AK EUROPA

Position Paper
February 2022
Social

Improving working conditions in platform work

COM(2021) 762

Executive summary

On 9 December 2021, the Commission presented a proposal for a Directive on improving working conditions in platform work. For years, employee representatives have been calling for a legal framework for workers employed via online platforms to ensure minimum standards of legal and social protection.

Brief overview

The AK welcomes the proposed Directive on improving working conditions in platform work. In the opinion of the AK, the following improvements, among others, are still necessary:

- **Regarding Article 2(1)(1)**, a **clear definition of the person** who is to be classed as the legally responsible employer is required. This is necessary in order to ensure the practical implementation of social security reporting and contribution obligations in Austria, for example.
- The **legal presumption** defined in Article 4 of the existence of an employment relationship is to be welcomed. However, the **criteria** set out in Article 4(2) of the Directive and the requirement that two of them be met are **too restrictive**. The AK therefore calls for the catalogue of criteria to be supplemented by further points and for this list to be illustrative instead of exhaustive.
- A positive aspect is the **reversal of the burden of proof** set out in **Article 5**, according to which it is incumbent on the labour platform to prove, where applicable, the absence of an employment relationship within the meaning of the Directive.
- **Articles 6 et seq.** contain **information obligations** towards platform workers and their representatives; that is to be welcomed and is conducive to an effective balance of interests.
- The AK welcomes the fact that **Article 7** states that automated decision-making systems may not be used to exert pressure on employees or to endanger their physical or mental health.
- The fact that the information requirements set out in **Article 10 also** apply **to self-employed persons** is to be welcomed. Companies that are not platforms should also be subject to the same obligations if they use algorithm-based decision-making and evaluation systems. The information should also be provided in English or, if more than 20 people are affected, in their native language.
- The AK welcomes the fact that the information obligations of platform companies vis-à-vis national enforcement authorities and interest groups are set out in **Article 11**. However, the **information** must be **provided** as soon as possible to give employees legal certainty about their employment status.
- The **communication channels** provided for in **Article 15** are to be welcomed, but in the AK's view they need to have **independent** or self-organised **moderation** in order to prevent possible censorship and influence on the part of the platform operator.
- Articles **14 and 17** prohibit retaliation against platform workers. However, the impairment of earning opportunities through "reputational damage", such as "blacklists" or "bad rankings", needs to be explicitly prohibited.

AK's position

Workers on digital platforms are playing an increasingly important role in the functioning and development of European economies. In 2021, for example, around 28 million people were already employed via such platforms, and this figure is expected to rise to around 43 million by 2025. The extent to which this sector is expanding is also reflected in the turnover of the platform work economy, which has grown by 500 per cent in the last five years, according to the Commission. Moreover, the COVID-19 health crisis, which has necessitated restrictions on leaving the house (lockdown rules) and official business and restaurant closures in many European Member States, including Austria, has made abundantly clear the social and de-facto infrastructural relevance of the platform economy for the provision of everyday goods and services.

These figures and developments make clear how great the importance of online labour platforms already is. However, a legal framework is still lacking at the EU level to ensure social and legal protection for workers on digital platforms. For years, trade unions and the AK have repeatedly pointed out the precarious work situation of workers in this sector and called for appropriate legal measures. In the platform economy, solo and false self-employment often leads to the circumvention of labour and social standards and national tax laws. Trade unions and academics have for some time observed and criticised the fact that the grey areas between employment and self-employment in the platform economy are growing and that more and more people in need of protection are falling outside the scope of labour law, which is why minimum wage provisions and collective agreements in particular are not being applied. Particularly in the case of courier services, delivery services or passenger transport, the use of constructions aimed at circumventing the employer status of the platforms and the persons employed there has been observed time and time again in the past. It is conducive to the system that, especially in this field, workers often have deficits in the national language, a low or unrecognised educational status, little knowledge of their rights and a lack of social network.

Often workers should be classified as employees, but the cross-border dimension makes legal enforcement difficult. In addition, very low wages are often paid; for example, around 55 per cent of people working through platforms receive less than the minimum hourly wage that applies in the country in which they work. Furthermore, platform workers spend about 8.9 hours per week on unpaid tasks.

The high flexibility of labour relations also leads to unstable employment. As a result, it is becoming increasingly difficult to link the amount and duration of social security benefits to periods of employment. Ensuring continuous social protection for employees in this sector thus becomes a challenge.

With the Directive on improving working conditions in platform work, the European Commission has now taken appropriate measures, which the AK expressly welcomes. In the following sections, the AK analyses the proposed text and outlines where the provisions still need to be tightened.

