Studien aus dem Max-Planck-Institut
für Sozialrecht und Sozialpolitik

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Ulrich Becker | Olga Chesalina (eds.)

Social Law 4.0: Update

Innovative Approaches to Ensuring and Financing
Social Protection for Platform Workers in Europe

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Preface

The present study is an update of our book "Social Law 4.0: New Approaches for Ensuring and Financing Social Security in the Digital Age", published in 2021 by Nomos, and the continuation of a research project which was initiated in February 2019 by the Max-Planck-Institute for Social Law and Social Policy.

To publish an "update" of a collective volume that is not a handbook but the result of joint research efforts is rather unusual. We thought it necessary though. Social law responses to changes in industrial relations still matter. In this context, the insights from our publications of 2021 continue to lay a reliable fundament for further research. They were based on examples for innovative approaches in different countries and developments in an international perspective. The overall goal of the update is to provide insights on changes and new developments since autumn 2020 concerning the access to and the financing of social protection with a special focus on platform work at national and European levels.

We also took the opportunity to add a concluding chapter. It provides a legal comparison of innovations, developments and approaches that form part of the country reports as well as proposals for future regulations.

How to publish such an update? A second edition of "Social Law 4.0" would not have been appropriate in order to mirror the dynamic of the legal developments. Therefore, we decided to ask the authors for updates of their previous book chapters. The reader may have to have a copy of the 2021 volume available, but this is published open access, and the publication of updates allows for concentration on essential aspects and for putting emphasis on changes over time.

We would like to thank the authors who had been prepared to share this update-adventure for the smooth cooperation and their valuable input. And we are also grateful to Eduard Schwarzenberger from Nomos for the support as well as to Marion Bywater and Christina McAllister for the proof reading.

Munich, March 2025

Ulrich Becker

Olga Chesalina

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Part I:
National Perspective

Belgium

Yves Jorens

I. Introduction

The legal landscape in Belgium has undergone significant changes since the publication of the book "Social Law 4.0" in early 2021. This essay aims to provide an update to the country report on Belgium, focusing on legislative developments, case law, and the new legal framework concerning platform work which entered into force on 1 January 2023.

II. Legislation and Legal Framework

As we mentioned in our previous report, the Belgian government wanted to strengthen the sharing economy and at the same time remove it from the grey zone in order to combat fraud. Therefore, it was decided to establish a special regulation. With the adoption of the Act on Economic Recovery and the Strengthening of Social Cohesion on 18 July 2018,[1] the legislator foresaw a total tax and social security contribution exemption for income from certain forms of employment (below a certain amount of income). The Constitutional Court has, however, overturned this regulation, not at least as this regulation entails a discrimination and as it considered that the measure – aimed at avoiding undeclared work – on the contrary made it possible to switch from a status subject to social security and tax obligations to a status exempting the person concerned from all those obligations.[2]

For that reason, a new rule was introduced, where only a separate solution for work performed in the framework of the socio-cultural and sport sector was established.[3] Platform work was, however, excluded and

1 Act on Economic Recovery and the Strengthening of Social Cohesion of 18 July 2018, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2018071803&table_name=wet (accessed on 1 September 2024).

2 See Constitutional Court, Judgement No. 53/2020 of 23 April 2020, https://www.const-court.be/public/n/2020/2020-053n.pdf (accessed on 1 September 2024).

3 Law of 24 December 2020 on Associations.

no particular exemption for this economic sector therefore applies. This implies that the income paid or granted as of 1 January 2021 is again taxable at a rate of 20%. However, this rate is only applied after a flat-rate expense deduction of 50%. The final tax burden is therefore 10%, to be increased by the additional municipal tax. From 1 February 2021, approved platforms will again have to withhold withholding tax from this income. There is as such no separate system anymore for platform work, and platform workers are treated like any other workers.

The classification of platform workers in Belgium is based on the binary divide between employees and self-employed individuals. Platform workers do not differ from other categories of workers. But some initiatives have been introduced by the Belgian legislator in attempts to redress issues faced by platform workers. The Belgian Employment Relations Act created a legal framework to establish the legal nature of an employment relationship. According to this Act, the intention of the parties constitutes the essential factor in determining whether or not a relationship of authority exists between the parties.[4]

The Act determines four general criteria to be used for purposes of determining the existence of a relationship based on "authority":[5] these are 1) the intention of the parties as per their agreement; 2) the worker's freedom to organise his/her own working time; 3) the worker's freedom to organise his/her work as well as 4) the ability to exercise hierarchical control.

III. Case Law

The classification depends on the facts and is determined by the Court. This can lead to diverging results where often platform workers were seen as self-employed. The Commercial Court of Brussels in Belgium rendered e.g., a decision in December 2018 that Uber drivers should be considered as self-employed as they choose when and where they work, choose for how

4 Art. 331 of the Programme Law of 27 December 2006 (Labour Relations Act).
5 Ibid., Art. 328-342.

long they drive, can take or ignore trips, own or rent their own cars and can complete other work or jobs as it suits them.[6]

Some years later in December 2021, there was a ruling pronounced by the Labour Tribunal of Brussels that Deliveroo drivers should not fall within the category of employees, but rather within the self-employed category.[7] The ruling became the first ruling in terms of the labour relationship qualification of workers in the platform economy by a labour tribunal or court in Belgium.

The ruling took its decision based on the following considerations:

1) the will of the parties, according to the contractual terms of their collaboration; the will was to provide independent services and to conclude an agreement in this regard;
2) couriers were free to organise their working time;
3) couriers were free to disconnect from the platform whenever they wished and they were not obliged to accept deliveries as long as they are not connected;
4) based on the declarations of the couriers, there was no evidence that the platform exercised concrete hierarchical control: basically, Deliveroo couriers did not receive definite instructions from Deliveroo, they did not have to justify their absence, nor did Deliveroo have the power to punish the drivers.

However, at the same time some further developments took place where the Labour Prosecutor's Office in Belgium introduced an initiative to conduct some investigations as a starting point to redress issues faced by platform workers. The Belgian Social Security Office and multiple drivers joined the Labour Prosecutor as intervening parties. They encountered a challenge from the onset due to the fact that they had intentions to interview Deliveroo couriers and get to know the experiences of the Deliveroo couriers and the challenges that they would usually come across. The Deliveroo couriers at first were reluctant to open up to the Labour Prosecutor's Office. This is because they feared that they would be suspected of tax evasion.

Two years later, after all investigations and interviews, in an appeal the Labour Court came to another conclusion. In December 2023, the Brussels Labour Court had given a ruling that Deliveroo couriers should be quali-

6 Commercial Court of Brussels, December 2018; also, later the Labour Tribunal of First Instance judged on 21 December 2022 that Uber drivers were to be considered self-employed workers.

7 Labour Tribunal of First Instance, 8 December 2021, 2021/014148.

fied as employees. This is just to emphasise that the case was still based on the general Academy of European Law (ERA) regulations, and not the presumption that Belgium introduced later on in its legislation concerning platform workers.[8]

At the same time, however, also the legislator started an own initiative.

IV. Recent Developments and Outlook

The Belgian legislator introduced a new legal framework for platform workers. This did not really come as a surprise as Belgium was also one of the main instigators of the proposal of the European Commission for platform work. The Belgian government got its inspiration in this proposal and basically copy-and-pasted it. In the Labour Relations Act, a new article was added specifying the above-mentioned general criteria introducing a rebuttable legal presumption of the existence of an employment contract for the platform economy. These criteria deal with the setting of remuneration, binding rules for appearance such as a wearing a uniform or behaviour with respect to the client, the supervising performance through electronic means (e.g., star ratings), the possibility of restricting the freedom to organise one's working hours or the possibility to work for another client. These criteria are more in particular:[9]

- the ability to demand exclusivity;
- the possibility of using a mechanism of geolocation;
- the possibility of restricting freedom indicating the way the work is performed;
- the possibility of limiting the level of income;
- the possibility of requiring compliance with mandatory regulations on appearance and behaviour or performance of work;
- the possibility to control the priority of future offers of work, the amount offered and/or the determination of ranking;
- the possibility to curtail, possibly by means of sanctions among other things, the freedom of organisation of work, in particular the freedom to choose one's working hours or periods of absence, to accept or refuse tasks, or to use subcontractors or substitutes;
- the possibility of preventing a platform worker from building up a client base outside the platform or performing work for a third party.

8 Labour Court of Brussels, 22 December 2023.

9 New criteria added in Art. 337/3, § 2 through the Labour Relations Act (fn. 4).

If three of the eight or two of the last five criteria are met, there is a rebuttable presumption of the existence of an employment contract. This presumption can be rebutted on the basis of the four general criteria this law aims to clarify. This law entered into force as per 1 January 2023.

In addition, a new provision was adopted according to which platform operators have the obligation to provide insurance for self-employed platform workers to cover bodily harm resulting from accidents occurring during the performance of remunerated activities through the digital platform or accidents occurring on the way to and from these activities.[10] The platform must take out a private insurance (through recognised private insurance companies). As a result, the platform operators have a similar obligation for self-employed workers as they have for employees. Indeed, employees of a digital platform are – like other employees – automatically insured against accidents at work. Belgian platform operators who fail to fulfil this obligation will be held civilly liable for damages to the platform workers as well as be subject to criminal penalties.

Further discussions before the courts are certainly not excluded, not at least taking into account some of the vague criteria of the law.

So basically, the Belgian government has already, and well in advance, implemented the foreseen adoption of the EU Platform Work Directive, however, based on the initial proposal of the EU Commission.

V. Conclusion

It is interesting to see how courts will deal with this new legislation. It is worth highlighting that the above-mentioned case law was based on the general criteria of the legislation as the new provisions were not yet applicable at the time of decision. Thus, it has to be seen if this new law will lead to a new classification for platform workers and as such will lead to better protection for platform workers. However, one should keep one element in mind: the Belgian legislator has set up a rebuttal of proof of evidence, but in this respect it is still up to the inspection services to first of all prove that the criteria of the legislator are fulfilled, as there is no automatic recognition of an employee status.

10 Art. 19 Law of 3 October 2022 dealing with different labour provisions (New Labour Deal).

Italy

Edoardo Ales and Emilia D'Avino

I. Introduction

This chapter aims at analysing the developments concerning the extension of access to social protection to new categories of self-employed persons in Italy until spring 2024. After a period during which a "tailor-made" approach linked to a certain typology (subordination and autonomy) prevailed, the new approach based on an arbitrary application of a social protection statute (as a "package") according to a political assessment of the weaknesses of specific groups of workers ("social types") is being used more extensively. Paramount examples would be "hetero-organised" collaborations and autonomous riders.

II. Subordination and Autonomy: A Political and Legal Issue

Italian legislation was confronted with the challenge of classifying work for the first time when mandatory social insurance against work accidents (*Infortuni sul lavoro*) was introduced by Act No. 80 of 17 March 1898. This Act defined who should be covered as a "worker" (*operaio*) for social law purposes. Such a notion included – in line with the purpose of Act No. 80 – paid or unpaid *supervisors* and *apprentices*, who from a labour law perspective may not necessarily be regarded as workers (*operai*). One has to stress that social security legislation at the beginning used a different classification of workers covered by mandatory insurance for accidents at work, deviating from the one used for labour relations. In the same manner, the definitions in the then introduced Mandatory Old Age and Invalidity Social Insurance[1] did not replicate those provided for in the legislation on employment contracts in the private sector enacted two months earlier.[2] Furthermore, manual workers (*operai*) were covered by the Mandatory Old

1 Royal Lieutenant Decree-Law No. 603 of 21 April 1919.
2 Royal Lieutenant Decree-Law No. 112 of 9 February 1919.

Age and Invalidity Social Insurance whereas they did not fall under the notion of contract of employment in the private sector. As a consequence, access to and protection by early social security legislation in Italy was provided in an autonomous way, not linked to labour law and its classifications.[3]

A decisive turning point in the evolution of notions and classifications is represented by the adoption, in the Civil Code of 1942, at the very sunset of the Fascist regime, of the notion of *subordination* that applies to all "collaborators" of the entrepreneur (Art. 2094). The notion of subordination has become the decisive classification tool, both for labour law and social law purposes. Nevertheless, social law may pursue more comprehensive coverage strategies in an autonomous way, as has been the case for some liberal professions which already had their own categorical old-age protection schemes.[4]

At the beginning of the constitutional period (1948), the very notion of *hierarchical subordination* was questioned because of its negative political significance and progressively substituted with that of *technical subordination* – to be understood in terms of "hetero-direction" of the employer on his "collaborators". Integration through the subordination of "collaborators" in the business as a hetero-organised structure excludes any form of autonomy inside it. The labour law protection of "purely" autonomous work, i.e. work performed without any form of integration whatsoever in the company, further to that already provided by the Civil Code (Art. 2223–2238), became an issue for the legislator only in 2017, when Act No. 81 was adopted.

Some forms of autonomous work were protected, as for social security, within the system of Professional Funds, while separated from the General Social Insurance System (*Assicurazione Generale Obbligatoria*). For

3 Indeed, the labour law legislation of that time did ignore, on purpose, the conditions of the worker (*operaio*) in order to exclude any recognition of rights during a period in which the worker movement was still struggling to overturn the existing political order. On the contrary, in a clear Bismarckian approach, the social security legislator tried (in vain) to appease workers' protests by introducing old age and invalidity pensions on a mandatory basis. Cf. *Gaeta, Lorenzo*, Storia (illustrata) del Diritto del Lavoro Italiano, Turin: Giappichelli 2020, pp. 388 ff.; *Ales, Edoardo*, Die geistigen Grundlagen der Sozialgesetzgebung des Kanzlers Otto von Bismarck und das Entstehen des Sozialstaates in Italien, in: Eichenhofer, Eberhard (ed.), Bismarck, die Sozialversicherung und deren Zukunft, Berlin: Berlin Verlag Arno Spitz 2000, pp. 55-74.

4 See below.

instance, since 1933 this has been and still is the case for barristers and solicitors. Furthermore, social protection had been extended beginning in 1956 to artisans and merchants, who are by definition small entrepreneurs. In 1990, the social security legislator has addressed artisans and merchants as "autonomous workers"[5] (Act No. 233 of 2 August 1990) with a view to distinguishing them from entrepreneurs falling outside the scope of social protection on the grounds that they "just" conduct the business.

III. Coordination: From Labour to Social Security Protection

From the perspective of notions and classifications, specific consideration must be given to *sales agents or representatives* who operate under an *agency contract* as regulated by Art. 1742 ff. Civil Code.[6] Although, at least in view of the Civil Code, they do not belong to the "collaborators" of an entrepreneur, their activity has to be *coordinated* with that of the company. Relationships of such kind caught on rapidly in the labour market also outside the realm of the agency contract. This is confirmed by the fact that, some years later, the legislator included in the scope of application of the new Employment Proceedings *coordinated and continuous collaboration other than that of the sales agents and representatives* (Act No. 533 of 11 August 1973 modifying Art. 409 No. 3 Civil Procedure Code). Nevertheless, the legislator did not provide these groups immediately with any other form of protection, social security included. As autonomous workers they could have been entitled to social security only if they fell within the scope of application of one of the specific schemes, which was almost never the case.

The possibility to qualify a work relationship as "coordinated and continuous collaboration", de facto outside any social security scheme (and burden), accentuated the fraudulent contractual behaviour of a part of the employers, stimulating the doctrine and the case law to look for an intermediate classification of such collaborations as "para-subordinated"[7] – with the consequence that at least part of the labour law provisions could have applied to them.

5 Act No. 233 of 2 August 1990.
6 *Ghezzi, Giorgio*, Del contratto di agenzia, Bologna: Zanichelli 1970.
7 *Santoro Passarelli, Giuseppe*, Il lavoro "parasubordinato", Roma: Franco Angeli 1979.

From the social security perspective, with reference to pensions, the legislator in Act No. 335 of 8 August 1995[8] has adopted a decisive provision. In fact, Art. 2(26) has extended the General Social Insurance System to any person who performs professionally, although not exclusively, an autonomous activity for which no registration by a professional board is required (as specified by Art. 18(12), Decree-Law No. 98 of 6 July 2011). Art. 26(2) also recalls the "coordinated and continuous collaborations". Decisive is the idea that, as it happens with sales agents and representatives, autonomous work can be compatible with *a certain degree of coordination* if the modalities of the latter are co-determined by the parties in a kind of *co-organisation* of the activity.

IV. The Extension of Subordinated Social Protection to Autonomous Work

From the late nineties, the legislator extended to female self-employed workers insured only by the *Gestione Separata* the provisions on maternity, family allowances and hospitalisation grant, increasing proportionally the contribution rate. This is a sign that, on the one hand, the integration into the organisation of the undertaking is not quite the same as in the case of subordinate work, but also, on the other hand, that the legislator considers the need for protection of the coordinated collaborator to be the same as that of the subordinated one.

From the perspective of notions and classifications, it is important to stress that in 2015 the legislator referred to "coordinated and continuous collaborators" insured by the *Gestione Separata*, but not entitled to a pension and without a VAT number, as beneficiaries of a specific unemployment grant (DIS-COLL, which was introduced by Art. 15 of Legislative Decree No. 22 of 4 March 2015). On the contrary, subordinated workers are entitled to NASPI, an unemployment benefit that is calculated based on the last wage. Both are of a typical social insurance nature.[9] Recently, Art. 1 paras. 142 to 155 of Law 213/2023 introduced a benefit for self-employed persons still enrolled in the Gestione Separata: the so-called ISCRO. It is recognised for those who have had a VAT number for at least three

8 Cinelli, Maurizio/Persiani, Mattia (eds.), Commentario della riforma previdenziale: dalle leggi "Amato" alla finanziaria 1995, Milano: Giuffré 1995.

9 *Renga, Simonetta*, Post fata resurgo: la rivincita del principio assicurativo nella tutela della disoccupazione, in: Lavoro e Diritto 29 (2015) 1, p. 77.

years, who have had a decrease in revenue of 70 per cent in the previous year, and who comply with the payment of social security contributions, who are not entitled to pension and who are not insured under other mandatory social security forms, and only if they are not beneficiaries of Inclusion Allowance. The audience who are entitled to protection is gradually expanding beyond just those who are subordinate. Finally, the legislator has taken note of the need to also protect self-employed persons – until a few years ago not considered as a potentially weak party in the work relationship. Despite this, young self-employed persons who have had VAT numbers for less than three years (among which are also many on-location platform workers) remain outside the protection system, and often form part of the "working poor" in the Italian labour market.[10]

A still highly controversial turning point as far as notions and classifications are concerned is represented by Art. 2(1) Legislative Decree No. 81 of 15 June 2015, as modified by Art. 1 Act No. 128 of 2 November 2019. It provided for the application of the protective statute of subordinate work (one could argue both from a labour law and social security perspective) to "collaborations that consist of exclusively personal and continuous work in the execution of modalities which are organised by the client, with particular reference to the time and place of work". The difference regarding subordination has to be found in the use of "organisation" instead of "direction" in order to describe the way in which the client relates to the collaborator: as a result, one could not define the former as an employer. Scholars have named this "hetero-organisation", with a view to distinguishing it from "hetero-direction". What is clear is the clash between "hetero-direction" as a typical feature of "traditional" subordination, and "hetero-organisation" as the main character of what we can call an "autonomised subordination",[11] in which *neither hetero-direction power nor full autonomy is at stake*.

A big chance to clarify the situation has been offered by the case of food delivery riders, contracted as coordinated and continuous collaborators, who have lodged claims before several Italian courts. In parallel to the court proceedings, the legislator has classified riders as autonomous workers by

10 The measure was introduced definitively after a three-year experimental period under Art. 1, paras. 386-400, Law No. 178/2020. *Bozzao, Paola/D'Avino*, *Emilia*, Gli ammortizzatori sociali in costanza di rapporto di lavoro: passato e futuro alla luce della recente riforma, Variazioni Temi Diritto del Lavoro (2022) 4, p. 713.

11 *Ales, Edoardo*, Subordination at Risk (of "Autonomisation"): Evidence and Solutions from Three European Countries, Italian Labour Law e-Journal 12 (2019) 1, p. 65.

adopting a specific regulation (see below) that could not have been taken into account by the judges due to its nonretroactive effect.

