – the presumption of employment – an adequate instrument for „improving working conditions in platform work"?

The role of indirect control and algorithmic management

Is there really something unique about platform work that requires a separate legal treatment? This has been questioned early on. On-demand work, day labouring, homework, and similar forms of precarious work have always existed. False self-employment has always been an issue with these kinds of work. While the work and collective actions of delivery couriers and Uber drivers in particular can easily be analysed as hierarchic in the sense of common definitions of employment status, platform work is more diverse than delivery and transportation. What many more labour platforms have in common, however, is that they deliberately use the blurring of hierarchies by indirect mechanisms of incentives, rating and feedbacks, to complicate the recognition of employee status. By automating these mechanisms, algorithm management obfuscates and augments them; it has therefore been "one of the main drivers of misclassification".

It is an important step that the proposals recognise the importance of algorithmic management for the classification of platform workers. Art. 3(2) follows the methodological cue of the typological method, which classifies work relationships according to the "primacy of facts", thereby inviting us to look beyond the contract and to analyse the specific business model and work organisation at hand. In this context the proposals demand that the determination of the existence of an employment relationship "[take] into account the use of algorithms [Council position: 'automated monitoring or decision-making systems'] in the organisation of platform work". This formula understands that digital labour platforms will often exercise control not in a hierarchical way, but rather through indirect means of feedback and incentives.

In contrast, the Council's new proposition of adding, in Art. 2(1ca), "the use of automated monitoring or decision-making system" also as a definitional criterion for digital labour platforms rather misunderstands the role of these mechanisms in the design of platforms – they are not constitutive, but often contribute and obscure the existing hierarchies on platforms.

The presumption of employment as regulatory instrument

The proposals' legal instrument for "improving working conditions" by the regulation of status can be found in Arts. 4, 4a and 5. They establish a "legal presumption" of employment, provided certain criteria are met (Art. 4(1) in the Commission and Council positions), and determine that the presumption can be rebutted on the basis of the national laws of the Member States (Art. 4a(3) in the Council position, Art. 5 in the Commision and Parliament positions; for Art. 4(1), Parliament also proposes an interesting methodology for the interplay of EU law and national laws).The reasons given in recital 28 for the choice of "burden of proof" as a regulatory instrument refer to the information asymmetry between workers and platforms, in particular in

relation to algorithms. One should wonder about this; the facts around platform work cases have hardly ever been a problem sofar, given that there there is usually an abundance of evidence about the factual elements, about the exact contents and circumstances of the contractual relationship. In practice, the presumption may work quite differently than burden of proof: It may rather guide the perspective of legal operators, and serve as a default rule for the weighing of indicators in the context of the typological method. In that case, effective implementation depends a lot on how national courts and tribunals use the presumption in their interpretation of facts.

The problems of the conditionality of the presumption

A presumption in EU law with the possible rebuttal on the basis of national laws is a strange instrument in itself. It gets almost weird if one looks at the conditions for the application of the presumption. The Commission's and Council's proposals establish criteria out of which platform workers have to prove some to establish a presumption [two out of five in the Commission's proposal, three out of seven in the Council's position].

Now, one would have thought that the EU legislator, once having made up her mind about a presumption for digital platform workers, would at least adapt definitions and criteria to the specificities of digital platform work. But most of criteria mentioned in Art. 4(1) of the Commission's and the Council's proposals reflect anything but traditional criteria of hierarchy. This is dangerous; it establishes basic criteria that are at the center of employment classification (such as "supervising the performance of work") as just one among several indicators that may even be rebutted. Without saying so, this may foster denying employment status in cases that before the proposed Directive would have clearly been considered employment.

But why condition the presumption at all? After all, a presumption that only applies if the worker can prove certain criteria, and that can be rebutted without limits, comes down to nothing else than putting the burden of proof on the worker. Remember that the rebuttal will be based on the Members States' national laws, and that these usually classify according to the typological method that clusters all the facts and indicators in an overall assessment. Where this methodology may leave the proposal's presumption, is unclear. On these terms, the Directive may end up completely ineffective.

The definition of "digital labour platform" as a possible basis for a presumption

Anyway, conditioning the presumption only makes sense if employment status cannot be generally presumed for digital platform work. Indeed: While there is a great variety of digital labour platforms (Silberman), ranging from mere passive intermediators to active service providers that use and coordinate the work activities

of individuals, only the latter resemble employers, justifying a presumption of employment.

But the Directive proposal does actually not cover the whole range of platforms. A closer look at the definition of 'digital labour platform' in Art. 2(1)(1c) of the proposal shows that the scope of application is quite limited. It only applies to "any natural or legal person providing a [Commission and Parliament: 'commercial'] service which […] involves [Commission and Council: 'as a necessary and essential component'], the organisation of work performed by individuals" (Council: 'in return for payment'). In other words: The Directive, in each of the proposals (Commission, Parliament and Council) is supposed to only apply to platforms that organise work . This is more than enough to engender a presumption of employment the way the Parliament proposes.

The Spanish and Portuguese labour laws as well as the Californian ABC rule are good examples for a presumption of employment that shifts burdens away from workers, rather conditions the rebuttal than the presumption, and thereby contributes to "improving working conditions".While the Spanish and Portuguese labour laws establish a general rebuttable presumption, without additional criteria to the general definition of the employment status, Sec. 2775(b)(1) Californian Labor Code rather conditions the rebuttal than the presumption. Three conditions ("ABC") have to be met in order to establish that the worker is not an employee but an independent service provider (basically: free from the control and direction; work is outside the usual course of the platform's business; worker customarily engaged in an independently established trade, occupation, or business). And this is the one criticism to be held against the Parliament's proposal: Conditioning the rebuttal in a way that would put effectively put the burden of proof on the platform, would rather mean having the platform prove the existence of strong indicators for self-employment instead of the non-existence of indicators for employment. 7. Waiting for the trilogue negotiations

The proposal is, in general, welcome. If a Directive is adopted, it will at least push national governments and legislators to take responsibility. Along with the Commission's Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, that would at least be something. However, while a Directive on Platform Work may in some time serve as a precursor for a legislation with much broader application, an effective improvement of working conditions on digital platforms are still a long way to go.

Now, the outcome of the trilogue negotiations is expected to depend on the outcome of the Spanish general elections on 23 July.

Acknowledgments

Thanks to Guy Davidov for inviting me to the Round Table on "Status and Control Following the Proposed EU Platform Work Directive" at the LLRN6 conference in Warsaw, which motivated this post. Thanks also to Alberto Barrio Fernandez and VerfBlog for the feedback on my drafts!