Regarding Chapter I – General provisions:

Article 1 of the Proposal states that the Directive applies to all digital labour platforms that organise platform work in the Union. The decisive factor is that the platform work is carried out in the territory of the Union. The place of establishment of the platform, on the other hand, is irrelevant. That is to be welcomed both for factual reasons and for reasons of legal certainty and effective enforcement, since that provision does justice to the cross-border operations of platform companies, rules out circumvention of the Directive via place of establishment of the company, and makes it easier for workers to enforce their claims and rights against platform companies.

"Digital labour platform" is defined in Article 2(1)(1) of the draft. The term platform operator is not further defined, but may be a natural person or a legal entity within the meaning of Article 2(1) of the Directive. In order to ensure the practical implementation of **social security reporting and contribution obligations** in

Austria, among other countries, the AK believes that a clear definition of the person who qualifies as the **legally responsible employer** and who is therefore subject to these obligations is essential. In this regard, Article 3(2) of the Directive stipulates that the party assuming the employer's obligations in accordance with national law must be clearly defined.

The term platform work, in turn, is defined as any work organised through a digital labour platform. This term is defined broadly in the draft Directive, which makes sense from the AK's point of view, as platform work is a heterogeneous phenomenon in practice. Thus, platforms on which services are organised or provided electronically and are requested individually by a service recipient are covered. The work mediated by the platform can take place online or on site. The prerequisite is that it is performed in the EU by a natural person on the basis of a contract with the platform. The specific contractual designation is irrelevant. In the definition set out in Article 2(1)(3) and (4) of the Directive, the Directive distinguishes between persons performing platform work and platform workers:

- Persons performing platform work are any individuals performing platform work, regardless of how the parties involved contractually designate the relationship between that individual and the digital labour platform;

- A platform worker, on the other hand, is any person who performs platform work who has an employment contract or employment relationship under the law, collective agreements or practices in force in the Member States. Reference is made fundamentally to the national concept of employee. The case-law of the CJEU must also be taken into account in this classification.

This distinction is relevant in that the obligations to provide information in the case of platform work (Article 12) thus also apply to all persons who perform platform work. Articles 6, Article 7(1) and (3) and Article 8, which concern the field of algorithmic management, are also intended to apply to natural persons who are not in an employment relationship. The rationale is that these automated monitoring and decision-making systems impact self-employed workers similarly to employed workers. This means that these obligations are also applicable to self-employed persons, which the AK welcomes.

Regarding Chapter II – Employment status:

Article 3 of the Directive stipulates that Member States shall establish an appropriate procedure to verify and correctly determine the employment status of persons performing platform work. This is intended to enable persons potentially in false self-employment to establish the existence of an employment relationship. This ensures that persons in false self-employment can access the working conditions, pay and collective co-determination rights to which they are entitled under Union or national law in accordance with their correct employment status.

Article 3 also clarifies that the correct determination of employment status is based on material considerations, namely the principle of primacy of facts. According to this principle, the determination of the work status is primarily determined by the actual employment relationship, the manner of actually performed work and remuneration, taking into account the use of platform work algorithms, and not by the contractual definition of the work relationship.

This rule is also in line with national Austrian law, according to which the classification of the employment relationship under social security law is to be assessed according to its **true economic substance**. If it follows from the underlying facts that an employment relationship exists, this article also stipulates that under national law the party assuming the employer's obligations must be clearly indicated.

With regard to implementation into national law, in the AK's opinion, the concept of employer is highly relevant for the determination of compulsory insurance. Whether an employment relationship establishing compulsory insurance exists must always be examined in relation to another person, namely the employer.

Article 4, which sets out the **legal presumption – which can be rebutted – of the existence of an employment relationship**, plays a pivotal role in the proposed Directive. The presumption applies if the digital labour platform controls the work performed by a person. Article 4(2) defines what is meant by control. In addition, **five criteria** are listed, at least two of which must be met for the legally presumed employment relationship to exist. If the digital labour platform disputes this, it bears the burden of proof.

The **AK welcomes the legal presumption of** the existence of an employment relationship. This demand can already be found in the AK's consultation paper on the digital future of Europe , in the policy paper "Plattformarbeit – was tun?" of the Vienna Chamber

of Labour, both from 2020, as well as in the policy brief on "Platform work" of the AK EUROPA office from 2021. In the future, this will make it more difficult for digital labour platforms to circumvent their status as employers and the associated obligations under national and European labour law, social security contributions law and tax law.