The *Corte di cassazione*,[12] although aware of the stance taken by the legislator, upheld the judgement of the Court of Appeal of Turin, according to which the activity of riders must be classified as "hetero-organised" collaboration, thus falling within the scope of application of subordination according to Art. 2(1) Legislative Decree 81 of 2015. Moreover, the *Corte di cassazione* has deemed irrelevant any investigation of the very meaning of "hetero-organisation", on the assumption that, by recognising the entitlement to the protective statute of subordination, Art. 2(1) constitutes a *remedial provision*. In the view of the *Corte di cassazione*, the legislator does not intend to classify *a new typology of work relationship*, focusing, on the contrary, on the positive effects that the remedy will have on the worker. What remains obscure is how to figure out when a work relationship falls within the scope of Art. 2(1) without having any idea of the real meaning of "hetero-organisation". This ruling remains until today an essential point of reference for interpreting the law. According to jurisprudence, it is enough to determine whether the coordination required serves the client's organisational needs to establish the existence of hetero-organisation in collaborative relationships under Art. 2 of Legislative Decree No. 81 of 2015. Worker activity can be adjusted based on the client's organisational structure. This allows for the client to have complete control over the timing and location of the service provided. However, this is just one way in which the power of hetero-organisation can be applied. There are other methods available as well.[13]

Finally, yet importantly, nothing is said about the social security aspects, neither by the legislator nor by the *Corte di cassazione*. However, remaining consistent with the clear statement of the legislator, "hetero-organised" collaborators shall fall within the scope of application of the General Social Insurance System, in the *Fondo Pensioni Lavoratori Dipendenti* (FPLD). It has been confirmed through a ruling that clarifies that there are no textual or logical reasons to exclude social security rights from Art. 2 of Legislative Decree 81/2015. The *principle of parallelism and automatism* between labour laws and social security regulations is well established. This

12 Cassazione, sez. lav. of 24 January 2020, No. 1663.

13 Tribunale Milano of 28 September 2023; Tribunale Milano of 19 October 2023, No. 3237; Tribunale Roma sez. lav. of 3 April 2023, No. 10401; Tribunale Firenze of 1 April 2020, No. 886.

principle arises from the fact that the labour relationship is the basis for the legal relationship, and once it has been identified and qualified, it determines the legal discipline and, consequently, the social security regulations that apply. Based on the described parallelism, if the conditions for the application of Art. 2 of Legislative Decree 81/2015 are met, the relevant social security legislation applies. If the provisions of Legislative Decree 81/2015 do not apply to collaborators, even if they are hetero-organised, due to the derogations of collective agreements referred to in Art. 2(2), the social security provisions for subordinate workers will not apply to them either, and the above-mentioned parallelism will no longer be valid.

Additionally, a teleological interpretation needs to be included in this systematic interpretation. This is because Art. 2 of Legislative Decree No. 81/15 was enacted to provide better protection for a certain category of workers who are similar to indirectly employed individuals. Therefore, in the absence of an express provision indicating otherwise, it is unreasonable to assume that such enhanced protection was only meant for labour law purposes and not for social security and workplace accident purposes. However, it imposes a *disproportionate burden* on the client who is not entitled to the managerial prerogatives he or she may enjoy as employer in terms of "hetero-direction".

On the other hand, individual or collective bargaining cannot derogate from social security. From a classification point of view, "hetero-organised" collaborations are neither subordinated nor autonomous. However, the subordination protective status applies, social security included. The practical effects of such a solution are not yet perceivable: Indeed, scholars are only beginning to discuss them.[14]

V. Platform Work as a Modality of ("False") Autonomous Work

As already highlighted, Act No. 128 of 2019 adds a Chapter V-*bis* to Legislative Decree No. 81 of 2015, with the very promising heading "Protection of

14 *Gragnoli, Enrico*, La subordinazione e l'art. 2 del decreto legislativo n. 81 del 2015, Lavoro Diritti Europa (2023) 3; *Speziale, Valerio*, Indici giurisprudenziali della subordinazione, presunzioni semplici, lavoro autonomo etero-organizzato e co.co.co, Lavoro Diritti Europa (2024) 1; *Zoli, Carlo,* La subordinazione e i nuovi scenari: un cantiere aperto, Lavoro Diritti Europa (2024) 1, p. 2.

Work through Digital Platforms" (Art. 47-*bis* to 47-*octies*).[15] Chapter V-*bis* does not apply to all forms of platform work, but only to "autonomous workers who carry out activities of goods delivery on behalf of others, in urban areas by bicycle or motor vehicles", the so-called riders (Art. 47-*bis*).

The contracts of the riders shall be in written form *ad probationem*, meaning the absence of the written form does not affect the validity of the contract. In the absence of a written form, one may advocate the existence of a subordinate contract, as it is useful to prove the actual conditions applied to the relationship and, if applicable, the infringement of workers' rights. Riders shall receive adequate information on their rights and on health and safety regulations. The scope of information duty has also been expanded by Legislative Decree 104/2022. Recipients of specific information obligations now include company trade union representatives (RSA) or the unitary trade union representation (RSU), and in the absence of the aforementioned representations, the territorial branches of the most representative trade union associations at the national level (Art. 1-*bis*, para. 6 of Legislative Decree 152/1997). The right to information can serve two distinct purposes. Firstly, it can be useful for exercising a control role, which the labour union must play regarding the correct use of new technologies in the company. Secondly, by opening up to participatory logic, it is functional to a real algorithm negotiation.

Failure to comply with the information duty results in a violation of Legislative Decree No. 152 of 1997, implementing the Written Statement Directive.[16] Effective sanctions are provided in such a case[17] (Art. 47-*ter*).

Riders shall receive remuneration (*compenso*) that, notwithstanding their classification as autonomous workers, can be determined by national collective agreements, signed by the comparatively more representative trade unions at national level. This is a very controversial point since it implies that in order to have their pay defined by collective bargaining, riders shall

15 *Ales, Edoardo*, Oggetto, modalità di esecuzione e tutele del "nuovo" lavoro autonomo. Un primo commento, Massimario di Giurisprudenza del Lavoro 72 (2019) 3, p. 719.

16 Directive 91/533/EEC – after 1 August 2022 Directive 2019/1152/EU of 20 June 2019 Relating to Transparent and Predictable Working Conditions in the European Union.

17 According to Art. 4 Legislative Decree No. 152 of 1997, the worker can contact the Provincial Labour Office so that the latter obliges the employer to provide the information required by the decree within fifteen days. If the employer does not comply with the order, the worker is entitled to an indemnity that cannot exceed the remuneration received in the last year and which must be determined based on the seriousness and duration of the violations and the behaviour of the parties.

be represented by already existing unions, usually focused on subordinate workers. In Italy there have been attempts at collective bargaining, but at the moment the contract of the logistics sector is considered applicable for riders, thus confirming the ambiguity about the nature of the relationship.[18] Under Art. 47c co. 1 of Legislative Decree 81/2015, on 1 September 2020 the first-ever National Collective Bargaining Agreement in Europe was signed in Rome. However, it was declared an illegal contract (yellow contract) because the parties involved did not meet the requirement of "greater comparative representativeness" in the category.

Riders shall be insured against work accidents and occupational diseases, features that are no longer typical of subordinate work only. Contributions are fixed according to the risk rate of the performed activity with reference to the general minimum daily remuneration for social security and social assistance contributions (€ 56.87 – INPS Circular Letter No. 21 of 25 January 2024), related to the days of actual activity. The physical or legal person providing the platform is responsible for the issue of work accidents and occupational diseases legislation, as provided by Decree of the President of the Republic No. 1124 of 30 June 1965, as well as for health and safety regulations, as provided by Legislative Decree No. 81 of 9 April 2008, (Art. 47-*septies*). As far as social security is concerned, being classified as autonomous workers, riders perform "an autonomous activity for which no registration with a professional board is required", thus falling within the scope of application of the *Gestione Separata* (Art. 2(1) Act No. 335 of 1995). Nevertheless, one may wonder whether as "false" self-employed persons to whom a wage is paid as set by collective agreements, they should not fall within the scope of application of the General Social Insurance System in the *Fondo Pensioni Lavoratori Dipendenti* (FPLD).

Although in a different way, compared to "hetero-organisation" protected as subordination, also the case of riders shows a further inconsistency between their formal classification and the protective statute that the legislator applies to them. In fact, that statute positions riders closer to the subordination than the autonomy category. Indeed, formally classified as autonomous workers, riders seem to have been provided by the same legislator with all that is needed to be reclassified by the Court of Justice

18 *Danesin, Giulia*, La contrattazione collettiva nel settore delle piattaforme digitali: Italia e Francia a confronto, Lavoro Diritti Europa (2023). See the bibliography and the sources mentioned within it.

as "false" self-employed workers. In any case, a few years later the debate is still open.

VI. Conclusion

The labour law categories of "hetero-organised" collaborators and autonomous riders are paramount examples of a clear trend towards the abandonment of a "tailor-made protective statute" based on subordination. The recent extension of unemployment protection to self-employed persons confirms the current approach of the legislator based on the (factual or assumed) need for protection and not on the old-fashioned typology of subordination and autonomy. However, the current approach of the Italian legislator often consists of an "arbitrary" application of labour law and social security protective statutes (as a "package") according to a political assessment of the weaknesses of specific groups of workers ("social types"), but without taking into account the way in which they are integrated into the organisation of increasingly "deconstructed" businesses. Until now, neither the *Cassazione* nor the legislator have investigated the legal nature of "hetero-organisation" and of "autonomous riders".

The labour law classification of the work relationship is still relevant for social security matters, although increasingly in a way that does not necessarily coincide with the way of assessing the needs of a certain category of workers. In our opinion, new forms of protection should be designed that take into account the degree of integration within the organisation of a business and provide for a proportional contribution burden on the part of the client/the principal. Such a "new-fashioned" tailored approach would require the abandoning of the "package" approach.

The United Kingdom

Philip Larkin

I. Introduction

As an overall observation, there has been no extensive or radical legislative reform formulated by Parliament in the UK to address precarious non-standard forms of employment over the past three years, and there has been no long-term policy-driven or technical legal change in the relationship between non-standard working patterns and the social security system. As Timmins stated in 2020, Universal Credit (UC)[1] is too far advanced in terms of development and operation in the UK and has absorbed too much political and financial capital for government to contemplate, still less effect, any major policy changes to the programme as it currently stands.[2] Thus there is currently little will or momentum from any sector of the political spectrum to instigate major ideological or conceptual change to UC. However, the Labour Party has set out plans for significant legislative reforms to the labour market, which may help ensure greater social protection for non-standard workers.[3]

For a brief period during the Covid-19 crisis and lockdown it did seem to some commentators as if the social security system was moving towards a stronger emphasis on protecting the economic well-being of citizens, and that government had both the will and intent to deal with inherent systemic and structural problems.[4] Certainly this era saw a huge accentuation in the volume of UC claims from both standard and non-standard workers alike, and a consequent collective administrative effort on the part of the

1 The primary legal foundations for Universal Credit are contained in the Welfare Reform Act 2012 and accompanying Regulations. UC stands as the central benefit in the UK social security system, payable to in-work and out of work claimants alike.

2 *Timmins, Nicholas*, Universal Credit: Getting it to Work Better, Institute for Government, 2020, https://www.instituteforgovernment.org.uk/sites/default/files/publications/universal-credit-getting-it-to-work-better_1.pdf (accessed on 1 September 2024).

3 See below for further discussion.

4 See *Harris, Neville/McKeever, Grainne*, Back to Normal for Social Security, JSSL 28 (2021) 3, p. 155.

Department for Work and Pensions (DWP) to deal with this trend, demonstrating what change may be achieved when there exists the political will (or pressure) to do so.[5] The Chair of the House of Commons Work and Pensions Committee, in his appraisal of the legal structure of UC and how it was able to withstand the strain of the Coronavirus Lockdown, stated:

> "It may well begin to rebuild public confidence in social security and a better understanding of why we need a social security system."[6]

Relating to the issue of non-standard work and UC, one example of this was the suspension of the Minimum Income Floor (MIF)[7] in UC in April 2020 for self-employed persons,[8] a category which includes a variety of online platform workers and other gig workers. The MIF operates on the assumption that the self-employed are earning a certain monthly income, which, for the majority of UC claimants, is equivalent to a full-time working wage[9] at the national living wage.[10] Although for the first year of self-employment the MIF does not apply,[11] concerns have been expressed about its later effects on the more financially vulnerable "sole-trading" self-employed people such as gig workers, whose earnings may fluctuate seasonally or who may receive incremental payment for work carried out. As far as the DWP is concerned, irregular employment is perfectly acceptable for UC recipients, including zero-hour contracts[12] as is self-employed

5 *Timms, Stephen*, MP, Chair of the House of Commons Select Committee noted the Department's "fleetness of foot" in the rapid reorganisation to ensure that as many citizens as possible were provided with financial assistance during the Covid-19 Lockdown; see also *Butler, Patrick/Timms, Stephen,* Universal Credit five-week delay is indefensible, the Guardian*,* 22 June 2020; see also *Larkin, Philip,* Surviving the Trial: Social Protection in the UK in the Era of Lockdown, JSSL 28 (2021), p. 170.

6 See *Butler, Patrick/Timms, Stephen*, ibid.

7 The MIF is set out in the UC Regulations 2013 (SI 2013/376) reg. 62. The suspension represented a fulfilment of the recommendation made in Citizens Advice, Universal Credit and Modern Employment: Non-Traditional Work, pp. 19-20.

8 The legal mechanism for doing this is contained in The Social Security (Coronavirus) (Further Measures) Regulations 2020, reg. 2.

9 For most UC claimants this is a notional 35 hour working week.

10 This was £ 10.42 weekly in 2023. The National Minimum Wage in 2023 and Forecast National Living Wage in 2024, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147845/The_National_Minimum_Wage_in_2023.pdf (accessed on 1 September 2024).

11 The "Start-Up Period".

12 This has not been the subject of case law, but zero-hours contracts were not considered appropriate for the income-based Jobseeker's Allowance benefit, which was the main unemployment benefit before UC. A UC claimant may be sanctioned if they

gig work. Indeed, the DWP affirms that UC is designed to be responsive to fluctuations in hours and earnings.[13] Some legislators during the passage of the Welfare Reform Bill 2011 through Parliament were cognisant of the reality that it is considerably easier to calculate UC awards for employees with set hours and fixed monthly salaries than for non-standard workers: John McDonnell MP[14] noted that in his own constituency much of the work available tended to non-regular, such as zero-hours and gig work, whose incomes were certain to fluctuate, entailing increased difficulty in individual financial planning and budgeting, as well as problems with the calculation of UC.[15] This bears out De Stefano's comment that "income stability remains a mirage" for irregular workers.[16] Such non-standard workers may find themselves worse off in comparison to their employed counterparts on a similar earnings level, since, in periods when their earnings are low, their UC award may be capped by the MIF, and this loss of income may not be recovered when earnings are higher.[17] The House of Commons Work and Pensions Committee also noted that this can deter people from self-employment, while simultaneously leaving vulnerable those who, due to lack of transferrable skills or education, have little alternative but to persevere in online platform work, perhaps having to take on more than one job to maintain a living income.[18] The suspension of the MIF meant that these workers were able to carry out online platform or other forms of non-standard work in the knowledge that they would receive at least

do not have a good reason for leaving a zero-hours contract job voluntarily. See Universal Credit: Zero-Hours Contracts. Question for Department for Work and Pensions UIN 5690, tabled on 18 July 2017, https://questions-statements.parliament.uk/written-questions/detail/2017-07-18/5690 (accessed on 1 September 2024).

13 See DWP, Universal Credit and Employers: Frequently Asked Questions, February 2015.

14 MP for Hayes and Harlington and Deputy Leader of the Labour Party between 2015 and 2020.

15 See HC Deb vol col 988 9 March 2011.

16 See *De Stefano, Valerio*, The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labour Protection in the "Gig" Economy, Conditions of Work and Employment Series, International Labour Office, Geneva, 71 (2016), p. 6, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf (accessed on 1 September 2024).

17 See *Finch, David*, Making the Most of UC: Final Report of the Resolution Foundation Review of Universal Credit, June 2015, https://www.resolutionfoundation.org/app/uploads/2015/06/UC-FINAL-REPORT2.pdf (accessed on 1 September 2024).

18 It is also possible that such workers are obliged to take on more non-standard work by DWP Work Coaches, see below.

reasonably adequate UC cover. However, this measure proved to be temporary, and the MIF was reinstated in July 2021,[19] underscoring the point that the Government never intended to initiate long-term reform to social security protection for non-standard workers. While the abolition of the MIF (or postponing its application for a period beyond one year) would not necessarily increase the income of non-standard workers, it could at least provide UC claimants in irregular forms of work an increased opportunity to develop a more settled relationship with the labour market, during which they have the freedom to build up further hours of work or secure regular employment in accordance with their skills and education. Nevertheless, it should be emphasised that zero-hour contract work remains popular among the UK workforce, largely because of the flexibility that permits individuals and families to schedule family, caring and other responsibilities around working life. The concept of more flexible relationships between workers and employers has been a historic feature of the UK labour market, with casual and short-time employment in the being a means of preventing the destitution which often followed redundancy, permitting older workers the opportunity to supplement their income,[20] and allowing employers to retain access to skilled and experienced staff during periods of recession. Recent research has indicated that ZHC jobs attract 25% more applicants than similar type permanent employment,[21] while only 15% of such workers ever apply for a permanent contract within the firm where they are engaged non-permanently.[22] Thus indicates that whatever reforms any UK govern-

19 The Universal Credit (Coronavirus) (Restoration of the Minimum Income Floor) Regulations 2021.

20 *Whiteside, Noel*, Before the Gig Economy: UK Employment Policy and the Casual Labour Question, ILJ 50 (2021) 4, p. 610, 614 et seq. Whiteside notes that the ability of skilled workers to gain at least some casual employment in manufacturing or extractive industry was instrumental in holding communities together, since it reduced the need for these citizens to leave the local area in search of work.

21 *Datta, Nikhil*, Why do Flexible Work Arrangements Exist? Centre for Economic Performance, Discussion Paper No. 2039, London: LSE and ESRC, October 2024, p. 2, https://cep.lse.ac.uk/pubs/download/dp2039.pdf?_gl=1*9hs3i6*_gcl_au*MTAyNDAzMDAyMi4xNzMxMjQxNTI3*_ga*MTI0OTc5NjkxLjE3MzEyNDE1Mjc.*_ga_LWTEVFESYX*MTczMTI0MTUyNy4xLjAuMTczMTI0MTUyOC41OS4wLjA (accessed on 11 November 2024).

22 See *Datta, Nikhil*, Why do Flexible Work Arrangements Exist?, ibid., at p. 3 and p. 1. This is despite the fact that there is a very high staff turnover in such positions, with Datta noting that their medium tenure is only around one third of their permanent counterparts, and 20% of hired ZHC staff never work a single shift.

ment may enact in the labour market, the demand for non-standard work will remain relatively high.

II. Present Operation of Universal Credit and Non-Standard Forms of Work

The approach of the DWP during the inflationary crisis of 2022/2023 was to ensure that as many citizens as possible engage in paid work as possible, an initiative precipitated by the requirement to fill the vast number of vacancies in various sectors of the domestic labour market.[23] In order to incentivise all forms of paid employment, the UC taper rate was reduced from 63% to 55% in late 2021.[24] The operation of the Welfare Reform Act 2012 (WRA) and UC does appear to have helped (or hastened) citizens into work,[25] but over the past years government has increasingly relied on the coercive element inherent in the WRA, with over 500,000 sanctions being made against UC claimants in the 12 months to January 2023.[26] UC

23 In September 2022 some 15.7% of businesses in the UK reported that they were suffering from personnel shortages, and, although this had fallen to 11.5 per cent by January 2023, this still represents a very significant problem. Statista, Percentage of Businesses Experiencing a Shortage of Workers in the United Kingdom from October 2021 to October 2024, https://www.statista.com/statistics/1369207/uk-worker-shortage/#:~:text=Percentage%20of%20businesses%20experiencing%20a%20worker%20shortage%20in%20the%20UK%202021%2D2023&text=As%20of%20January%202023%2C%20approximately,15.7%20percent%20in%20September%20202 (accessed on 1 September 2024). The issue has also been the subject of a House of Commons Report, see *Francis-Devine, Brigid/Buchanan, Isabel*, Skills and Labour Shortages, 10 January 2023, Debate Pack, Number 2023/0001 1.0, https://researchbriefings.files.parliament.uk/documents/CDP-2023-0001/CDP-2023-0001.pdf (accessed on 1 September 2024).