However, the **criteria listed in Article 4(2) and the requirement that two of them be met are too restrictive.** The AK therefore calls for the catalogue of criteria to be supplemented by further points in order to ensure effectiveness of the presumption rule in line with the regulatory objective of the Directive, and for this list to be illustrative rather than exhaustive. In particular, the criterion of the **possibility of control or restriction of communication** between the persons performing the platform work and the recipients of the service should be added to this catalogue. Knowing that the platform economy is still in a process of **disruptive development**, the AK believes that an open and dynamically designed catalogue of criteria and the **fulfilment of only one criterion typical of platform work** is more appropriate than a restrictive rule. We also support the requirement for Member States to take a variety of accompanying measures under Article 4(3); in particular, for easily understandable information on the legal presumption to be made publicly available and for guidelines to be developed for digital labour platforms, employees, social partners and also enforcement authorities so that they can understand, implement and ultimately also pursue and enforce the legal presumption under Article 4 of the Directive.

The AK emphasises that a clear formulation of Article 4 as outlined above is necessary to ensure effective implementation at the national level. For example, with regard to social security classification, clear rules are an effective tool for creating legal certainty for all parties involved.

Another positive aspect is the reversal of the burden of proof set out in **Article 5**, according to which it is incumbent on the labour platform to prove, where applicable, the absence of an employment relationship within the meaning of the Directive. The fact that proceedings against the statutory presumption of employment should also not have any suspensive effect is expressly to be welcomed for reasons of the social protection that accompanies the granting of employment status.

Regarding Chapter III – Algorithmic management:

The AK welcomes the far-reaching information obligations for operators of digital platforms set out in **Article 6** et seq. of the proposed Directive. Platform workers must be informed that automated systems are used to supervise and evaluate their work. Platform workers must also be informed if systems are used that make or support automated decisions that affect material terms and conditions of employment, such as access to work assignments, earnings, occupational health and safety, or working hours. These information obligations exist vis-à-vis the platform workers and also vis-à-vis their representatives such as trade unions and statutory interest groups, which is certainly conducive to an effective balance of interests.

Furthermore, under **Article 8**, platform workers have the right to request an explanation from the platform operator for automated decisions that affect them in a significant way. In special cases, such as the suspension of the platform account, a statement of the reasons must be provided in writing. In addition, a review of automated decisions can be requested from the platform, which must respond within a relatively short period of one to two weeks.

Here, the AK also wishes to highlight the positive point that **Article 7** sets out the obligation for digital labour platforms to be monitored and evaluated as to the impact of automated decision-making systems on working conditions and the safety and health of platform workers. The clarification that automated monitoring and decision-making processes may not be used in a way that puts pressure on platform workers or endangers their physical or mental health is also to be welcomed.

The AK supports the proposed information requirements for platforms. It is particularly positive that, under **Article 10**, these apply not only to employed platform workers, but also to self-employed persons. It is true that issues of collective action and measures are not addressed in the draft. However, provisions concerning informing and consulting representatives regarding the use of algorithms (as in **Article 9**) – which are a prerequisite for collective bargaining – for example, can be found in the text.

The AK calls for information for foreign-language workers to be provided in English as well. From upwards of 20 affected persons with the same native language, the platform also needs to be made available in their language. In general, the digitalisation of work processes is increasingly blurring the distinction between platform work and non-platform

work. As a consequence, the AK considers it necessary to impose the **same information obligations on non-platform companies** with regard to practices of algorithm-based decision-making and evaluation processes.

Regarding Chapter IV – Transparency on platform work:

The AK expressly welcomes the fact that the information obligations of platform companies vis-à-vis national enforcement authorities and interest groups are set out in **Article 11**. This is the only way to ensure compliance with legislative and administrative labour regulations, social security contributions and other relevant regulations. The reporting requirements set out in **Article 12** are applicable to all persons performing platform work, i.e. to both employed and self-employed persons. They therefore go beyond the Austrian reporting requirements. However, the draft Directive leaves considerable leeway and national implementation in national law will play a major role. At present, national law also lacks a comprehensive obligation on the part of employers or social insurance institutions to inform insured persons about their social insurance classification. The AK calls for the introduction of such obligations in the scope of implementation of the Directive in order to ensure legal certainty for all contracting parties. Persons working via platforms should be personally informed at the beginning of the employment about which national provisions in the field of labour and social law apply to them.

In the AK's view, the provision in Article 12 of the Directive that labour platforms only have to inform the Member States every six months (or annually under certain conditions) about the number of platform workers, their employment or contractual status, and the applicable general terms and conditions (GTC) is problematic: Not only could entitlements under labour law possibly be forfeited after six months, but it is also crucial in the field of **social security and, in particular, unemployment insurance** that employees receive **legal certainty** regarding their employee status as quickly as possible. This applies, for example, to the ex-ante question of whether or not unemployment exists despite the additional earnings and thus whether or not there is entitlement to benefits from unemployment insurance. The same applies with regard to the ex-post question of whether an employment relationship subject to unemployment insurance existed and thus whether or not the conditions are fulfilled for entitlement to unemployment benefits. That concerns important issues of basic material security.