24 This permits UC claimants to retain 45% of their earnings up to a threshold limit. See Reducing the Universal Credit Taper Rate and the Effect on Incomes, https://commonslibrary.parliament.uk/reducing-the-universal-credit-taper-rate-and-the-effect-on-incomes/ (accessed on 1 September 2024).

25 For example, the DWP claimed in June 2018 that UC would lead to 200,000 more individuals entering paid work, and this figure would rise by 90,000 once the scheme was fully operational. DWP, Policy Paper, Universal Credit Programme full Business Case, Summary 7 June 2018, https://www.gov.uk/government/publications/universal-credit-programme-full-business-case-summary (accessed on 1 September 2024).

26 Benefit Sanctions Statistics to February 2023 (experimental), published 16 May 2023, https://www.gov.uk/government/statistics/benefit-sanctions-statistics-to-february-2023-experimental/benefit-sanctions-statistics-to-february-2023-experimental (accessed on 1 September 2024). See also Sec. 26-27 of the WRA 2012.

recipients who leave paid work (and this can also include self-employed persons who cease work), or even lose pay "for no good reason" may be subject to sanctions,[27] and, in addition to the need to meet the MIF, DWP Work Coaches have been particularly fastidious about ensuring that claimants increase their hours of work and corresponding income.[28] The gig economy in particular has grown exponentially over recent years, with a workforce of some 7.25 million,[29] and while only 9.4% of gig workers rely on this form of work for their entire income, 48.1% are in full-time employment.[30] This indicates that although this non-regular work continues mainly to be a "side occupation", it appears to be increasingly viewed as suitable employment if it will lead to a decreased dependence on state benefits, and there is evidence to suggest that Work Coaches are less willing in practice to permit UC claimants sufficient time to secure higher-skilled and better remunerated labour market positions, but rather to ensure that they accept whatever work may be available.[31] This trend is in accordance with statements from Government Ministers advising that those citizens

27 This was the clearly stated position in "Universal Credit: Leaving Paid Work or Losing Pay Voluntarily (LV) or Through Misconduct", ADM 17/17, which provides guidance on the operation of WRA 2012 Sec. 26(2)(d). The most common sanction is a reduction in the amount of UC paid. Benefit Sanctions Statistics to May 2023 (experimental), published 15 August 2023, https://www.gov.uk/government/statistics/benefit-sanctions-statistics-to-may-2023-experimental/benefit-sanctions-statistics-to-may-2023-experimental (accessed on 1 September 2024).

28 The so called "Four Week Policy" was initiated in February 2022, allowing UC claimants four weeks to find employment suited to their skills and qualifications, before being obliged to widen their search for other work. Previous claimants had up to three months to find suitable employment. DWP Press Release "Jobseekers have Four Weeks to Find Work Before Widening Their Search", 8 February 2022, https://www.gov.uk/government/news/jobseekers-have-four-weeks-to-find-work-before-widening-their-search (accessed on 1 September 2024).

29 See *Fennell, Andrew*, Gig Economy Statistics UK: The Latest Facts and Figures behind the UK's Fast-Growing Gig Economy, Standout CV, March 2024, https://standout-cv.com/gig-economy-statistics-uk#:~:text=The%20UK%20gig%20economy%20workforce%20is%20now%20estimated%20at%207.25%20million (accessed on 1 September 2024).

30 Furthermore, of those gaining at least half of their income from non-regular gig work, some 51.9% are in full-time employment and 14% in part-time. See *Fennell, Andrew*, Gig Economy Statistics UK, ibid.

31 *Doyle, Mary-Alice*, Universal Credit: Why Work Search at Four Weeks is a Lose-Lose Policy, Policy in Practice, 14 February 2022, https://policyinpractice.co.uk/blog/universal-credit-why-work-search-at-four-weeks-is-a-lose-lose-policy/ (accessed on 1 September 2024). See also below for a discussion of UC and progression in the labour market.

struggling financially should simply "take on more hours of work",[32] and for many citizens this will entail taking on gig or other forms of non-standard work. Due to consistent underinvestment in technical training and workplace skills education in the UK over decades, Hoynes, Joyce, and Waters observe that the increase in the employment rate has tended to be in the part-time, non-standard sector, including gig and zero-hour contract work, which is also inclined to be lower paid work.[33] Furthermore, despite the benefits which non-regular work may bring to consumers, there is little scope for participants to build up the human capital necessary to secure higher-skilled, better paid, and regular employment,[34] so, for at least some citizens, the operation of the WRA 2012, in combination with the DWP policy of accelerating the process of labour market entry and the current inflationary crisis, is obliging them to engage in non-standard work and rendering it difficult to progress to more regular employment.[35] Both statistical and claimant interview evidence demonstrates the financial pressures on non-standard workers in the UK economy (gig workers in particular) are subject to, with many having to take on more than one form of work in order to meet their living costs and satisfy MIF requirements if they are claiming UC.[36]

32 *Browning, Oliver*, "Work More Hours" Therese Coffey Tells People Struggling to Buy Food, the Independent, 23 February 2023. This may partially explain why such a high percentage of people in the gig economy are either full-time or part-time employed.

33 *Hoynes, Hilary/Joyce, Robert/Waters, Tom*, The IFS Deaton Review: Benefits and Tax Credits, London: IFS 2023, p. 53.

34 See *Hoynes, Hilary/Joyce, Robert/Waters, Tom*, The IFS Deaton Review: Benefits and Tax Credits, ibid., p. 34.

35 Another possible influence upon the trend has been the exit of the UK from the European Union, which has reduced the pool of available personnel in the UK labour market.

36 See, for example, *Hall, Rachel*, "I have no Free Time": People Top Up Wages with Extra Work in Cost of Living Crisis, the Guardian, 19 June 2022. The trade union representing independent, non-standard workers, the Independent Workers of Great Britain, conducted a survey illustrating the reality that during the present inflationary period gig workers have been affected by both rising costs and lower remuneration for services, See IWGB. New Survey Reveals the Hidden Cost of Living in the Gig Economy this Christmas, 20 December 2022, https://iwgb.org.uk/en/post/new-survey-reveals-the-hidden-cost-of-living-in-the-gig-economy-this-christmas/ (accessed on 1 September 2024).

III. Prospects for Reform?

1. Reform of the UK Social Security System

Under the former Conservative Government no reform of the relationship between social security protection and non-standard forms of work was pursued. It also appears that the change of political party in government at the 2024 UK General Election will not result in any repeal or extensive legislative conceptual remodelling of UC.[37] Despite the statement made by Labour Party Leader Keir Starmer in 2021 that a future Labour government would abolish UC in its entirety,[38] the Party seems to have reversed somewhat on this commitment, indicating that it will probably retain much of the conceptual structure of UC (although the benefit may be given a different title) with possible incremental changes to factors such as benefit levels. The UC system continues to operate in the same manner regarding non-standard forms of employment as it did in 2020 before the Covid-19 period. While there have been no political calls for the merger of the UK tax and benefits system, the fusion, or closer alignment of the National Insurance and income tax systems has been suggested from a number of different sources, largely for reasons of administrative efficiency and greater transparency,[39] and any developments in this area are unlikely to be of great consequence to non-regular workers. It should be noted that one of the possible alternatives suggested in place of UC, a Universal Basic Income (UBI), while there definitely exists no plan to develop such a scheme on a

37 This must take place before 28 January 2025, see *Kelly, Richard*, Research Briefing: Dissolution of Parliament, House of Commons Library, 20 April 2023, https://researchbriefings.files.parliament.uk/documents/SN05085/SN05085.pdf (accessed on 1 September 2024).

38 He did indicate, however, that this development would probably take an entire Parliamentary term, and it was not intended to uproot the conceptual foundations of the WRA 2012 and UC, but rather to effect technical changes to the system, allowing low-income earners on benefits to retain more of their take-home pay. See *Channon, Max*, Universal Credit – Labour will Scrap it Altogether, says Sir Keir Starmer, 8 October 2021, https://www.walesonline.co.uk/news/uk-news/universal-credit-labour-scrap-altogether-21798982 (accessed on 1 September 2024); see also *Daly, Patrick*, Labour to Set out Plans for Replacing Universal Credit, the Independent, 23 August 2023.

39 Office of Tax Simplification, The Closer Alignment of Income Tax and National Insurance: A Further Review, Cm 9354, November 2016, https://assets.publishing.service.gov.uk/media/5a75b89640f0b67b3d5c8b35/OTS_final_report_print_file.pdf (accessed on 1 September 2024).

national (or even regional) level, the idea is presently being piloted in two areas of England.[40]

2. Proposed Legislative Reforms to Non-Standard Forms of Employment

Despite the equivocation of the British Labour Party on the topic of social security reform, there exists a significantly firmer commitment on the part of the Opposition to legislative reform to some aspects of the non-standard labour market, which may facilitate easier provision of social protection for some workers in this category. The Supreme Court ruling[41] that Uber drivers had the status of "worker" not only confirmed that they would be entitled to hourly pay, the national living wage, and holiday pay, but also prompted speculation as to what ramifications this development might have on the wider non-standard labour market. One source postulated that while the removal of the self-employed status would entail that Uber would reduce the number of drivers who can log on to the platform at the same time,[42] thus meaning that the gig economy would overall be less capable of absorbing displaced workers, this could lead to drivers working more set and regular hours.[43] Although this may reduce the level of flexibility inherent in this sector of the economy, it does open the possibility for more predictable levels of monthly income, allowing for an easier calculation of UC, thereby strengthening the level of social protection afforded to such workers. It is primarily the factors of uncertainty of hours and monthly income, and the subsequent difficulties caused for non-regular workers when claiming UC, which may have prompted the Labour Party's pledge to impose a legal ban on zero-hours contracts and contracts without a minimum

40 In the areas of Jarrow and East Finchley 30 people will be paid a monthly lump sum of £ 1,600 monthly, without conditions, for two years, and the effects on their lives of this will be observed. See *Hussen, Dahaba Ali*, Universal Basic Income of £ 1,600 a Month to be Trialed in Two Places in England, the Guardian, 4 June 2023.

41 Uber BV and others (Appellants) v. Aslam and Others (Respondents) [2021] UKSC 5.

42 This development would be necessitated by the need for Uber to pay drivers for time spent waiting between rides. See *Richards, Simeon*, How Might Uber Drivers' New Status as Workers Affect the Gig Economy?, https://www.economicsobservatory.com/how-might-uber-drivers-new-status-as-workers-affect-the-gig-economy (accessed on 1 September 2024).

43 See ibid.

number of guaranteed hours should they form the next government.[44] Perhaps even more significantly, the Party outlined a plan to create a single status of "worker" for all but the "genuinely self-employed", providing all those in this former category with the same basic rights and protections.[45] Thus, there does seem to be an animus on behalf of the left of the UK political spectrum to impose a level of legislative regulation on the non-standard sector of the labour market, which, together with social security reforms,[46] could potentially have a beneficial impact on the regularity of their work patterns and incomes, reducing their dependency on state benefit, and facilitating an easier calculation of monthly UC. Recently elements of this policy have manifested themselves in the form of the Employment Rights Bill, which, although it stops far short of abolishing ZHCs outright, and does not contain a single, all-encompassing definition of "worker", does place an obligation on employers to make an offer of guaranteed set hours to a "qualifying worker"[47] after the end of a set "reference period."[48] This, in effect, would compel employers to offer workers a guaranteed-hours contract based on the hours they have worked during a 12 week period. The Bill would also repeal the Workers (Predictable Terms and Conditions) Act 2023, which represented a somewhat belated attempt by the previous Conservative Government to ensure that non-standard workers could apply for more settled and predictable hours of work.[49] Angela Rayner, Deputy Prime Minister and sponsor of the Bill in Parliament, has asserted that the Bill would finally end "exploitative" ZHCs, and provide up to 2.4 million workers the right to a contract which genuinely reflects the number of hours which they work.[50] It is envisaged that these reforms could also mean

44 The Labour Party, Employment Rights Green Paper, A New Deal for Working People, p. 8, https://labour.org.uk/wp-content/uploads/2022/09/Employment-Rights-Green-Paper.pdf (accessed on 1 September 2024).

45 See ibid., p. 7.

46 For example, the promise on behalf of the Labour Party to allow working UC recipients to retain more of their income before the taper begins to operate.

47 See Clause 1 of the Employment Rights Bill 2024, which would insert a new section 27BA into the Employment Rights Act 1996. A "qualifying worker" is defined as one who was employed by an employer under one or more worker's contracts which were ZHCs or which obliged the employer to make work available minimum hours not exceeding a specified number.

48 See Clause 1, which inserts a new section 27BA into the Employment Rights Act 1996.

49 This is set out in Clause 5 of the Bill.

50 See HC Deb Vol 755 col 49 21 October 2024. It has been observed, however, that should the Bill become legislation, it might still be possible for employers to circum-

that it is considerably easier for the DWP to calculate the UC allowance for many more individuals and families, a beneficial development for those who need more predictable income from both work and UC. It would also reduce the obligation on some citizens on ZHCs whose income does not meet the MIF to increase their income by finding more non-standard work.[51] Conversely, the Bill also provides the right for workers to apply for more flexible working arrangements, reflecting the reality that non-standard forms of work remain both popular and attractive to many.[52] To enforce the new law, the Bill would permit[53] the Secretary of State to set up an executive body of the Department for Business and Trade to ensure employers' compliance with its terms.[54]

However, despite the potential of the Bill to effect reform to the position of ZHC workers, and enable them to achieve more predictable UC entitlement, it is possible to identify a number of limitations in its content. First, the Bill will not encompass all gig workers, nor genuine low-skilled self-employed persons, who, undoubtedly, will continue to experience problems with fluctuating incomes without any improvement in their social security rights (including pension rights) and no right to a basic minimum level of pay.[55] Furthermore, it is possible that even with guaranteed hours of

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vent the necessity of having to award a contract with a higher number of guaranteed hours by simply keeping the worker's hours low during the 12 week period of assessment. See *Atkinson, Rose*, I'm Stuck on the Zero-Hours Job Treadmill. Here's Why Labour's Reforms Won't Help Me, the Guardian, 16 October 2024.

51 See *Browning, Oliver*, "Work More Hours" Therese Coffey Tells People Struggling to Buy Food (fn. 32).

52 See Clause 7 of the Employment Rights Bill 2024. See also *Datta, Nikhil,* Why do Flexible Work Arrangements Exist? (fn. 21). The current version of the Employment Rights Bill is available here: https://publications.parliament.uk/pa/bills/cbill/59-01/0011/240011.pdf (accessed on 11 November 2024).

53 Clause 74 of the Bill.

54 This would be known as the Fair Work Agency, and the Bill would confer a single set of powers on it to investigate and take action against businesses that do not comply with the law. See UK Government. Factsheet: Fair Work Agency in the Employment Rights Bill, https://assets.publishing.service.gov.uk/media/67125ae0e94bb9726918ee38/fair-work-agency.pdf (accessed on 11 November 2024). See also *Elgot, Jessica*, New Enforcement Agency will Protect Workers' Rights as part of 'Watershed' Bill, the Guardian, 10 October 2024.

55 Such workers are also more likely to remain dependent on UC for longer periods of time. Research has demonstrated that half of gig workers earn below the national living wage, which will inevitably mean that many will be obliged to take on more of this work in order to satisfy the exigencies of the MIF. See *Wood, Alex/Burchell, Brendan/Martindale, Nick*, Gig Rights & Gig Wrong. Initial Findings from the Gig

work, a significant number of former ZHC workers and their families may remain dependent on UC, since such work tends to be concentrated within low-skilled sectors of the economy with little opportunity for pay advancement.[56]

Rights Project: Labour Rights, Co-Determination, Collectivism and Job Quality in the UK Gig Economy, London: The British Academy, 2023, https://www.bristol.ac.uk/media-library/sites/business-school/documents/Gig%20Rights%20&%20Gig%20Wrongs%20Report.pdf (accessed on 11 November 2024).

56 This was contained in evidence to the Low Pay Commission, Annex A, Submission, HM Treasury, 2002, discussed by *Simpson*, *Bob*, The National Minimum Wage Five Years On: Reflections on Some General Issues, I.L.J. 33 (2004) 1, pp. 22, 24. It should also be noted that, if the Employment Rights Bill does become legislation, it will not come inro force until 2026 at the earliest. See also *Brione, Patrick/Cunningham, Stephanie*, Research Briefing: Employment Rights Bill 2024-25, London: House of Commons Library, 23 October 2024, https://researchbriefings.files.parliament.uk/documents/CBP-10109/CBP-10109.pdf.

Sweden

Annamaria Westregård

I. Introduction

This update of Looking for the (Fictitious) Employer – Umbrella Companies: The Swedish Example, in Social Law 4.0: New Approaches for Ensuring and Financing Social Security in the Digital Age,[1] covers new developments from autumn 2020 to spring 2024.

So far, no new changes that focus on platform work and umbrella companies have been made in traditional labour law legislation, nor are there at the moment any legal inquiries which focus on platform work and umbrella companies. Some new collective agreements for platform and umbrella company workers were, however, concluded in 2021 and the first court rulings clarifying the employment status of umbrella company workers were issued. Of particular interest is a new case about platform work and temporary work agencies, involving a three-party construction, from the Labour Court, see section II.1.b). Legal inquiries have been made to determine the possibility of extending the health and safety protection in the 1977 Work Environment Act (Arbetsmiljölagen 1977:1066) to also include platform workers and umbrella company workers. These legal inquiries were prompted by new cases from the administrative courts, see section II.2.a). There have, so far, been no major changes in social security legislation, although legal inquiries have been made into the calculation of sickness and unemployment benefits that are meant to improve access to social security of non-standard workers, see section III. For some concluding comments on the Directive on improving working conditions in platform work[2] from a Swedish perspective, see sections IV and V.

1 *Westregård, Annamaria*, Looking for the (Fictitious) Employer – Umbrella Companies: The Swedish Example, in: Becker, Ulrich/Chesalina, Olga (eds.), Social Law 4.0: New Approaches for Ensuring and Financing Social Security in the Digital Age, Baden-Baden: Nomos 2021, pp. 203-227.

2 Directive EU 2024/2831 on Improving Working Conditions in Platform Work, OJ L, 2024/2831.

II. Labour Law and Health and Safety Protection

1. Labour Law

a) General News in Legislation with Impact on Platform and Umbrella Company Workers

One of the most important Swedish labour laws, the 1982 Employment Protection Act (1982:80), underwent extensive revision in 2022. The changes in Section 4 a) are of special interest with regard to platform workers and umbrella company workers. Unless otherwise agreed by the parties, an employment contract will now be presumed to mean full-time employment.[3] This can have an effect on zero-hour contracts, although such contracts are still rare in the Swedish labour market, where employment contracts are generally concluded for each and every short assignment. In such cases, the presumption of an employment relationship is not activated. There have also been changes in Section 6 i), which states that an employer is not allowed to prohibit an employee from taking on employment with other employers unless the new position competes with the employer in a harmful way. This statutory legislation may also be useful for platform workers who work for more than one company and claim to be employees rather than self-employed.

b) New Practice from the Labour Court

The Swedish Labour Court recently delivered a judgement on platform work and temporary work agencies.[4] A food delivery platform company, Foodora, used a three-party construction involving a temporary work agency acting as an intermediary between Foodora and the performing party. The performing party, a moped courier, was employed by the temporary work agency on a very short contract for each assignment and then rented out for each assignment to Foodora. Foodora also had employees of its own who delivered food by bicycle. For these employees, Foodora has a collective agreement, the Bike Delivery Agreement, between Foodora and the Swedish Transport Workers' Union, see below. The three-party construction involving the temporary work agency was used only in relation

3 If the employer states otherwise, the burden of proof is on him.
4 Labour Court ruling 2022 no. 45.

to couriers delivering food by moped. The performing party switched from delivering by bike and being employed by Foodora on (short) fixed-term contracts, to delivering by moped and being rented out by the temporary work agency to Foodora. The reason for the performing party wanting to switch from bike to moped was that the remuneration for moped couriers was much higher than that for Foodora-employed bike couriers. The performing party did not understand that the change from bike to moped also meant a change of employer and in employment conditions. The legal issue was whether the performing party was still employed by Foodora or employed by the temporary work agency. The Union regarded the three-party construction as a case of bogus employment aimed at avoiding the collective agreement. The Labour Court decided that the three-party construction was not to be considered bogus employment and that the performing party was not employed by Foodora.

The case raises a number of questions. In its decision, the Labour Court kept strictly to the regulations in the 2012 Agency Work Act (2012:854) and focused on interpreting the definition of temporary work agencies in Sec. 5 (1). The Labour Court did not analyse the role of the temporary work agency in question, which differed from that of regular temporary work agencies in that it rented out employees exclusively to Foodora, after the performing party had accepted an assignment on Foodora's platform. The employment was not, as is normally the case in temporary work agencies, a permanent position. The Labour Court also accepted the construction wherein the temporary work agency employed the performing party, on a short, fixed-term contract, only for the duration of the assignment. If the Labour Court had instead decided that the performing party was (still) employed by Foodora, this would have had consequences for the whole temporary work agency industry in Sweden. The judgement must be seen as an important signal from the Labour Court, indicating that temporary work agencies are now an established industry in their own right.[5] Abuse of law might have been an alternative route to pursue for the Union, but no question of abuse of law was invoked.

5 There was no discussion in the case of whether the blue-collar agreement on general employment conditions in the temporary work agency industry was applicable, so the temporary work agency was probably not a member of the employers' organisation.

c) Collective Agreements Concluded for Platform and Umbrella Company Workers

Two new types of collective agreement were concluded in 2021, one for platform workers and one for umbrella company workers.

The only collective agreement in Sweden so far that covers platform work was concluded at local company level: the above-mentioned Bike Delivery Agreement between Foodora and the Swedish Transport Workers' Union. The solution chosen in that collective agreement is that platform workers are permanently employed by the platform and receive a salary per hour and extra payment for each delivery.[6] They are regarded as regular employees and therefore the collective agreement falls outside the scope of Art. 101 TFEU. There are, so far, no collective agreements that cover Foodora's moped and car couriers.

There is also an industry-wide collective agreement for umbrella companies, between the Swedish Umbrella Companies' Trade Association and the union Säljarna.[7] In the umbrella company business model,[8] umbrella company workers are regarded as employees, and according to the collective agreement, they are employed on a short, fixed-term employment contract for the duration of an assignment.[9] They are not regarded as self-employed.[10] The employer is, according to the collective agreement, obliged to provide sickness insurance, accident insurance, life insurance and pensions. The other Swedish unions are still reluctant to conclude collective agreements in cases where the employment is a short, fixed-term contract, as most unions want the main employment to be a permanent position and fixed-term contracts to be exceptions.

6 Sec. 2 in the Foodora Agreement, see also Labour Court ruling AD 2022 no. 45.

7 https://saljarnas.se/om-saljarnas/in-english/ (accessed on 1 September 2024).

8 Umbrella companies in Sweden have a special design: The umbrella company worker (to be) bids for work, and, if successful, arranges both the work and the remuneration with the client. After having made sure the client has signed a contract with the umbrella company, the umbrella company worker (to be) goes on to sign a short, fixed-term employment contract for the duration of the assignment with the umbrella company. The client is invoiced by the umbrella company when the work is done. Once the client has paid the umbrella company, the performing party is credited, after deductions for tax, social security contributions, and the umbrella company's commission.

9 Para. 2 in the Säljarna Collective Agreement.

10 See *Westregård, Annamaria*, Who Counts as an Employer in Sweden?, Italian Labour Law e-Journal 13 (2020) 1, https://illej.unibo.it//article/view/10997/11359 (accessed on 1 September 2024).

2. Health and Safety Protection

a) New Practice from the Administrative Courts

Two important judgements on whether the 1977 Work Environment Act (Arbetsmiljölagen 1977:1066) is applicable to platform work were delivered by the Administrative Court of Appeal in the autumn of 2021.[11] The question was whether the Swedish Work Environment Authority had the mandate to inspect the workplace of platform workers and impose conditional fines. The Court focused on whether the platforms Taskrunner AB and Tipptapp AB were employers in the sense intended in the Work Environment Act according to the aims formulated in the *travaux préparatoires* (government bill).[12] The Court came to the conclusion that the platforms' influence over the work environment of platform workers was virtually non-existent, and that the platforms were therefore not employers in the sense of the Work Environment Act. No party was thus found to be responsible for the work environment of platform workers.

b) Proposed New Legislation

After these judgements, a legal inquiry was initiated, resulting in a government inquiry report, SOU 2022:45 *Steg framåt, med arbetsmiljön i fokus* (Step Forward with the Work Environment in Focus.) A new concept, that of a *responsible principal*, was introduced. According to the proposal in SOU 2022:45, a principal that has influence over and can improve the work environment, is responsible for the work environment of platform workers and umbrella company workers, even if they are not employed by him. The responsible principal can be either the platform or the service consumer. In a three-party construction, only a service consumer that is a company can be a responsible principal, as the proposal does not apply to private persons. So far, the proposal has not resulted in any legal changes, which means there is still a gap in the legislative protection of platform workers.

11 Administrative Court of Appeal in Gothenburg Judgement of 19 November 2021 in case 4120-21 (Taskrunner AB) and Judgement of 9 December 2021 in case 6394–21 (Tipptapp AB).

12 Government Bill, prop. 1976/77:149, pp. 194-196.

III. Social Security

1. Sickness Benefits

The social security system for sickness benefits and parental leave as it is described in Social Law 4.0 Sec. III.3. has not yet undergone any major legal changes. The social security insurances are still designed for employees with full-time permanent positions and the traditionally self-employed. Employees with intermittent working hours and no planned schedules still have problems compared to regular employees, both with regard to entering the insurance and with regard to the calculation of benefits. This particularly affects umbrella company workers and platform workers who decide for themselves when to work. For the genuinely self-employed who hold a business certificate, it is easier to access sickness benefits as the Swedish Social Insurance Agency assumes these self-employed work full time.[13]

According to the Swedish Social Insurance Agency, the employment contract is of particular importance in their assessment of whether platform workers and umbrella company workers should receive sickness benefits. The problem is that a formal employment contract is not at all necessary, according to labour law. This, along with the non-existent definition of the concept of employment, creates difficulties for administrators charged with the task of assessing the right to benefits for those with unregular working hours offered at short notice – often the case for platform workers.[14]

Most umbrella company workers are regarded as either employees or on-demand workers.[15] Changes to the 2010 Social Insurance Code (2010:110), which entitle on-demand workers to sickness benefits for 90 days, subject to the same conditions as other employees,[16] were introduced on 1 February 2022.[17] Before the changes, on-demand workers without scheduled work who became ill were regarded as unemployed. They were entitled to sickness benefits on the same conditions as other unemployed workers, which is unfavorable compared to sickness benefits for employees. Surprisingly, in

13 The Swedish Social Insurance Inspectorate, ISF Report 2023:3, p. 45.
14 ISF Report 2023:3, p. 65.
15 ISF Report 2023:3, p. 68.
16 Government inquiry report SOU 2020:26 En sjukförsäkring anpassad efter individen, pp. 62 ff.
17 *Westregård, Annamaria*, Looking for the (Fictitious) Employer – Umbrella Companies: The Swedish Example (fn. 1), pp. 203-227.

spite of what is said in the Swedish *travaux préparatoires*, administrators apply this rule to umbrella company workers, which is of course advantageous for them and solves some of the problems they have accessing and calculating sickness benefits.[18]

Calculating benefits for part-time workers with irregular working hours is still problematic, as calculations focus on what the performing party could have been expected to earn if not sick. A legal inquiry that resulted in government inquiry report SOU 2023:30[19] may improve their situation as it suggests that "historical income" should instead be used as the basis for the calculation of benefits. For self-employed persons with a registered company this would mean using the average income gained over the previous three years, and for employees the income over the previous year. One of the main aims in SOU 2023:30 is to eliminate the differences between employees and self-employed workers, so that it does not matter whether the performing party is categorised as an employee or as self-employed. Regulations for the two categories can, of course, not be exactly the same, but the legal effects can be similar. Income from both employment and from a company can be combined and is accumulated so the benefits are calculated on the whole sum.

2. Unemployment Benefits

The government has just announced it will proceed with legal inquiry SOU 2020:37, described in Looking for the (Fictitious) Employer – Umbrella Companies: The Swedish Example. So far, there has been no government bill, and it is therefore impossible to say which parts of the legal inquiry the government intends to proceed with.

IV. The Directive on Improving Working Conditions in Platform Work

In the Directive on improving working conditions in platform work (hereinafter: the Platform Work Directive), the concept of employment is constructed as a presumption. In Sweden, an overall assessment is made in all legal areas (labour law, tax law, social security legislation etc.) when categorising persons performing work as either employees or self-employed

18 ISF Report 2023:3, p. 68.
19 Government inquiry report SOU 2023:30 A security system for everyone.

in the binary system. From a Swedish perspective, the idea of a definition that rests on a presumption is problematic as it clashes with the Swedish practice of an overall assessment where all relevant criteria are taken into account. In this overall assessment, some criteria are also regarded as more important than others; this depends on the legislation and differs between e.g., labour law, tax law, sickness and unemployment insurances. In the Platform Work Directive the construction of the presumption is now handed over to the Member States, but it is still a presumption.

Both the Swedish Parliament and the powerful social parties on the labour market were negative to the presumption in the first proposal.[20] According to their line of reasoning, the idea of a presumption determining the concept of employment is alien to the Swedish legal order, goes against the Swedish model of industrial relations and limits the influence of the social parties; the concept of employment should be defined completely by national legislation, not by EU law.

V. Conclusion

The legal developments concerning platform workers and umbrella company workers these past three years have been rapid. There have been court cases that have challenged the legislation and the legislature needs to catch up. This pattern is most visible when it comes to social security and health and safety protection. In the past few years, Sweden has seen government inquiry reports investigating legal changes in sickness insurance, unemployment insurance and work employment protection that will fill the legal gaps for the above-mentioned groups of workers. So far, there have been no legal changes that focus on platform work or umbrella company workers in traditional labour legislation, even though the biggest changes to the 1982 Employment Protection Act for decades were implemented in 2022. Some of those changes will, of course, also apply to platform workers and umbrella company workers with short, fixed-term contracts.

It is not surprising that there have been no legal investigations in labour law. In the Swedish model, the legislator leaves it to the social parties to solve problems, if and when they might arise, in collective agreements. This

20 Remiss av Europeiska kommissionens förslag till direktiv om förbättrade arbetsvillkor på digitala plattformar, https://www.regeringen.se/remisser/2021/12/remiss-av-europeiska-kommissionens-forslag-till-direktiv-om-forbattrade-arbetsvillkor-pa-digitala-plattformar/ (accessed on 1 September 2024).

is not possible when it comes to social security legislation or health and safety legislation, and that is why we now see more legal activity from the legislator concerning platform workers and umbrella company workers in these areas. We can only speculate about the different scenarios when the Platform Work Directive is to be implemented in Sweden. One scenario is that the Platform Work Directive's definition of platform workers will come to spread from labour law to other legal areas in national legislation, e.g., sickness and unemployment benefits and health and safety regulations. Another scenario is that the presumption will come to be used also to define other atypical workers than platform workers in national-level labour and social security legislation.

Since 2020, we can see that the social parties, in accordance with the traditional Swedish method of handling new developments in the labour market, have started to negotiate and conclude collective agreements for platform workers and umbrella company workers. The unions are, however, probably not satisfied with the fixed-term employment constructions in the collective agreements, as their aim in the long run is permanent full-time positions, which means that this legal development is likely to continue.

The Netherlands

Saskia Montebovi and Gijsbert Vonk

I. Introduction

In this contribution, we provide an update on developments surrounding the social position of non-employees, especially the solo self-employed, in Dutch labour and social security law. This contribution outlines the most relevant initiatives and obstacles from autumn 2020 until autumn 2024.

The share of the solo self-employed in the Netherlands is large and still increasing. Out of a working population of 9.6 million people, more than 1.2 million (2023) are solo self-employed in their main job.[1] In itself, as long as they are genuinely self-employed, this growth is not problematic, as the Minister of Social Affairs and Employment (SZW) also mentioned in her legislative concept proposal of October 2023 and in other letters to the Parliament.[2] What is worrisome is the above-average share of solo self-employed persons and the above-average growth of their number in recent years. There is a marked increase in social sectors, such as healthcare, education and childcare.[3]

This increase in self-employment over the past decade(s) also raises concerns about bogus self-employment. The phenomenon of bogus self-employment as well as the great divide between employees and self-employed workers as regards social security is the reason for a (new) series of measures and investigations, often at the request of the Minister of SZW. Below we first discuss the most relevant measures and/or plans, with some measures building on what had already been introduced before 2020; we

1 https://www.cbs.nl/nl-nl/dossier/dossier-zzp/ontwikkelingen-zzp#:~:text=De%20grootste%20groep%20zzp'ers,in%20de%20meeste%20bedrijfstakken%20toegenomen (accessed on 1 September 2024).

2 Concept Memorie van Toelichting, Wetsvoorstel verduidelijking beoordeling arbeidsrelaties en rechtsvermoeden, internetconsultatie, 6 oktober 2023 - 10 november 2023.

3 Concept Memorie van Toelichting, Wetsvoorstel verduidelijking beoordeling arbeidsrelaties en rechtsvermoeden, p. 9: "Aantal zelfstandigen in zorg afgelopen jaar met 22.000 toegenomen", https://nos.nl/artikel/2498622-cbs-aantal-zelfstandigen-in-zorg-afgelopen-jaar-met-22-000-toegenomen (accessed on 1 September 2024).

then go on to take a closer look at the case law with a focus on landmark cases on the qualification of dependent self-employed workers.

II. Measures/Plans

1. Web Module for Employment Relationship Assessment

In January 2021, a six-month pilot web module was set up. In this test phase, employers/clients and self-employed workers could practice using the online questionnaire to learn more about the qualification of their (future) employment relationship. The results of the web module were not promising enough as in more than 25% of the cases the qualification of the relationship was not clear. Therefore, after the evaluation of the web module in September 2021, it was decided not to implement the web module as a legal instrument but only as an information tool. Also, this web module is not addressed to the self-employed person himself/herself but is only for the client/employer who wishes to engage a contractor, to see if this can be done outside of a subordinate relationship.[4]

The new government (July 2024) seems to continue this policy and published in September 2024, next to the web module, another instrument: a selection tool for employers *and* workers to help them assess their relationship.[5] This holistic assessment of the employment relationship entails a list of 10 questions (yes or no) and leads to the result "yes", "no" or "maybe" there is an employment relationship. In the latter case, it is up to the two parties to discuss whether and how to continue their relationship: as an employee-employer relationship or as a relationship of a self-employed worker with a client. The choice between these two statuses is not optional, as each option leads to a different employment and social security position. In the case of greater embedding in the organisation, the relationship is more likely to qualify as an employee-employer relationship, requiring payment of social contributions and the application of strict labour law rules. In the other case of less embedding of the employee in the organisation

4 https://beoordelingarbeidsrelatie.nl; This web module is accessible through the website of the Ministry of Social Affairs and Employment (accessed on 15 October 2024).

5 This is about preventing bogus self-employment: see: Voorkomen van schijnzelfstandigheid. Aanpak schijnconstructies, https://www.rijksoverheid.nl/onderwerpen/zelfstandigen-zonder-personeel-zzp/voorkomen-van-schijnzelfstandigheid (accessed on 15 October 2024).

of the employer/client, the relationship is likely to be qualified as real self-employment and therefore an independent status of the worker. Thus, less labour law rules apply (as in the Netherlands rules concerning e.g. safety and noise also apply to self-employed, if they work at the same place as employees), and there is no protection through employee insurances for social risks like sickness, invalidity, unemployment or second pillar pensions. It's up to the self-employed to cover these risks on the private market. There is, however, a public mandatory insurance for health care and the first pillar pension based on the residence scheme.

In summary, the web module and the new selection tool are not legal instruments but supportive and informative aids for assessing the nature of the employment relationship, having their origins in a law from 2016 aimed at preventing bogus self-employment.[6] However, during the long period of their development a moratorium on the active enforcement activities by the competent tax authorities has been applied, rather increasing the risk of such bogus self-employment to occur. It was only in the autumn of 2024 that is was decided to lift the moratorium (as from January 2025). This will require the parties involved to take responsibility for choosing the correct status of their relationship.[7] Companies and organisations that hire people as self-employed for work that they do not perform independently will then again be subject to fines and surcharges. In the period preceding this date, there has been a considerable degree of concern among both contractors and clients. The government is aware of these concerns and has committed to a more risk-based enforcement strategy in the first year with a focus on obvious situations of abuse and false self-employment. Only at later stage all solo self-employment arrangements shall be reviewed.

2. Reports of Government Advisory Bodies Aiming at Major Labour Market Reforms

Under the Rutte III government (2017-2021, early resignation) the Minister of Social Affairs and Employment (*Koolmees*) tasked various bodies to

6 Onderwerpen. Zelfstandigen zonder personeel (zzp), https://www.rijksoverheid.nl/onderwerpen/zelfstandigen-zonder-personeel-zzp/nieuwe-maatregelen-zzpers-en-opdrachtgevers (accessed on 7 April 2025).

7 Vanaf 1 januari 2025 volledige handhaving op schijnzelfstandigheid. Nieuwsbericht, https://www.rijksoverheid.nl/actueel/nieuws/2024/09/06/vanaf-1-januari-2025-volledige-handhaving-op-schijnzelfstandigheid (accessed on 15 October 2024).

come up with labour market reform proposals. We discuss the three most relevant here.[8]

Under the Rutte IV government (2022-2023, early resignation) the new Minister of Social Affairs and Employment (*Van Gennip*) continued the work of her predecessor, with some delay and obstacles due to the difficult coalition negotiations and the aftermath of the corona pandemic.

a) Report of Borstlap Commission – January 2020

The official cabinet reaction to the report of the *Borstlap* Commission and the report of the WRR (below) dates from November 2020.[9] In his reaction, the Minister of Social Affairs and Employment stated:

"The challenge is also to ensure that these recommendations are taken into account in the long-term reforms. However, making the labour market future proof with institutions that contribute to a better balance between employees and other workers is a matter of years. A key message of the reports is that much of the cause of the labour market gap lies in our own laws and regulations. This offers a perspective: it means that we have the power to move towards a labour market that works for all – although the challenge is extremely complex. Beacons need to be changed, and that takes time, also given the effort required to implement."

b) Report of WRR – January 2020

The report of the Netherlands Scientific Council for Government Policy (WRR) focuses on the search for the conditions for decent work for all. It claims that the Netherlands is not at the forefront of decent work; and that the Netherlands is one of the countries where social security for the self-employed is least regulated. The WRR, just like the OECD, emphasises

8 For an overview of all the reports concerning solo self-employed and labour market reforms, see: *Montebovi, Saskia*, ZZP en sociale zekerheid in Nederland, Tilburg 2021, pp. 67-151.

9 Letter from the Minister of Social Affairs and Employment to the Parliament: "De Kabinetsreactie op de Commissie Regulering van Werk en het WRR-rapport nr. 102 "Het Betere Werk", 11 November 2020.

that the Netherlands is at an important juncture where urgent decisions need to be taken about the type of labour market desired for the future.[10]

c) Report of SER – June 2021

The Netherlands Tripartite Social and Economic Council (SER) published a socio-economic policy advice for 2021-2025.[11] In addition to recommendations for the labour market in general and for investment in a broad-based welfare system, the SER made specific proposals for the self-employed: a system of compulsory insurance for incapacity for work, a general safety net (based upon the COVID income support measures), improved second and third pillar pension coverage, and collective bargaining and the legal presumption of employment to prevent bogus self-employment of low-paid workers.

These three reports were eagerly awaited in 2020 and 2021, as they focused explicitly on the labour market reforms that Dutch society had increasingly been calling for. One of the most recent noteworthy and promising developments is the draft law of 6 October 2023, aimed at the clarification of the assessment of employment relations. Below we discuss this bill in more detail.

In short, since 2018, many reports to and letters from the Minister have been published.[12] Two parliamentary dossiers that have received the most attention in the last few years are the "self-employment" dossier (31 311) and the "labour market policy" dossier (29 544).[13] At the time of finishing in autumn 2024, the new government has just completed its first 100 days and is still looking for a direction for the time ahead. The balance in the coalition government of four parties is delicate: two entirely new political parties (BBB and NSC) and the radical right Freedom Party of Geert Wilders (PVV) and the conservative-liberal political party (VVD) are in a

10 WRR Report: pp. 5, 38, 86.

11 SER Advice 21/08, Zekerheid voor mensen, een wendbare economie en herstel van de samenleving, June 2021.

12 There are regular updates from the Minister to the Parliament about the progress on the labour market package development, see also: *Montebovi, Saskia*, ZZP en sociale zekerheid in Nederland (fn. 8), pp. 177-188; Letter from the Minister of Social Affairs and Employment, 3 April 2023: "Voortgang uitwerking arbeidsmarktpakket".