The Directive must therefore provide even more clarity and legal certainty in this regard for all parties involved.

Regarding Chapter V – Remedies and enforcement:

First of all, the AK welcomes the rights of the representatives of the platform workers provided for in the draft. Those rights are accompanied by an article on access to evidence (**Article 16**), which is necessary because platform-based work is organised in such a way that platform companies have virtually all the evidence at their disposal. Even the proof of control over the provision of services, which is required for the legal presumption to apply, can be very difficult without the cooperation of the platform company. The fact that this is to be prevented and that legal pursuit is to be facilitated by access to evidence is expressly welcomed.

The AK welcomes the fact that, under **Article 15,** digital labour platforms must in future provide digital communication channels for persons performing platform work and their representatives. The Commission itself acknowledged in the preface to the draft that algorithmic management potentially entails gender bias and discrimination, and therefore could reinforce gender inequalities. The proposed Directive leaves open the matter of how to deal with the **potential for discrimination** that can arise from the use of algorithmic (rating) systems and the digital mediation of work, and which can only be countered to a limited extent with the existing anti-discrimination directives (for the Austrian legal situation, see Risak, Martin/Gogola, Michael (2018) Gleichbehandlung in der Plattformökonomie: Ein weiterer Baustein für faire Arbeitsbedingungen für CrowdworkerInnen [Equality in the Platform Economy: Another Component of Fair Working Conditions for Crowdworkers], juridikum 4/2018, pp. 435-445). In the AK's view, there remains a need for regulation here.

In this context, however, it is important in the AK's opinion to recognise that the communication channels are intended to create a space in which those performing platform work and their representatives can exchange their different and common experiences and interests. This also applies in particular to working conditions and the automated monitoring and decision-making systems that influence them. That rule is intended to safeguard the interests of the platform workers and to enable them to be better enforced, as explicitly stated in Recital 45 and in Article 15 of the Directive. The communication channels need to have independent or self-organised moderation to prevent possible censorship and influence on the part of the platform operator.

Articles 14 and 17 of the Directive, as well as Article 6(3), prohibit retaliation and reprisals against persons who perform platform work. However, the "digital" or offline impairment of earning opportunities through "reputational damage" (credit damage), for example in the form of "blacklists" or passed-on "bad rankings", is not prohibited explicitly enough. Reference should be made here to the recommendations set out in the aforementioned basic paper on platform work.

- Ratings should be subject to mandatory disclosure to platform workers and also to service recipients;
- there should be transparency and clarity about how ratings are ascertained at and how they may be weighted;
- there is a need for ways to challenge and correct "wrong" and discriminatory ratings, and
- a ban of transfer ratings to other platforms (portability).

Moreover, the AK calls for the addition of a **generally formulated provision** on prohibition that is formulated more broadly than the aforementioned data processing. In the case of other categories of precarious workers, such as temporary workers, the AK has repeatedly observed that employers and informal employers' associations and networks keep such **"blacklists"**. It was only possible to take action against this in one-off cases under tort law. Other damaging agreements between platform representatives, platform operators and their representatives (such as business associations or their auditors) should also be effectively prohibited by means of sanctions.

Contact Us!

In Vienna:

Frank Ey
T +43 (1) 501 65 12768
frank.ey@akwien.at

Christian Berger
T +43 (1) 501 65 13728
christian.berger@akwien.at

Bundesarbeitskammer Österreich
Prinz-Eugen-Straße 20-22
1040 Vienna, Austria
T +43 (0) 1 501 65-0

www.arbeiterkammer.at

In Brussels:

Alice Wagner
T +32 (2) 230 62 54
alice.wagner@akeuropa.eu

AK EUROPA
Permanent Representation of Austria to the EU
Avenue de Cortenbergh 30
1040 Brussels, Belgium
T +32 (0) 2 230 62 54

www.akeuropa.eu

About Us

The Austrian Federal Chamber of Labour (AK) is by law representing the interests of about 3.8 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore, the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The main objectives of the 1991 established AK EUROPA Office in Brussels are the representation of AK vis-à-vis the European Institutions and interest groups, the monitoring of EU policies and to transfer relevant Information from Brussels to Austria, as well as to lobby the in Austria developed expertise and positions of the Austrian Federal Chamber of Labour in Brussels.