13 Kamerstukken II, 31 311, Werken als zelfstandige; Kamerstukken II, 29 544, Arbeidsmarktbeleid.

constant search for how to deal with each other in a complex political and social context.

3. Incapacity for Work – A Compulsory Scheme for Public Insurance

As mentioned in the previous contribution (2020), the solo self-employed cannot rely on any public insurance scheme against the risks of illness (short-term) or incapacity for work (long-term). The first signs of the reintroduction of a state insurance scheme were seen in the 2019 pension agreement. The idea was to set up a separate insurance for the self-employed in which they would be compulsorily but minimally insured against disability. Early in 2023, the Minister of Social Affairs and Employment announced the intention to further develop a particular proposal and to introduce it within one to two years. At the time of writing this has not yet been done.

This ministerial intention for a proposal is based on the March 2020 proposal of the Stichting van de Arbeid, another advisory body to the government.[14] Some main features of the intended ministerial proposal are: a separate arrangement for the solo self-employed, a waiting period of 52 weeks, a standard benefit of 70% of the last earned income but with a limit of € 30,000 gross per year, a benefit of maximum € 1,650 gross per month, an insurance premium at 8% of the income, and also a re-integration procedure. So far, only these broad outlines have been presented, and there is no agreement on the concrete elaboration and details of this plan. Moreover, this proposal for a public disability scheme for the solo self-employed immediately provoked many reactions, mostly critical and dissatisfied.

A salient detail is that the Borstlap Commission, as well as other advisory bodies, advised the Minister not to create a separate scheme for the self-employed, but to create a disability scheme for all working people.[15] This plea for more contract-neutral basic insurance for all workers seems a bridge too far at this point. Indeed, for the short term, a separate system for the self-employed, next to the employee schemes, may be the most feasible option. It is up to the new government, installed in July 2024, to manage this politically sensitive issue.

14 Stichting van de Arbeid, Keuze voor zekerheid. Zelfstandigen standaard verzekeren tegen langdurig inkomensverlies door arbeidsongeschiktheid, 3 maart 2020.

15 Commission Borstlap, In wat voor land willen wij werken?, 2020; ONL-AVV-VZN – Sociaal Akkoord 2021, p. 4 and p. 16-17; WRR nr. 102, Het betere werk. De nieuwe maatschappelijke opdracht, 2020.

4. Representation of the Self-Employed

The classic Dutch consultation structure in policy and politics is based on the employee-employer model and thus excludes the self-employed. Recently, this has changed. For example, until 2023 the Social and Economic Council of the Netherlands (SER), which is an authoritative advisory body for the Dutch government and Parliament, included only employers, employees and independent experts. Yet, since 2023, also the self-employed are represented and have a voice in the SER.[16]

5. Platform Work and Qualification by Presumption of Law – Legislative Proposal October 2023

To date, the Dutch government has not yet introduced any measure specifically for platform workers. However, in 2019, MP Van Dijk presented an initiative paper called "Reclaiming the Platform Economy" in which he pointed out how much the platform economy was putting pressure on the entire social security system, and that therefore action was urgently needed.[17] In his plea for decent work at fair wages, for all workers, he emphasised that the correct qualification of the employment relationship between a platform and its worker was essential but hard to prove for the worker. That is why he proposed the reversal of the burden of proof. Thus, for the qualification of the employment relationship, the platform worker is by definition an employee unless the platform company proves that he is self-employed. These ideas, which strongly resemble the later proposal of the EU Platform Workers Directive[18], have not yet materialised in the statute book, nonetheless they have certainly sown the seeds of debate about platform work and vulnerable self-employed workers.

In June 2022, the cabinet responded to this initiative to regulate platform work and agreed upon the urgent need for clarification and improvement

16 Wie zitten er in de SER?, https://www.ser.nl/nl/ser/over-ser/wie-zitten-er-in-de-ser (accessed on 1 September 2024); Benoeming nieuwe Kroonleden Sociaal-Economische Raad, https://www.rijksoverheid.nl/actueel/nieuws/2023/11/24/benoeming-nieuwe-kroonleden-sociaal-economische-raad (accessed on 1 September 2024).

17 Kamerstukken II, 2018-2019, 35 230, nr. 2, Initiatiefnota van het lid Gijs van Dijk over De hervorming van de platformeconomie, https://zoek.officielebekendmakingen.nl/kst-35230-2.pdf (accessed on 1 September 2024).

18 Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, COM/2021/762 final.

concerning the position for platform workers. In that same reaction, the Minister also referred to the reports of the *Borstlap* Commission and the WRR.[19] The former Minister of Social Affairs and Employment considered several measures and intentions on national as well as European level. She emphasised the interdependence of different policies and that reforms would take time.

However, there seems to be a new dot on the horizon with the October 2023 bill proposal.[20] This bill aims to clarify employment relationship assessments and introduce a legal presumption. In fact, the draft law of 6 October 2023 first introduces some additional criteria to clarify the distinction between employees and (pseudo) self-employed workers. Second, the proposal reintroduces the concept of rebuttable presumption.[21] This time it applies not only to platform workers, but to all workers below a certain hourly rate. The proposal sets € 33 per hour as the threshold below which a worker is legally considered to be an employee.[22] The employer or client who wishes to refute the worker's claim can do so by providing evidence.

The proposal was submitted to the Council of State by the former Minister of Social Affairs in June 2024 and is also supported by the new Minister of Social Affairs. At the time of finishing this article, autumn 2024, this bill is now before the Advisory Division of the Council of State for independent advice. It remains to be seen if and when the next labour market reforms will take place.

19 Kamerstukken II, 2021-2022, 35 230, nr. 4, Initiatiefnota van het lid Kathmann over De hervorming van de platformeconomie, https://zoek.officielebekendmakingen.nl/dossier/kst-35230-4.html (accessed on 1 September 2024).

20 The official title of the proposed Act is: Bill to Clarify the Assessment of Employment Relationships and Legal Presumption.

21 Concept Legislative Proposal in order to clarify the employment relationship by changing the Civil Code, Voorstel van wet, Wijziging van Boek 7 van het Burgerlijk Wetboek in verband met het verduidelijken van wanneer sprake is van werken in dienst van een ander in de zin van artikel 610 van Boek 7 van het Burgerlijk Wetboek en het invoeren van een rechtsvermoeden (Wetsvoorstel verduidelijking beoordeling arbeidsrelaties en rechtsvermoeden), internetconsultatie, 6 oktober 2023 - 10 november 2023.

22 See proposal: new article 7:610aa BW.

III. Case Law

The previous contribution (2020) pointed at the ad hoc character and even contradictory nature of the jurisprudence on the qualification of the employment contract dealing with cases "on the brink of solo self-employment". Thus, it was pointed out that on 23 July 2018, the Amsterdam District Court was of the opinion that a Deliveroo worker did not have employee status in view of the clear intention of the parties expressed in the agreement[23], while on 15 January 2019 the Court changed its mind and reached the decision that such a worker was deemed to be an employee, this time going beyond the mere formal expression of the intention of the parties and carefully looking at the material conditions of the case.[24]

It is actually in this latter Deliveroo case, initiated by the main Dutch Union Federation FNV, that the Netherlands Supreme Court (*Hoge Raad*) would eventually give a new twist to its framework for interpreting formal employment contracts, thereby re-affirming the second judgement of the local Amsterdam court. This is the case of Deliveroo Netherlands B.V. against *Federatie Nederlandse Vakbeweging* of 24 March 2023.[25]

In order to fully understand the new strand in the case law, it is necessary to first of all point at another case which came before the *Hoge Raad* in 2020.[26] This dealt with the qualification of an employment relationship of a woman who received social assistance from the City of Amsterdam. She carried out work for this municipality as part of a re-integration programme, while retaining her right to benefit. The worker claimed to be formally employed by the municipality on the basis of an employment contract and was therefore to receive a proper wage. In her lengthy conclusion, Procureur-General *De Bock* argued that the material aspects of an employment relationship should be leading, rather than the intention of the parties as expressed in the written terms of the employment contract itself. This new approach was accepted by the *Hoge Raad*. The written text of the contract serves to know what rights and duties the parties have agreed upon, but for the qualification of the employment relationship, the intention of the parties is no longer relevant. Only the substantial requirements apply (i.e. work, wage and subordination).

23 ECLI:NL:RBAMS:2018:5183.
24 ECLI:NL:RBAMS:2019:189 and 2010.
25 ECLI:NL:HR:2023:443.
26 ECLI:NL:HR:2020:1746. Hoge Raad, 6 November 2020 (X/Gemeente Amsterdam).

As a matter of fact, the outcome of the latter case was that the re-integration worker did not have an employment contract in view of the fact that no wages had been paid. Whatever can be said of the tautological nature of this argument,[27] the new interpretation of the *Hoge Raad* would allow for another way of qualifying new types of labour relationships, such as the ones carried out by platform workers. This brings us back to the Deliveroo case of 24 March 2023, generally seen as the test case for assessing the legal nature of platform work.

Procureur-General *De Bock* now advised the *Hoge Raad* not to look so much at the criterion of subordination of the employee (the power of the employer to give instructions). The starting point should be whether the work is embedded in the organisation of the job provider. Points of view in this regard would include: (i) whether core activities are involved, (ii) whether the work has a structural character and (iii) what the organisational framework is within which the work is carried out (place of work, working hours, etc.). However, *the Hoge Raad* ruled otherwise. Pending the recent endeavors of the Netherlands and the EU legislator to come up with its own solutions, it would stick to its established case law that due consideration should be given to all circumstances of the case. Embedding the work in the organisation of the job provider was one of these circumstances but not the starting point for assessing whether there is a relationship of authority. Nonetheless, the *Hoge Raad* highlighted a number of points that had not been so clearly stated in previous case law: whether the worker behaves as an entrepreneur in society (e.g. fiscal status, the number of clients and the duration for which the worker commits himself to a particular client); the freedom of the worker to decide as to how the work is performed; and the practical relevance of formal contractual conditions for the employer. In doing so, the *Hoge Raad* has shown itself more receptive to include new types of labour into the formal employment relationship. Merely manipulating the written terms of a contract is no longer conducive to shutting the door to such relationships.

IV. Conclusion

Platform work has been high on the political agenda for quite some time. Various measures and plans have been introduced, including the Web Mod-

27 Cf. the critical comments by Driessen, M.J.A.C., in TRA 2021/21.

ule for Employment Relationship Assessment and a new selection tool, which aimed to help employers and self-employed workers understand their employment relationships. However, the results were not promising enough to implement it as a legal instrument. Additionally, reports from government advisory bodies, such as the Borstlap Commission, WRR, and SER, have emphasised the need for labour market reforms and better social security for the self-employed. A draft law from October 2023, which intended to introduce a legal presumption for platform workers below a certain hourly rate and an improved assessment framework for the employment relationship, has not yet been adopted. The courts, however, seem to be more sensitive to the gap in social protection between employees and non-employees. The trend in case law is to interpret the formal employment contract more broadly and include new forms of labour, in particular platform work. In the landmark Deliveroo case of 24 March 2023, the *Hoge Raad* reaffirmed that all circumstances of a case should be considered when assessing whether an employment agreement exists. The approach of the *Hoge Raad* to assess in this context (apart from classical criteria like subordination and integration in the organisation) also whether the worker behaves as an entrepreneur leaves room for the lower courts to reassess the situation of platform workers also in other areas.

In anticipation of the new law, proposed in October 2023, to provide a clear assessment framework for employers, employees and self-employed persons, which is currently before the Council of State for consultation, the existing 2016 law will be enforced from 1 January 2025. From that date, therefore, the tax authorities will start to inspect businesses and check whether existing self-employment contracts are in fact genuine self-employment contracts. If not, fines and surcharges will follow. It is the responsibility of the parties to choose the correct status of their relationship.

In short, it is still uncertain how the labour market reforms initiated by previous governments will work and, in particular, whether the vulnerable social position of the self-employed will be improved.

France

Francis Kessler

I. Introduction

In an information report dated 2021 entitled "Platformisation of work: action against economic and social dependence", the French Senate (the 2nd parliamentary assembly) noted that "self-employment linked to digital platforms is reported to be growing strongly in France (+7% jobs created per year) and could generate almost 350,000 full-time jobs by 2025".[1] This report has to be put in line with the last available survey in 2022 that more than 230,000 self-employed people are registered as digital platform workers: 179,200 two-wheeled delivery drivers (other postal and courier activities) and 52,700 VTC (chauffeur-driven transport vehicle) drivers.

These delivery and driver jobs have exploded since January 2019, particularly in 2020 and 2021. Between 2019 and 2022, the number of delivery drivers increased more than 5-fold (from 35,000 to 180,000 between January 2019 and June 2022), while the number of drivers rose from 33,000 to 53,000, an increase by 1.6 points.[2] It should be noted that, according to Insee statistics published in early 2023 for 2022, this category of self-employed entrepreneurs, listed under "other postal and courier activities", holds the record for the lowest average quarterly wage, with an average of € 1,282 per quarter (i.e. just over € 427 per month).[3] These studies do not take into account undocumented migrants who subcontract licenses, as they are unable to open their own accounts.

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1 Sénat Plateformisation du travail: agir contre la dépendance économique et sociale, Rapport d'information n°867 (2020-2021), 29 September 2021.

2 *Botton, Hugo,* L'Ubérisation des quartiers populaires, Compas zOOm, n°27, Compas, November 2022.

3 Les auto entrepreneurs fin juin 2022, Stat'Ur conjoncture n.° 357, January 2023. See *Daugareilh, Isabelle*, La Fabrication de travailleurs pauvres par les plateformes de mobilité en France, in: Marzo, Claire (coord.), Les Salaires minimaux des travailleurs de plateformes dans l'Union européenne – Analyse de droit comparé et de l'Union européenne, Bruxelles: Bruylant 2024, pp. 109 ff.

Indeed, French law only regulates location-based platforms, so-called "in-situ platforms" that require workers to be located in a specific area to provide services such as deliveries, transport and personal care. Moreover, it focuses its rules exclusively on VTCs (literally "cars with drivers") and goods delivery (mainly by bicycle).[4]

After giving a brief summary of developments regarding the situation of platform workers since autumn 2020 (II), this contribution aims to provide an overview of how the French legislator has set out the beginning of social protection for platform workers in terms of insurance against accidents at work (III). This chapter will also take a look at the role and the place of collective agreements in terms of social protection for platform workers (IV). Finally, it will look at some of the proposals that have emerged concerning the creation of a special status for platform workers (V).

II. Slight Changes Since 2020

Little has changed for platform workers since 2020, and even less so when it comes to social protection. While few specific measures concerning the social protection of platform workers have been put in place over the past four years, the French government has endeavored to establish a general framework within which these specific measures could emerge.

In 2019, a law[5] was passed to authorize the government to take, by ordinance, measures falling within the legislative domain for the purpose of determining the modalities of an election of representatives for self-employed workers using platforms for their activity and the conditions for exercising this mandate. On this basis, the Order of 30 April 2021[6] lays the foundations for structured social dialogue between digital platforms and self-employed workers operating in the VTC and vehicle-based goods delivery sectors. This order lays down the rules governing the representation of the workers concerned and entrusts the new Employment Platforms Social Relations Authority (Autorité des relations sociales des plateformes

4 See Art. 50-0 of the French General Tax Code. See *Big, Gheorghe/Kessler, Francis*, France, in: Schubert, Claudia (ed.), Economically-Dependent Workers as Part of a Decent Economy: International, European and Comparative Perspective, 2022, p. 25 f.

5 Law No. 2019-1428 of 24 December 2019 on the Orientation of Mobility, Art. 48.

6 Order No. 2021-484 of 21 April 2021 on the Representation of Self-Employed Workers Using Platforms for their Activity and the Conditions for Exercising this Representation.

d'emploi – ARPE), a public administrative body, with the task of regulating social relations between platforms and workers, in particular by ensuring the dissemination of information and promoting consultation. The structure of this social dialogue has been completed with a second order dated 6 April 2022,[7] which complements the rules organizing social dialogue with the platforms and specifies the role of the ARPE in this social edifice.

Thus, the major change is the creation of this new player, the ARPE administration, along with a legal frame for representation, which is supposed to regulate the social dialogue between platforms and their workers. The aim is to create the best possible framework from which measures specifically tailored to platform workers can emerge, including social protection.

Since October 2018, the French *Anti-Fraud Act*[8] has obliged platforms to share detailed information on workers' income with the social security agencies.[9] In this respect, the platforms will have to comply with the following obligations, under penalty of a fixed fine of up to € 50,000. They must:

- provide, for each transaction, honest, clear and transparent information on the tax and social obligations of the users who carry out commercial transactions through it;
- provide an electronic link to the tax administrations' websites to enable users to comply, if necessary, with these obligations.

Each year, they must also, under threat of a penalty of 5% of the undeclared amounts:

- send to the users of the platform a statement of the operations carried out as well as various information concerning both the operations and the operator;
- send to the tax authorities a document summarizing all this information for all users.

In addition, workers can authorize the platform to transfer contribution payments on their behalf to the contribution collections agency (ACOSS).

7 Order No. 2022-492 of 6 April 2022 Reinforcing the Autonomy of Self-Employed Workers on Mobility Platforms, Organizing Social Dialogue in the Sector and Supplementing the Missions of the Employment Platforms Social Relations Authority.

8 Law No. 2018-898 of 23 October 2018.

9 *Saillard*, *Yves*, Chapitre 8. Créer une protection sociale pour les travailleurs des plateformes de services, in: Agir contre le non-recours aux droits sociaux: Scènes et enjeux politiques. Fontaine, Presses universitaires de Grenoble. Libres cours Politique 2019, pp. 181 ff.; *Kessler*, *Francis*, Remarques conclusives, in: Marzo, Claire (ed.), Réinventer la protection sociale des travailleurs de plateformes numériques. Etude pluridisciplinaire des fondements de la protection sociale à la lumière du travail des plateformes, Paris: Mare & Martin 2023, pp. 245 ff.

If the platform is not required, in these cases, to automatically transmit the information to the tax administration, the latter may nevertheless become aware of it as part of the exercise of its right of communication.

Finally, as from 1 January 2020, the Act has established a system of joint and several liabilities for online platforms for the payment of value added tax (VAT) due by sellers and service providers who carry out their business activities through them.[10] This system will be applicable to platforms that have not provided proof of having carried out sufficient due diligence (measures allowing users to regularize their situation, or even exclusion of the user in the case of work time violations) after two formal notices issued by the tax administration.

III. Voluntary Private Insurance

Platform workers in France do not have a separate status and, therefore, have to be classified under one of the employment statuses recognized in the country. Usually, platform workers are considered as self-employed.[11] Most of them work under the status originally called "auto-entrepreneur", now called "micro-entrepreneur". It is a specific tax status that benefits from simple tax and accounting rules. Although the French Labor Code does not define as such the independent contractor status, it does however provide in Art. L. 8221-6-1 "*that a self-employed worker is one whose working conditions are defined exclusively by himself or by the contract defining them with his principal*". Even today, platform workers are largely considered to be self-employed and are therefore subject to the social protection of this regime. However, since 2019, a number of courts have reclassified platform workers as employees.[12] The worker status is essential in determin-

10 See also ECJ 28 February 2023, aff. C-695/20, Fenix International: JurisData No. 2023-003332. The Council of the EU may, in VAT matters, establish a presumption that the operator of a digital platform is in the absence of proof to the contrary, the supplier of the services provided.

11 The model is hardly original: it simply uses an old formula, that of the solo self-employed, to structure an organization that enables small teams of decision-makers to pilot – via a digital platform – an independent workforce that is flexible and adaptable to the constantly changing needs of potential consumers. *Daugareilh, Isabelle*, La Santé des travailleurs de plateformes en France, Revue de droit sanitaire et social (RDSS) 2022, pp. 997 ff.

12 Cass. Soc., 28 November 2018, No. 17-20. 079 (Take it Easy) and Cass. Soc., 4 March 2020, No. 19-13.316 (Uber).

ing the rules to which they are subject in terms of social protection. As the case of platform workers is still uncertain, the French legislator has introduced specific rules on social protection for platform workers. The law of 8 August 2016,[13] thus, creates the first provisions concerning platform workers in terms of social protection. It introduces the possibility for those workers to have their insurance covering work-related accidents taken over by platforms.

First of all, it is interesting to note that neither the French Social Security Code nor the French Labor Code refers to "social protection" for platform workers, but rather to "social responsibility".[14] The concept of social responsibility is not defined yet, neither by the French Labor Code nor in case law. Nevertheless, this social responsibility implies, under French Labor law, that platforms must cover the risk of work-related accidents. Indeed, Art. L. 7342-2 of the French Labor Code states that when a platform worker takes out insurance covering the risk of accidents at work or joins the voluntary insurance scheme for accidents at work mentioned in Art. L. 743-1 of the French Social Security Code, the platform has the obligation to pay the contribution, up to a ceiling set by decree. However, in order to benefit from this coverage, workers must fall within the scope of the law as defined in Art. L. 7342-1 of the French Labor Code. The article applies for workers who work with platforms which determine the characteristics of the service provided or the good sold and which set its price. Besides, the text does not apply if the worker subscribes to a collective contract taken out by the platform and providing cover at least equivalent to the voluntary insurance for accidents at work, and the contribution to this contract is borne by the platform.[15]

The leading example is the AXA insurance company.[16] Several platforms have signed an insurance contract with this company, providing a daily allowance of € 25 per day for active couriers, paid for a maximum of 15 days from the 8th day of sick leave. Active couriers are those who have completed a minimum of 150 journeys for drivers and 30 deliveries for delivery drivers in the 8 weeks preceding the date of illness.[17] In fact,

13 Law No. 2016-1088 of 8 August 2016 on Labor, the Modernization of Social Dialogue and the Securing of Professional Careers.
14 Art. L. 7342-1 of the French Labor Code.
15 Art. L. 7342-2, para. 2 of the French Labor Code.
16 Allianz Partner, a company of Allianz, has developed with Uber a similar tool for other countries than France.
17 https://www.uber.com/fr/fr/drive/insurance (accessed on 1 September 2024).

because of these strict conditions, few platform workers make use of them. It should also be added that the virtual absence of public policy provisions concerning workplace accident coverage for platform workers leaves a great deal of room for contractual freedom, resulting in less favorable provisions for workers. And this contractual freedom can flourish even more because the legal definition of an industrial accident is broad. The French Social Security Code states that "*an accident at work, whatever its cause, is an accident caused by or in the course of work*"[18] to any person employed or working in any capacity or in any place whatsoever for one or more employers. AXA's insurance policy defines it as "*bodily injury resulting from an external cause and occurring suddenly, unforeseeably and beyond the control of the insured*". AXA's insurance contract covers the risk from the moment the errand or delivery is accepted until 15 minutes after the end of the errand. This excludes travel time or waiting time of more than 15 minutes between two errands. The freedom of contract that is exercised here runs counter to the essential nature of the French notion of an accident at work, namely the presumption of imputability that prevails in social security law, and which allows an accident at work to be deemed to have occurred at the time and place of work, without regard *a priori* to the cause.

Deliveroo's insurance, for instance, covers riders[19] against injuries and third-party liability while they are online and for one hour after they have gone offline. In the event of childbirth, adoption or stillbirth of a child and of the occurrence of additional costs "an additional costs-dependent child benefit" – an indemnity of maximum € 1,000 – is granted under various conditions.[20]

The French legislator has also introduced a right of education and professional training. The platform must pay the worker's contribution. At his or her request, the worker can benefit from training measures for drivers. In this case, the platform will have to cover the costs of the support and pay the worker compensation.[21]

18 Art. L. 411-1 of the French Social Security Code.

19 The insured person and the substitute who has made at least 1 delivery for the master policyholder during the last 30 days are covered. See https://deliveroo.qover.com/en-fr (accessed on 1 September 2024).

20 The current contract with Deliveroo must have been in force for at least 41 weeks from the date of the event. The rider must also have completed at least 200 orders in the 6 months prior to the event date.

21 Art. L. 7342-3 of the French Labor Code.

Despite these rules, social protection for platform workers remains weak. They are still not covered by unemployment insurance, as they are only rarely eligible for the self-employed workers' allowance.[22] The same applies to daily allowances in the event of temporary incapacity for work, which are conditional on an average annual income that presupposes a high turnover for a service-providing activity. It can also be deplored that this new legal framework is not an obligation but merely a possibility. In fact, the platform only has a financing obligation if the worker has voluntarily protected himself against the risk of a work-related accident. *A priori*, the obligation to fund workplace accident cover does therefore not rest with the platforms. In this sense, it cannot be asserted that workers have been recognized as having a right to be covered in this area. Finally, these rules do not form a system and rely on private insurance. This may pose a problem, as it leads to a process of marketization of social protection, which takes place in an area that is not constrained by rules of public order.[23]

The legal framework introduced by the French legislator goes along with a system of collective agreements also established by law.

IV. Social Protection and Collective Agreements for Platform Workers?

Given that there is a very extensive legal framework for collective representation in France, the question arose of setting up such mechanism for platform workers. Social dialogue in France is structured around the company and negotiations with workers from the same area. The legal framework is therefore detailed but most of it refers to employees. For the self-employed, the issue is more complex, since they have no one to negotiate with (the employer) and are not expected to work together but independently. The Court of Cassation ruled as follows: "*The purpose of any collective bargaining is to regulate general working conditions and relations between employers and employees; therefore, a national collective bargaining agreement does not apply to a self-employed person who does not employ any*

22 To be eligible for this allowance, the worker must be in receivership or compulsory liquidation, as simply selling their business is not enough.

23 *Del Sol, Marion,* La Protection sociale complémentaire des travailleurs de plateforme au risque du marché, Dr. Soc. (2021) 7, p. 589.

employees."[24] In order to enable platform workers to organize and defend themselves collectively and to benefit from the advantages of collective agreements, the Law of 8 August 2016 introduced collective representation for these workers.[25] Art. L. 7342-6 of the French Labor Code states that self-employed workers who use one or more electronic contact platforms to carry out their professional activities "have the right to form and join a trade union organization and to represent their collective interests through it". According to Art. L. 7343-1 of the French Labor Code, the legal provisions governing the representation of platform workers in Chapter III, "Social Dialogue in the Sector", only concern the "activities of driving a chauffeur-driven transport vehicle" and the "activities of delivering goods by means of a two- or three-wheeled vehicle, whether motorized or not". The social dialogue between platforms and workers is regulated by the Employment Platforms Social Relations Authority[26] (ARPE in French). The ARPE was in charge of organizing the professional elections in this sector, which were held between 9 and 16 May 2022.[27] As a result, a right to negotiate and contractual obligations have been created.

Art. L. 7343-37 of the French Labor Code mentions several topics on which negotiations may be undertaken, in particular "complementary social protection benefits which fall within the scope of Art. L. 911-1 and L. 911-2 of the Social Security Code". As a reminder, these articles describe the implementation of collective guarantees for the employees. For the time being, collective agreements have been negotiated and signed in the VTC and goods delivery sectors. These collective agreements currently do not contain any provisions relating to collective complementary social protection guarantees which play an important role for employees.[28]

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24 Labour Chamber of the Court of Cassation (Cass. Soc.), 21 March 2007, No. 05-13.341.

25 Law No. 2016-1088 of 8 August 2016 on Labor, the Modernization of Social Dialogue and the Securing of Professional Careers.

26 Art. L. 7345-1 of the French Labor Code.

27 The organization of the elections follows the same rules as for the employees. The ability of trade unions and employer's organizations to negotiate is defined in Art. L. 7343-29 of the French Labor Code.

28 In the VTC sector, six agreements were signed: 1 method agreement on the organization and means of social dialogue; 3 agreements on incomes, raising the minimum income per trip to € 9, and the introduction of a minimum income of € 30 per hour of activity and € 1 per kilometer travelled; 1 agreement giving drivers greater freedom of choice regarding routes for drivers; 1 agreement on the transparency and operation of central reservation and to provide a better framework for terms and conditions

However, new elections were held from 22 to 30 May 2024: ARPE organized elections to designate representatives of self-employed platform workers. These digital ballots concern two business sectors: goods delivery on two or three wheels and VTCs. A total of 12,987 self-employed workers took part in the ballots. 10,200 (19.96%) in the VTC sector and 2,787 (3.90%) in the delivery sector. Self-employed workers could vote to designate their representatives from among the 19 candidate organizations (9 candidate organizations in the VTC sector and 10 organizations in the delivery sector) and it is not entirely excluded that negotiations will be held on these issues. In an Agreement to Combat All Forms of Discrimination concluded on 7 May 2024 it was agreed to "prevent, raise awareness for and combat all forms of discrimination on the platforms used to put people in touch with each other"[29] and, on the other hand, to "involve all users of the platforms and their representatives in this issue, whether they be independent delivery drivers, restaurateurs, retailers or recipients of deliveries, in order to work towards raising awareness and getting everyone involved"[30].

Although not directly granting social protection rights, the scope of the agreement also includes the following theme: the creation of a Discrimination Observatory. This Observatory will take the form of an annual meeting dedicated to examining situations of discrimination, with a specific item on the agenda of one of the meetings of the negotiating commission. When examining such situations, the members of the commission will draw on the results of an annual survey of delivery personnel carried out by the platforms, and will be able to adapt the actions taken at sector level if necessary.

On the preventive front, the platforms undertake to design and distribute to their users (independent delivery drivers, restaurant owners, retailers receiving deliveries) and to their employees in contact with them "a guide on the remarks, acts and behaviors that constitute discrimination and the

for breaking off commercial relations. In the delivery sector, four agreements were signed: 1 method agreement on the organization of social dialogue; 1 income agreement setting a minimum hourly guarantee; 1 agreement on deactivations aimed at providing a better framework for the termination of relations; 1 agreement to combat discrimination.

29 Agreed for an indefinite period, the text will take effect 3 months after publication in the Official Journal of the French Republic of the approval decision by the Employment Platforms Labor Relations Authority (ARPE in French), i.e. on 31 October 2024.

30 Agreement to Combat All Forms of Discrimination on Matchmaking Platforms.

means of preventing or reacting to them"[31]. They will also communicate to them and their subcontractors the main commitments set out in the agreement, and the organizations representing delivery personnel will do the same for their members.

In addition, because "an effective approach to combating all forms of discrimination must include all platform users"[32], the signatories will draw up a charter of reciprocal commitments incorporating the principles of the agreement and adapting them for restaurants and retailers. Within a month of drawing up a draft charter, they will invite restaurant, retail and consumer representatives to a joint meeting to propose the charter.

To enable delivery drivers to report discrimination, the platforms will have to set up "an easily accessible alert system"[33] via the dedicated support section of their application. If it is established that a delivery driver is a victim of discrimination, the platform "will do its utmost to listen to the driver's concerns and take his or her report into account"[34]. If the driver so requests, the platform will direct him or her towards specialized players (associations, etc.) likely to be able to provide psychological support and/or assistance with the process.

V. The Status of Platform Workers Still under Debate

Several proposals have been made in France concerning the status of platform workers without any of them being convincing.

An initial bill dated 11 September 2019, relating to the status of platform workers, proposed to create an ad hoc status for these workers corresponding to an "autonomous employee" status. From a social protection point of view, this new status provided for compulsory affiliation of platform workers to the general social security scheme. It also extended to these workers the benefit of unemployment insurance allowance, with an adaptation of the unemployment insurance rules referring to an agreement between representative employers' and workers' organizations within the framework of the objectives set by the proposal. In addition, it proposed to deepen the social responsibility of platforms towards self-employed platform workers.

31 Ibid.
32 Agreement to Combat All Forms of Discrimination on Matchmaking Platforms, p. 7.
33 Agreement to Combat All Forms of Discrimination on Matchmaking Platforms, p. 5.
34 Ibid.

It was thus proposed to leave workers the choice of whether or not to adhere to the collective contract proposed by the platform and required the latter, in case the worker individually subscribed to another insurance, to pay his or her contributions.[35] This bill was rejected by the Senate on 4 June 2020.

Another proposal was put forward in a report led by Jean-Yves Frouin and submitted to the French Prime Minister on 1 December 2020.[36] This concerned the creation of a third-party status, in other words, a status between the self-employed's status and the employee's status. According to the author of the report, this status would have been "intended to apply to workers, not because of the particular nature of their activity or profession, but because of their state of economic dependence, and consequently with regard to objective elements characterized essentially (or mainly) by their situation of economic dependence". However, the question of social protection has not been addressed through this third-party status. Apart from these two proposals, which do not specifically concern the social protection of platform workers, little has changed. These debates, and consequently the study of similar proposals, may well be back on the agenda of the French legislature, following the directive of the European Parliament and of the Council on the improvement of working conditions for platform workers.

VI. Conclusion: Towards a Compulsory Levy of Contributions by Digital Platforms?

The Social Security Financing Bill for 2024[37] was published on Wednesday 27 September 2023. Several measures are foreseen concerning platform in

35 Report Made on Behalf of the Social Affairs Committee on the Proposed Law on the Status of Workers on Digital Platforms, by Ms. Cathy Aporceau-Poly, Senator.

36 *Frouin, Jean-Yves*, Regulating Digital Work Platforms, Report to the Prime Minister, 1 December 2020.

37 A Social Security Finance Bill (PLFSS, for "Projet de Loi de Financement de la Sécurité sociale") is a piece of draft legislation introduced annually in France to set the budgetary provisions for the national Social Security system, i.e. it determines the general conditions for balancing the annual finances, and sets expenditure targets for the following year. Once the bill has been adopted by majority vote in the French Parliament, it passes into law as the Social Security Finance Act (LFSS, for "Loi de Financement de la Sécurité sociale") and is published in the Official Journal in December of each year.

situ workers. By 2027, the social contributions of micro-entrepreneurs are to be deducted directly by platforms, without changing the employment relationship with them.[38]

The withholding obligation would also apply to platform users who have chosen, when this option is open, to be affiliated with the general scheme (short-term furnished rental operators and movable property rental operators). Implementation of this measure could be brought forward to 2026 for a limited number of operators.[39]

This would apply to platforms covered by Art. 242 of the General Tax Code. Only transactions for which the platform plays a financial intermediation role would fall within the scope of the obligation, with the platform only being able to offset contributions against remuneration if the remuneration passes through the platform. All self-employed workers covered by the micro-social regime, whether craftsmen, shopkeepers or self-employed professionals covered by the CIPAV (the social security subsidiary basic system for the self-employed), would thus fall within the scope of these new obligations, provided they generate part of their sales via a digital platform. This would not apply to self-employed workers who have opted for a sole proprietorship and pay contributions based on their actual income, nor to those operating as a company (SARL, SASU), nor to those carrying out an activity considered as non-professional in sectors where a financial threshold determines the obligation to join the social security scheme (rental of short- or long-term furnished accommodation, short-term classified tourism and bed and breakfast, and property rental). Social security contributions and levies would be deducted directly from sales or revenues, as well as taxes and the payment in full discharge of income tax, where micro-entrepreneurs have opted for the latter. This deduction would be equivalent to payment of these social security contributions, taxes and levies by the contributor concerned.

However, these provisions would not apply to the corporate property tax (*cotisation foncière des entreprises* - CFE) and VAT.

Social security contributions and taxes deducted in advance would be collected under the conditions and subject to the guarantees, securities and penalties applicable to contributions deducted in advance from employees' remuneration. Failure by a platform operator to comply with the withholding obligation would result in the application of a penalty of a maximum

38 LFSS 2024, Art. 6, I, 2.
39 LFSS 2024, Art. 6, II, B.

amount equal to 5% of the sales or revenue on which the obligation was breached. A decree would determine the procedure for imposing this penalty.

Elections were held in France in June 2024: it is still uncertain that these measures will be applied as such under a new government.

Meanwhile, some French judges continue to classify the relationship between drivers, deliverymen and the platforms as employment relations with all the social security and complementary compulsory social protection rights attached to this status.[40] In a series of rulings concerning the Uber platform, the Paris Court of Appeal adopts a resolutely liberal approach, justifying the status of self-employed workers via the platform's business model and the terms and conditions of the services that drivers accept by choosing to operate within this framework.[41] In his comment, Grégoire Loiseau states that "going against the approach of the Cour de Cassation's social chamber, which favors recognition of a subordinate relationship, the Paris Court of Appeal further fractures a body of law that has become unreadable and even unintelligible"[42]. The Cour de Cassation shows its determination to regain the upper hand by censuring a decision that had rejected the request to requalify as an employment contract the service provision contract of a delivery driver who had worked for the TokTokTok platform.[43]

40 *Gomes*, *Barbara*, The French Platform Workers: A Thwarted Path to the Third Status, Italian Labour Law e-Journal 15 (2022) 1, p. 143.

41 Court of Appeal Paris, 11 May 2023, n.° 22/08225, O. K. c/ sté Uber France et al.

42 *Loiseau, Grégoire,* Statut juridique des travailleurs des plateformes - Travailleurs de plateforme: la division s'installe, Communication – Commerce électronique n.° 7-8 of 1 July 2023.

43 Labour Chamber of the Court of Cassation (Cass. Soc.), 27 Sept 2023, n.° 20-22.465, 2023; *Loiseau, Grégoire*, Travailleurs des plateformes numériques – Le droit débousolé des travailleurs de plateforme, La Semaine Juridique – Social, n.° 41, July 2023, p. 23.

Part II:
European Perspective

Recent EU Developments Addressing Challenges of Platform Workers

Paul Schoukens and Charlotte Bruynseraede

I. Introduction

This contribution builds on the discussion on the social protection of platform workers[1] as published in Social Law 4.0, Chapter 12 *"Building Up and Implementing the European Standards for Platform Workers"*.[2] The Chapter mainly focused on the 2019 Recommendation on access to social protection (hereinafter: the Recommendation)[3] which at the time served as one of the only EU instruments with clear potential to provide for improvements in the access to social protection for platform workers. As the Recommendation calls for an extension of social protection for all workers – including self-employed and non-standard workers – without reference to the specificities characterising platform work (e.g. marginal nature of the work, irregular working patterns, virtual mobility of the workers), the more general wording of the instrument may, however, not suffice to always adequately encompass these workers in social protection schemes. From that point of view, the Chapter highlighted a few of the shortcomings and specific challenges for the social protection of platform workers in particular. Now, a few years after the drafting of the Recommendation, the labour and social protection of platform workers came much more to the fore, both in Member States and on an EU level. It can be considered as one of the central issues in the contemporary EU social policy debate. The increased attention on this group calls for a further discussion on the

1 Under "platform worker" we understand any person performing platform work irrespective of whether the platform worker is considered an employee or self-employed worker. Where a distinction between both statuses is necessary, this is clarified in the text.

2 *Schoukens, Paul*, Building Up and Implementing the European Standards for Platform Workers, in: Becker, Ulrich/Chesalina, Olga (eds.), Social Law 4.0: New Approaches for Ensuring and Financing Social Security in the Digital Age, Baden-Baden: Nomos 2021, pp. 307-334.

3 Council of the EU, Council Recommendation of 15 November 2019 on Access to Social Protection for Workers and the Self-Employed, 12753/19, OJ, C 378/1.

Recommendation and recently adopted EU instruments and their impact on the social protection of platform workers.

In a first part, the key challenges addressed in the previous paper are recalled. The second part starts with the follow-up procedure and latest Member State reports on the implementation of the Recommendation, specifically focusing on whether the Recommendation brought about improvements to the extension of social protection to platform workers.

We then continue with the discussion of three legal EU initiatives and their potential for the improvement of the social protection of platform workers: 1) the Directive on improving working conditions in platform work, 2) the Directive on adequate minimum wages, and 3) the Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons. In a final part, we reflect on whether the existing instruments are sufficient to remedy the existing challenges and truly have the potential to provide adequate social protection for platform workers or whether (and if so, which) issues remain.

II. Challenges for Platform Workers as Discussed in Previous Paper

The Recommendation was launched to provide to all professionally active persons access to an adequate level of social protection and therefore only implicitly deals with platform work (as a non-standard type of employment). Three main challenges for platform workers were highlighted by the previous discussion: 1) the ambiguity regarding employment status, 2) the often very low income earned by platform workers, and 3) the meaning of a professional activity.

The unclarity on the legal qualification of platform workers and consequences for their social protection was one of the concerns raised. In combination with the Recommendation's unbalanced approach towards employees and self-employed workers in terms of formal access (mandatory v. at least on a voluntary basis) and the fact that Member States still do not provide formal access to all social protection schemes for self-employed workers (not even on a voluntary basis), the observation that platforms often attempt to qualify platform workers as self-employed workers in order to reduce tax and social security burdens, may hamper formal access for platform workers.

Even if Member States were fully in line with the Recommendation and provide for at least voluntary access for self-employed workers, the likeliness of self-employed platform workers to voluntarily join social protection schemes is arguably small (e.g. the contributions due may form a significant financial burden). Clarity regarding labour market status can prevent misclassification and thus lead to more comprehensive social protection. However, even with a clear employment qualification, problems of limited formal access persist for genuine self-employed platform workers. Moreover, irrespective of the employment status, problems with regard to effective access remain in place (see discussion below).[4]

Another challenge for platform workers, was the problem of low income and of how to take these workers into account for the organisation of social protection. The Recommendation calls for an "adequate" level of protection (Art. 11), but remains rather vague on the interpretation of adequate; generally speaking, benefits should be sufficient to keep workers out of poverty and should not fall below minimum subsistence levels. It remains challenging to assess what kind of social protection is to be guaranteed to persons with a structural low income, often a reality for platform workers.[5]

Finally, the more conceptual question on what is to be regarded as work and professional income, was raised.

III. Recent EU Actions

1. National Action Plans Following the Recommendation on Access to Social Protection

The Recommendation on access to social protection was accompanied by a follow-up procedure in which Member States were encouraged to regularly report on the implementation of the Recommendation and to implement a National Action Plan highlighting challenges, improvements, and planned initiatives with regard to the extension of social protection. The final report of 2023 which summarises the National Action Plans shows that platform

4 *Schoukens, Paul*, Building Up and Implementing the European Standards for Platform Workers (fn. 2), pp. 307-334.

5 *Schoukens, Paul*, Building Up and Implementing the European Standards for Platform Workers (fn. 2), p. 323.

work took an important position in the debate concerning social protection for all workers.[6]

According to the final report, eleven Member States dedicated a specific discussion on platform workers' social protection, mostly highlighting the challenges in the light of the Recommendation.[7] Five Member States included specific measures to improve these workers' social protection,[8] whereas four Member States only mentioned the need to take further action without any concrete proposals.[9] Above that, possible changes in legislation and further action to improve the situation for platform workers are being discussed in several other Member States.[10] Among the measures, extensions of access to benefits for platform workers are mentioned, for instance. These actions show that – notwithstanding the absence of explicit mention of the extension of social protection to platform workers in the Recommendation – several Member States acknowledge the highly vulnerable position of platform workers and do consider them as key target in extending social protection to all workers.

2. The Directive on Improving Working Conditions in Platform Work

In 2021, the European Commission published a proposal for a Directive on improving working conditions in platform work (hereinafter: the Platform Work Directive). Following a long legislative process in which finding the necessary majority among the Member States proved very difficult,[11] a revised proposal of the initial draft finally received the Member States' approval in March 2024.[12] In April 2024, the European Parliament formally endorsed the text. The finalised act was adopted by the Council of the EU in October and in November 2024, the text was published in the Official

6 Report from the Commission to the Council on the Implementation of the Council Recommendation on Access to Social Protection for Workers and the Self-Employed, Brussels, COM(2023), 43 final.
7 Ibid., p. 14.
8 Belgium, Cyprus, Italy, Romania, Slovenia.
9 Germany, Estonia, Lithuania, Portugal.
10 Greece, Spain, France, Portugal, Germany, Croatia, Luxembourg, the Netherlands.
11 European Parliament, Legislative Train 01.2024, Initiative to Improve the Working Conditions of People Working in the Platform Economy, Q4 2021; Legislative Train 01.2024., 2A, Europe Fit for the Digital Age, 2024, pp. 1-2.
12 Council of the EU, Platform Workers: Council Confirms Agreement on New Rules to Improve their Working Conditions, Press Release, 11 March 2024.

Journal of the EU.[13] EU Member States have two years to incorporate the minimum requirements set out in the Platform Work Directive.

This Directive is the very first EU instrument focusing on platform workers in particular.[14] Looking at the instruments' main objectives,[15] i.e. improving the working conditions and protecting personal data of persons performing platform work by 1) introducing measures to facilitate the correct determination of the employment status, 2) promoting fairness, transparency, human oversight, safety and accountability in algorithmic management in the platform work context and 3) enhancing transparency, in platform work, also in cross-border situations, the Platform Work Directive at first sight does not seem to bring about any major changes as far as the social protection of platform workers is concerned. The instrument may have an indirect impact though, at least according to the Directive itself. Reference to social protection and to the Recommendation is made throughout the proposal,[16] by which mainly the assumption prevails that a proper classification may improve the access to social protection.

Concerning the first objective, i.e. the correct determination of the employment status, the Platform Work Directive contains a rebuttable presumption[17] of an employment relationship, depending on the platform's degree of control and direction over the performance of the work. This is assessed according to the facts, as laid down in national law, collective agreements or practice in force in the Member States, while at the same time taking into account the case law of the Court of Justice.[18] A correct determination of employment status could indirectly improve the social security of platform workers. Although the Platform Work Directive highlights the fact that it only imposes the obligation to apply the legal presumption in all relevant administrative or judicial proceedings without imposing the obligation on Member States to apply the legal presumption in social

13 Directive EU 2024/2831 on Improving Working Conditions in Platform Work, OJ L, 2024/2831.

14 *Barrio, Alberto*, The Role of the EU in Adapting Social Law to the Digital Transformation of Work. Lessons Learned from the Proposed Directive on Improving Working Conditions in Platform Work, Hungarian Labour Law e-Journal (2023) 1, p. 21, https://www.hllj.hu/letolt/2023_1_a/02_ABarrio_hllj_uj_2023_1.pdf (accessed on 1 September 2024).

15 Art. 1 Platform Work Directive.

16 Recitals (6) and (11) Platform Work Directive.

17 With the burden of proof to rebut the presumption on the platform; Art. 5 Platform Work Directive.

18 Art. 5 Platform Work Directive.

security proceedings (bearing in mind the limited EU power to intervene in social security matters, see Art. 153 TFEU), the latter is nevertheless encouraged.[19]

A clear framework on the application of the employment status, meets part of the abovementioned challenge on the difference between self-employment and wage labour, as platform workers who are reclassified as employees, may have better social protection (the Recommendation calls for access "on a mandatory basis"). Yet, the Platform Work Directive by no means solves all obstacles in terms of access to social protection. Even though clarity on the employment status may lead to an enlargement of formal access for misclassified platform workers, problems regarding effective access still remain irrespective of the employment status.[20] According to the Recommendation, rules governing contributions and entitlements should not hinder the possibility of accruing and accessing benefits on grounds of the type of employment relationship, but as national social security schemes traditionally implemented minimum thresholds in order to open effective access to social protection schemes (e.g. minimum qualifying periods, working periods), platform workers may still encounter significant obstacles in reaching these minimum thresholds due to the nature of their work. Hence, even if clarity on the employment status is achieved,[21] problems may arise with regard to effective access to social protection.[22]

The other objective set out by the Platform Work Directive concerns the protection of personal data in platform work, amongst other things by setting out limitations on the processing of personal data by means of decision-making systems,[23] imposing the duty on digital platforms to provide a data protection impact assessment,[24] requiring transparency on automated monitoring or decision-making systems,[25] and requiring human oversight and a review of automated systems.[26] Finally, transparency on platform

19 Art. 5 Sec. 3 Subsec. 2 and Recital (33) Platform Work Directive.
20 *Hooker, Josie/Antonucci, Lorenza*, Improving the EU Platform Work Directive Proposal: A Contribution from Emerging Research Findings, OSE Opinion Paper, no. 28, 2022, p. 9, https://www.ose.be/sites/default/files/publications/2022_Hooker_Antonucci_OpinionPaper28.pdf (accessed on 1 September 2024).
21 *Schoukens, Paul*, Building Up and Implementing the European Standards for Platform Workers (fn. 2), pp. 307-334.
22 Ibid.
23 Art. 7 Platform Work Directive.
24 Art. 8 Platform Work Directive.
25 Art. 9 Platform Work Directive.
26 Arts. 10-11 Platform Work Directive.

work itself is required, inter alia by a requirement to declare platform work and provide access to relevant information on platform work.[27] Most relevant in light of the connection between these objectives and the social protection of platform workers in particular would be Art. 16 and 17 of the Platform Work Directive. Art. 16, only applicable to platform workers who work as employees, sets out the obligation for digital platforms to declare work performed by platform workers (employees) to the competent (labour and social protection) authorities.[28] This would particularly be relevant in situations where digital labour platforms are established in another country than the country in which the platform work is performed.[29] Art. 17 continues with the obligation to share information on the number of persons performing platform work and their contractual or employment status, the general terms and conditions applicable to those contractual relationships, and the intermediaries the digital labour platform has a contractual relationship with. On request by the competent authority, the platform must also provide information on the average duration of activity, the average weekly number of working hours and the average income of those working on the platform on a regular basis. Competent authorities furthermore have the right to ask for additional details and clarifications of the information provided. Unlike Art. 16, Art. 17 is applicable to all persons performing platform work irrespective of whether they are classified as employees or self-employed persons. The Explanatory Memorandum acknowledges that the duty to declare basic relevant information on the number of platform workers working through digital labour platforms may facilitate the enforcement of applicable rules.[30] An example would be increased clarity on the social contributions due for platform workers. It is important to note however, that this assumes that in cross-border situations, it will always be clear which the competent country will be for social protection (in application of Regulation EU 883/2004 and/or social security coordination conventions). For platform work this may not always be the case, even if the platform worker is (assumed to be) working as wage-earner.[31]

27 Arts. 16-17 Platform Work Directive.
28 Art. 16 Platform Work Directive.
29 Recital (55) Platform Work Directive.
30 Recital (9) and (57) Platform Work Directive.
31 *Strban, Grega/Carrascosa Bermejo, Dolores/Schoukens, Paul/Vukorepa, Ivana*, Social Security Coordination and Non-Standard Forms of Employment and Self-Employment: Interrelation, Challenges and Prospects, MoveS Analytical Report 2018, Brussels 2020, pp. 30-36; *Vukorepa, Ivana*, Cross-Border Platform Work: Riddles for

A final key provision that may indirectly improve the platform workers' social protection, is the protection from dismissal as laid down in Art. 23. Member States must take the necessary measures to prohibit dismissal or termination of the platform workers' contract merely based on the grounds that they have exercised their rights under the Platform Work Directive. Above that, platform workers will have the explicit right to ask for the grounds for the dismissal or termination of contract. This can be pivotal in light of unemployment protection in particular, given that the proof of the involuntary character of the unemployment is often a requirement in order to become entitled to unemployment benefits.

What the Platform Work Directive fails to address, however, is how to deal with unpaid labour. Research shows that unpaid labour is an inherent part of platform work (e.g. periods when platform workers have to wait when picking up a delivery, or the fact that they will often charge too little time for an assignment for fear of bad ratings).[32] The question then arises as to how unpaid work should be addressed in employment law (working hours), but in particular also in social security law: labour that is not remunerated by platforms will hardly lead to any accrual of social protection rights.

Overall, the Platform Work Directive does, strictly speaking, not deal with the challenges that platform workers face as regards their social protection. It merely addresses the issue in an indirect manner assuming that the rebuttable presumption of an employment relationship and the reporting of the work on platforms will lead to a better social protection for platform workers in the end. Yet, turning platform workers into employees does not solve the issues they face in relation to effective access to social protection. Social protection systems do apply minimum income and/or work thresholds that are ultimately detrimental for platform workers (including the ones working on the basis of an employment contract), as

Free Movement of Workers and the Social Security Coordination, Zbornik PFZ 70 (2020) 4, pp. 481-511 and *Strban, Grega*, Social Law 4.0 and the Future of Social Security Coordination, in: Becker, Ulrich/Chesalina, Olga (eds.), Social Law 4.0: New Approaches for Ensuring and Financing Social Security in the Digital Age, Baden-Baden: Nomos 2021, pp. 335-362.

32 *Pulignano, Valeria/Piasna, Agnieszka/Domecka, Markieta/Muszyński, Karol/Vermeerbergen, Lander*, Does it Pay to Work? Unpaid Labour in the Platform Economy, ETUI Policy Brief, 2021.15, pp. 8-9, https://www.etui.org/sites/default/files/2021-11/Does%20it%20pay%20to%20work.%20Unpaid%20labour%20in%20the%20platform%20economy_2021.pdf (accessed on 1 September 2024).

their work is characterised by short term part-time contracts and limited revenues. In line with the suggestions made by the Recommendation this asks for a more comprehensive regulation of the minimum protection to be guaranteed to persons whose work is characterized by short time assignments; as a large share of these persons are hired as self-employed workers, it is doubtful whether the EU has been given the competence to implement such regulation.[33]

3. Directive (EU) of the European Parliament and of the Council of 19 October 2022 on Adequate Minimum Wages in the European Union

Another challenge that remains completely unaddressed by the Recommendation is the often very low income earned by platform workers and the question of how to take this into account for the organisation of social protection. As the previous discussion noted: "*The Recommendation calls for guaranteeing an effective social protection and thus for organizing the system so that scattered insurance records should not be disproportionally sanctioned in social protection systems, yet remains silent as to what should be guaranteed in terms of decent levels of social protection and what when the income basis was too low during his or her working life to justify a decent minimum protection.*"[34]

In this regard, another recently adopted EU-instrument could indirectly contribute to extended social protection for platform workers on low income: the Directive on adequate minimum wages in the European Union (hereinafter: the Minimum Wage Directive). The Minimum Wage Directive remains general in its wording and targets all persons under an employment contract. Nevertheless, the importance of a framework on adequate minimum wages in view of the structural trends reshaping the labour market and the increase of e.g. platform work, is mentioned in the recitals.[35]

Two core elements prevail: 1) setting adequate minimum wages and 2) promoting collective bargaining.[36] Both serve the overarching goal of

33 *Barrio, Alberto,* The Role of the EU in Adapting Social Law to the Digital Transformation of Work (fn. 14), p. 34.
34 *Schoukens, Paul*, Building Up and Implementing the European Standards for Platform Workers (fn. 2), p. 326.
35 Recital (11) Directive on Adequate Minimum Wages.
36 Arts. 4 and 5 Directive on Adequate Minimum Wages.

reducing in-work poverty.[37] Bearing in mind the lack of competence for the EU to intervene on the level of pay, as set out in Art. 153(5) TFEU, the Minimum Wage Directive does not establish the level of pay as such but serves as a *framework* for setting adequate minimum wages,[38] including several criteria to be taken into account by the Member States.[39] According to the Minimum Wage Directive, these elements are not infringing the lack of EU competence as they fall under "working conditions", enshrined in Art. 153(1)(b) TFEU, which is invoked as legal basis. This reasoning, however, has been highly controversial and continues to cause uncertainty: at the time of writing this paper, an action for annulment of the Directive brought by Denmark is pending.[40]

An adequate minimum wage is described as a wage that is fair in relation to the national wage distribution and at the same time provides a decent standard of living, which, suggested by the Minimum Wage Directive, corresponds to national reference values of 60% of the gross median wage or 50% of the gross average.[41] There is no obligation for Member States guaranteeing minimum wage protection by means of collective agreements to implement a statutory minimum wage.[42] With respect to the promotion of collective bargaining, the Minimum Wage Directive obliges Member States in which the collective bargaining coverage rate is below 80% to establish an action plan promoting collective bargaining, as collective bargaining is considered an important element in achieving adequate wages.[43]

For platform workers in particular, it is acknowledged that they often operate in low-paid occupations and have more difficulties organising and negotiating collective agreements.[44] Moreover, research has shown

37 *Ratti, Luca*, The Sword and the Shield: The Directive on Adequate Minimum Wages in the EU, Industrial Law Journal 52 (2023) 2, p. 485.
38 Art. 1 Directive on Adequate Minimum Wages.
39 *Di Marco, Antonio*, Minimum Wages Directive and Beyond: Workers' Dignity Taken (Almost) Seriously, Human Rights Law Review 23 (2023) 3, p. 5.
40 Action brought on 18 January 2023 – Kingdom of Denmark v. European Parliament and Council of the European Union, Case C-19/23, 2023/C 104/22.
41 Recital (28) Directive on Adequate Minimum Wages.
42 Art. 1 (4)(a) Directive on Adequate Minimum Wages.
43 Art. 4 (2) Directive on Adequate Minimum Wages; Recital (16) Directive on Adequate Minimum Wages; *Di Marco, Antonio*, Minimum Wages Directive and Beyond: Workers' Dignity Taken (Almost) Seriously (fn. 39), p. 6.
44 Recital (11) Directive on Adequate Minimum Wages.

that platform workers are prone to in-work poverty.[45] In that sense, the aims of the Minimum Wage Directive of safeguarding at least a minimum wage for platform workers and increasing the possibility to negotiate better wages sound promising. In terms of the social protection of these workers however, most of the abovementioned problems are not remedied. Higher wages in theory have an effect on the rights accrual and in the end lead to higher benefits, but the actual effect can be questioned. First of all, even when the income is fixed at a certain minimum, the risk of labour instability prevails amongst platform workers. Scattered insurance records and insufficient working hours may still lead to difficulties reaching certain minimum (income) thresholds or building up enough rights to receive appropriate benefits especially bearing in mind the traditional design of social security systems based on a less fragmented work record and the fact that the minimum wages as set out in the Minimum Wage Directive also refer to full-time employment as a starting point.[46] Moreover, we can question whether mere protection against poverty is sufficient in light of the philosophy of professional social security schemes, which in the end aim to appropriately protect against the loss of income from work. Finally, here, too, unremunerated waiting periods remain problematic.

Another important limitation is the scope of application. The Minimum Wage Directive only applies to those working under an employment contract.[47] Hence, self-employed workers are excluded. Even if more clarity around the employment relationship was created under the Platform Work Directive, a large part of the platform workers would still be considered self-employed workers and therefore excluded from the Minimum Wage Directive. In order to enjoy minimum guarantees for their remuneration, self-employed platform workers will need to find recourse to other legal means, such as the possibility to conclude collective "labour" agreements with their principals. As will be addressed below, the recent EU Commission guidelines on collective agreements by solo self-employed workers have provided an outcome of sorts in this respect (see 4.). Similarly, the information duty which the Platform Work Directive refers to in Art. 17 (see above under 2.) could be helpful, too, if it covered the remuneration (levels) provided to self-employed platform workers.

45 *De Becker, Eleni/Schoukens, Paul/Bruynseraede, Charlotte/Dockx, Alexander*, Working Yet Poor Project. Comparative Report on Social Security, Horizon 2020, 2022, p. 247.

46 Recital (28) Directive on Adequate Minimum Wages.

47 Art. 2 Directive on Adequate Minimum Wages.

4. Guidelines on the Application of Union Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons

Platform workers who qualify as self-employed persons thus do not fall within the scope of the Minimum Wage Directive. Moreover, until very recently, their rights to collective bargaining and entering into collective agreements were virtually non-existent, as the EU for many years took a reluctant stance on collective bargaining power among the self-employed because of the anti-competitive effect of such agreements.[48]

Art. 101 TFEU enshrines a prohibition to conclude anti-competitive agreements between undertakings. Quite soon, the Court of Justice of the EU ruled in *Albany*[49] that collective bargaining between employees and employers with the intention to improve the working conditions of the employees are excluded from the scope of application of Art. 101 TFEU. For self-employed workers, however, the prohibition remained in effect, although more recent case law caused a shift. In *FNV Kunsten*[50] the ECJ ruled that false self-employed and self-employed workers in a situation comparable to that of employees, are excluded from the prohibition of Art. 101 TFEU. The ambiguity of the judgment raised several questions regarding the extent of the application of the prohibition to conclude collective agreements.

In order to create clarity, the Commission set out Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons[51] (hereinafter: the Guidelines). It becomes apparent that, in the light of creating a level playing field between economic and social objectives and the increasingly blurred boundaries between employees and self-employed workers, the EU is quiet-

48 *Countouris, Nicola/De Stefano, Valerio*, The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively", in: Waas, Bernd/Hießl, Christina (eds.), Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights, Alphen aan de Rijn: Wolters Kluwer 2021, p. 10 ff.

49 ECJ 21 September 1999, C-67/96, Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie, EU:C:1999:430.

50 ECJ 4 December 2014, C-413/13, FNV Kunsten Informatie en Media v. Staat der Nederlanden, EU:C:2014:2411.

51 Communication from the Commission. Guidelines on the Application of Union Competition Law to Collective Agreements Regarding Working Conditions of Solo Self-Employed Persons, (2022/C 374/02).

ly moving away from the stringent interpretation in favour of competition law.[52]

The Guidelines provide clarity as to situations in which collective agreements concluded by solo self-employed workers will not be considered as violating Art. 101 TFEU, as well as to situations which are as such excluded from the prohibition set out in the article. Especially the latter is of interest for the discussion on platform workers. According to the Guidelines and in line with the jurisprudence of the ECJ, two categories are entirely excluded from the scope of application of Art. 101 TFEU: false self-employed and solo self-employed persons in a situation comparable to workers. Section 3 of the Guidelines clarifies that *"Collective agreements by solo self-employed persons comparable to workers [fall] outside the scope of article 101 TFEU"*, and are hence allowed (if it concerns the improvement of their working conditions at least). Solo self-employed persons comparable to workers include three types of solo self-employed workers: 1) economically dependent solo self-employed workers, 2) solo self-employed persons working "side-by-side" with workers, and 3) solo self-employed persons working through digital labour platforms.[53]

According to point 15 of the Guidelines, working conditions "include matters such as remuneration, rewards and bonuses, working time and working patterns, holiday, leave physical spaces where work takes place, health and safety, insurance and social security, and conditions under which solo self-employed persons are entitled to cease providing their services or under which the counterparty is entitled to cease using their services." In terms of social protection for platform workers, the previous would mean that collective agreements can be concluded (whether by the social partners or not) that relate to additional social protection, for example in the event of illness or unemployment. Wage settlements can also have an impact on social protection because it can lead to higher pension accrual (as mentioned above).

52 *Hoekstra, R.F.*, Het grondrecht op collectief onderhandelen van zelfstandigen versus het Europese mededingingsrecht, Arbeidsrechtelijke Annotaties 12 (2018) 3, pp. 43-44.

53 Point 2(d) of the Guidelines defines "digital labour platform" as follows: "any natural or legal person providing a commercial service which meets all of the following requirements: 1) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application, 2) it is provided at the request of a recipient of the service and 3) it involves, as a necessary and essential component, the organization of work performed by individuals, irrespective of whether that work is performed online or in a certain location."

IV. Conclusion

Several new EU initiatives have been launched to protect the working conditions of platform workers. The major limitation of the initiatives is to be found in the scope of protection: they address mainly labour law protection and leave aside the field of social protection. Although it is assumed that some of the measures will have an indirect effect on the eventual social protection of platform workers – such as the rebuttable assumption that platform work is performed on the basis of a labour contract when facts indicate control and direction, and the fact that the contractual relations will need to be reported to the competent authorities – the main problem in relation to social security remains at the end of the day: due to irregular work patterns and scarce revenues, platform workers struggle with an effective and adequate access to social protection. The main remedies to address these problematic issues have been suggested in the EU Recommendation on access to social protection, however they are stipulated in a general fashion and need to be fine-tuned to the specific case of platform work. In other words, notwithstanding the recent initiatives that have been taken at EU level to protect (platform) work better, the essentials for what is needed in the field of social security are still to be found in the EU Recommendation. What now remains is the challenge to have these social security recommendations translated into a more (legally) enforceable EU instrument.

New Forms of Organising Work and Challenges for Coordinating National Social Security Systems in the EU

Grega Strban

I. Introduction

One of the most challenging questions, socially and legally, is to which country and to which legal system a cross-border (employed and self-employed) worker belongs.[1] More specifically, which social security system is called upon to collect social security contributions[2] and to provide social security benefits? When social security systems were developing after the Second World War, the standard beneficiary was perceived as a man in full time, open-ended employment with family responsibility towards a wife and two children.[3] When such a person moved to another country, it was usually for a longer period of time.

Therefore, deciding on a *lex loci laboris* rule, according to which a person is subject to the social security system in the country of work, regardless of where such person or family members reside[4] or where the employer is based, was only logical, legally and practically.[5] The idea was that the social

1 Verschueren, Herwig (ed.), Residence, Employment and Social Rights of Mobile Persons, On How EU Law Defines Where they Belong, Intersentia 2016; see Art. 48 TFEU mentioning "employed and self-employed migrant workers".

2 Concerning the not always easy task of distinguishing between social security contributions and taxes cf. *Rennuy, Nicolas/Weerepas, Marjon*, in: Spiegel, Bernhard (ed.), Social Security and Tax Law in Cross-Border Cases, MoveS Legal Report 2022, https://op.europa.eu/en/publication-detail/-/publication/f9a7f369-ed21-11ec-a534-01aa75ed71a1/language-en (accessed on 1 September 2024).

3 Art. 67 ILO Convention No. 102 on Minimum Standards of Social Security, 1952.

4 The place of work is still recognised as a decisive factor and workers in the Member State of work, rather than children in the residence state, have to be treated equally. See, e.g. decision in case C-328/20 – Commission v. Austria (Indexation of family benefits), EU:C:2022:468.

5 *Jorens, Yves*, Cross-Border EU Employment and its Enforcement: An Analysis of the Labour and Social Security Law Aspects and a Quest for Solutions, Springer 2022, p. 230.

security system with the closest and most genuine link[6] to a worker shall apply. Hence, the work-based centre of interest, rather than residence shall form the legal basis for social security coverage. Under such perception, labour and social security are clearly interrelated.[7]

The *lex loci laboris* rule became subject to criticism already when more residence-based social security Member States joined the EU, such as the UK, Ireland and Denmark in 1973. Later on, also countries not fully basing their social security on social insurance joined, such as Spain and Portugal in 1986, as well as Sweden and Finland in 1995.

The question of the present paper is whether the physical place of work[8] is still the most appropriate connecting factor between a person and a social security system in today's times of modified living and working conditions. It is not so much that cross-border mobility occurs more often and is of shorter duration than in the past, but it has become more and more unpredictable,[9] which undermines the *lex loci laboris* rule. It seems that the *lex loci domicilii* rule, favouring the place of residence as a connective factor for social security, is applicable not only for economically non-active persons[10] but also as a subsidiary principle for residence-based benefits.[11] More importantly, are *lex loci laboris* and *lex loci domicilii* the only choices to determine the closest link between a person and a national social security system or do other possibilities exist?

Furthermore, persons in more flexible, non-standard forms of employment (e.g. fixed-term, part-time, agency employment) and self-employment (e.g. part-time, involuntary, sole trader, dependent self-employment) living in various kinds of partnerships (e.g. with reconstituted families,

6 The CJEU has used the notion of a "genuine link", e.g. in case C-138/02 – Collins, EU:C:2004:172.

7 Although the social security law of one Member State and the labour law of another may apply to a migrant worker, cf. *Jorens, Yves*, Cross-Border EU Employment and its Enforcement: An Analysis of the Labour and Social Security Law Aspects and a Quest for Solutions (fn. 5), p. 231.

8 See e.g. case C-137/11 – Partena, EU:C:2012:593.

9 *Strban, Grega (coord.)/Carrascosa Bermejo, Dolores/Schoukens, Paul/Vukorepa, Ivana*, Social Security Coordination and Non-Standard Forms of Employment and Self-Employment: Interrelation, Challenges and Prospects, MoveS Analytical Report 2018, Brussels 2020, p. 10, https://op.europa.eu/en/publication-detail/-/publication/d5ae78c2-c578-11ea-b3a4-01aa75ed71a1/language-en (accessed on 1 September 2024).

10 Art. 11 of Regulation (EC) 883/2004.

11 See e.g. case C-352/06 – Bosmann, EU:C:2008:290.

living together apart, or other arrangements)[12] may be more vulnerable in the labour market and may be dependent on social assistance in order to live a life in dignity. However, is the right to free movement still guaranteed to social assistance recipients?

Therefore, recent developments in social security coordination are explored. They refer mainly to the (repeated) failure to reform the Social Security Coordination Regulations, the need for better identification of the competent Member State – also by introducing a multilateral framework agreement on cross-border telework – and the application of the EU Charter of Fundamental Rights by the Court of Justice of the EU.

II. Determining the Applicable Social Security Legislation

The Social Security Coordination Regulations[13] determine the applicable legislation for standard workers. A distinction is made between activities as an employed and, respectively, self-employed person. What is relevant is employment and self-employment for the purposes of legislative affiliation with social security, but not with other fields such as labour or tax law. Moreover, "activity" is defined by the Member State in which such activity exists and it is not always very clear when an activity is recognised as that of an employed or self-employed person (e.g. with doctoral researchers/students, whose legal status may vary from country to country).[14] Hence, definitions might differ also due to social security law not recognising (in full) certain activities for unemployment insurance, such as mini-jobs or self-employment.[15]

12 *Strban, Grega (coord.)/Spiegel, Bernhard/Schoukens, Paul,* The Application of the Social Security Coordination Rules on Modern Forms of Family, European Commission, MoveS Analytical Legal Report, Brussels 2019, 2020, https://op.europa.eu/en/publication-detail/-/publication/aa8476cd-c4af-11ea-b3a4-01aa75ed71a1/language-en (accessed on 1 September 2024).

13 Regulation (EC) 883/2004 on the Coordination of Social Security Systems, OJ L 166 of 30 April 2004 as amended, and Regulation (EC) 987/2009 (so-called Implementing Regulation), OJ L 284 of 30 October 2009 as amended.

14 Berghman, Jos/Schoukens, Paul (eds.), The Social Security of Moving Researchers, Leuven: Acco 2010.

15 *Strban, Grega*, Social Law 4.0 and the Future of Social Security Coordination, in: Becker, Ulrich/Chesalina, Olga (eds.), Social Law 4.0: New Approaches for Ensuring and Financing Social Security in the Digital Age, Baden-Baden: Nomos 2021, p. 335.

Varying definitions might result in uncertainty for the workers, since they might not be aware as to which element will be decisive for their social security coverage. It might be the (habitual or actual) place of work, the place of habitual residence (related to the substantive part of the activity performed there, while defining "residence" may not always be easy as such),[16] the seat of the employer, or other elements that are relevant for establishing the closest or most genuine link to the legislation of a certain Member State.

Matters can become even more complicated in relation to the application process for the A1 form confirming the legislation applicable. Employers might not be certain when and for which purpose the A1 has to be requested, e.g. for posting or for simultaneous activities. The distinction also depends on the time frame which is used for an assessment. It might not be a case of consecutive posting or a weekly pattern of pluriactivity, but workers might be assessed on a yearly basis, which may actually allow forum (or better: applicable legislation) shopping on the part of employers.

1. Centre of Professional or Business Activities

There might be several solutions to the problem of determining the legislation applicable for highly mobile workers. One is to reconsider and modernise the *lex loci laboris* rule. If the place where one effectively works is what governs the determination of a competent Member State, why not keep track of these places in a systematic (e.g. yearly) manner. The work of the majority of people might still be mostly performed on the territory of a certain Member State. This Member State could remain competent for the days of work performed in another Member State. It is open for discussion what should be the minimum amount of work performed in a Member State in order to make the latter a competent state. It might be the minimum of, e.g. 80%, 75% or 66% of a person's overall work. Instead of work, income earned could also be a criterion for determining the closest and most genuine link with a certain Member State. The percentage might be lower if habitual residence is taken into account (as currently a proportion of 25% of work in the Member State of residence is required, although employment has precedence over self-employment). Otherwise,

16 See e.g. case C-255/13 – I, ECLI:EU:C:2014:1291, where a person residing for over a decade in another Member State did not establish residence there. *Corpus manendi* was present, but *animus manendi* was missing.

the closest and most genuine link might be established in the Member State of residence, regardless of the economic activity.

However, it might not always be easy to distinguish from other, already existing rules for determining the applicable legislation. Posting provisions, for example, seem rather difficult to apply to the group of highly mobile workers, who most of the time travel to specific Member States for a shorter period of time in an irregular pattern. The solution might be to specify a minimum working period (or income gained) in another Member State in order to apply the posting rules – which were, after all, designed for a more stable working period abroad (up to 24 months).[17]

Such a designation rule with focus on a centre of professional activities was proposed as a "click" system for mobile researchers. A highly mobile researcher would, by "clicking" a competent Member State that is established according to a person's research centre, remain under that social security legislation also during future activities in other Member States. This proposal was introduced especially for third-country nationals who come to the EU (the European Research Area) to work for a university and/or research institution, but it could also be applicable to researchers moving within the EU.[18]

Moreover, a special designation rule has already been established for flight crew or cabin crew members performing air passenger or freight services.[19] The so-called home base rule stemming from Regulation (EC) No. 1008/2008[20] is a welcome novelty. The purpose of the new rule was to have a clear and stable criterion to determine the applicable social security legislation for pilots and cabin crew without too many changes. Nevertheless, it has not alleviated all the issues of unclarity regarding the implications of some social security coordination rules. Stability of the home base rule is undermined by setting no limit on the number of home bases an individual pilot or cabin crew member may be assigned to over time, and it does not rule out the possibility of having home bases in several

17 Art. 12 of Regulation (EC) 883/2004.

18 *Schoukens, Paul/Pieters, Danny/Berghman, Jos et al.*, Social Security, Supplementary Pensions and New Patterns of Work and Mobility: Researchers' Profiles. Brussels: European Commission, DG Research, 2010, https://cdn5.euraxess.org/sites/default/files/policy_library/final_report_september2010_0.pdf (accessed on 1 September 2024).

19 Art. 11(5) of Regulation (EC) 883/2004.

20 Regulation (EC) 1008/2008 of 31 October 2008 on Common Rules for the Operation of Air Services in the Community, OJ L 293.

Member States. Neither does the legislative framework foresee a procedure for changing the home base or the number of times it can be changed.[21] Moreover, the concept of the operator, who assigns the home base to the worker, is still unclear. The majority of low-cost airlines are not hub-based, but provide point-to-point connections, operating from different points ("bases") in distinctive Member States.[22] Additionally, in several Member States, there is a view that in this context, the Posting of Workers Directive[23] is not applicable as a consequence of the designation rules for pilots and aircrew members.[24]

2. A Genuine EU Social Security Scheme

Another option, instead of a stable centre of professional activities, could be a genuinely EU-wide social security system. Such a solution has already been proposed in the form of a Thirteenth State (today it could be the Twenty-Eighth State or Thirty-Second State, taking also EFTA States, if participating in social security coordination, into account). It was envisaged as a single European social security system which would operate as an alternative to the current Social Security Coordination Regulations.[25]

Such a system could be open to all intra-EU migrants. They would have the option of joining such system and not make use of the coordination rules and underlying national social security systems that are coordinated on the basis of the Social Security Coordination Regulations. The European

21 European Transport Workers Federation, Fair Aviation for All: A Discussion on Some Legal Issues, 2019, pp. 12-17, https://www.etf-europe.org/resource/fair-aviation-for-all-the-legal-issues-jan-2019/ (accessed on 1 September 2024).

22 *Jorens, Yves*, Cross-Border EU Employment and its Enforcement: An Analysis of the Labour and Social Security Law Aspects and a Quest for Solutions (fn. 5), p. 272.

23 Directive 96/71/EC of 21 January 1997 concerning the Posting of Workers in the Framework of the Provision of Services, OJ L 018 and Directive 2014/67/EU on the Enforcement of Directive 96/71/EC concerning the Posting of Workers in the Framework of the Provision of Services and Amending Regulation (EU) 1024/2012 of 28 April 2014 on Administrative Cooperation through the Internal Market Information System ("IMI Regulation"), OJ L 159.

24 *Busschaert, Gautier/Pecinovsky, Pieter*, The Application of the EU Posting Rules to Aircrew, EU Project Research Report for Support for Social Dialogue in the Civil Aviation Sector, Brussels, 2019, p. 58.

25 *Pieters, Danny/Vansteenkiste, Steven*, The Thirteenth State. Towards a European Community Social Insurance Scheme for Intra-Community Migrants, Leuven: Acco 1993; *Pieters, Danny/Schoukens, Paul*, The Thirteenth State Revisited, Festschrift Franz Marhold, Wien: Manz Verlag 2020, p. 807.

system would offer a complete system of social insurance, covering all traditional social risks. The method applied is not completely new in EU law, since there are special schemes adopted under the Staff Regulations (such as the Sickness Insurance Scheme common to the institutions of the European Communities – JSIS). There were also lively discussions on introducing either a genuine or a top-up European Unemployment Benefits Scheme (EUBS).[26]

The objectives of such an EU scheme would be to present an alternative to the mere (but complex) coordination of national social security law, to provide an incentive for a voluntary harmonisation of social security systems and to make sure that a public law alternative exists in addition to the emerging initiatives of private insurance cover of the social protection needs of intra-community cross-border workers.

However, as the ideas of a genuine EU social security system are still alive, it might be difficult for the Member States to reach an agreement on the matter. Instead of legislative solutions, a more administrative one has been applied.

3. Multilateral Administrative Agreement

During the COVID-19 sanitary crisis, where many were obliged to stay at home and work from there, a practical solution has been found in order to avoid having to change the applicable social security legislation. If only the physical workplace had been taken into account, the applicable legislation might have switched from *lex loci laboris* to *lex loci domicilii* (if a substantial part of activities is pursued in the Member State of residence, as it is a rule for simultaneous activities).[27] Therefore, the link between a worker and his workplace has been broken.

Telework (not necessarily from home)[28] was not known, or at least not so widespread, when the Coordination Regulations were passed. It was boosted during the pandemic and is likely to stay, be it in the form of

26 *Strban, Grega/Hauben, Harald*, The Legal and Operational Feasibility of a European Unemployment Benefits Scheme at the National Level, in: Coucheir, Michael (ed.), CEPS Special Report No. 145, September 2016.

27 Art.13 of Regulation (EC) 883/2004 and Art. 14 of Regulation (EC) 987/2009.

28 On different, but (to a certain extent) overlapping notions, cf. *Schoukens, Paul/Everaet*, *Gerard*, A Reflection on Telework in Social Security Coordination, Zbornik PFZ, 73 (2023) 2-3, p. 375.

combining office work with working from home, or combining work with leisure (so-called workation). The special regime, which retained the applicable legislation and disregarded the physical place of work, was advocated during the pandemic and justified with *force majeure*. It was enshrined in the Guidance Note on Telework, yet ceased to be applicable by 30 June 2023.[29]

Although the Member States followed this guidance, many legal questions were raised. The competencies of the Administrative Commission for the Coordination of Social Security Systems are not endless. It has no competences for making or modifying EU law, not even in cases of *force majeure*.[30] The question is whether the special Guidance Note was at all necessary. Some argue that the place of work (*locus laboris*) has a legal meaning. It is not necessarily the place where a person physically works, but the place where the outcome of work is effective, i.e. for which work is performed (place of employment). In this way, continuity of a legal relation can be upheld also during telework periods. Otherwise, migrant workers may be discriminated against, since resident workers in the Member State of employment could be preferred by employers.[31] This might be true if a person works for one (and the same) employer from another Member State.[32] However, it might also be possible that a person teleworks for more employers (customers) in (and from) several Member States. In such cases, a special rule or a special agreement might be required.

In order not to change the applicable legislation too often and secure stable inclusion in a given social security system, the Member States have concluded bilateral agreements valid during the pandemic and beyond it.[33] This practice has been followed by a multilateral Framework Agreement on the application of Art. 16(1) of Regulation (EC) No. 883/2004 in cases of

29 Administrative Commission for the Coordination of Social Security Systems, Guidance Note on Telework, EMPL/1053-01/22, AC 125/22REV3.

30 *Eichenhofer, Eberhard*, Sozialer Schutz bei Arbeit vom Homeoffice im Binnenmarkt, Zeitschrift für europäisches Sozial- und Arbeitsrecht (ZESAR) 2 (2003) 9, p. 355; *Schoukens, Paul/Everaet Gerard*, A Reflection on Telework in Social Security Coordination, Zbornik PFZ, 73 (2023) 2-3, p. 380.

31 *Verschueren*, *Herwig,* The Application of the Conflict Rules of the European Social Security Coordination to Telework During and After the COVID-19 Pandemic, European Journal of Social Security (EJSS) 24 (2022) 2, p. 92.

32 *Eichenhofer* ZESAR 2 (2003) (fn. 30), p. 356.

33 Cf. ibid., where a bilateral agreement between Germany and Slovakia from 6 April 2023 is mentioned. Home office work does not affect applicable legislation if it remains below 40% of the overall work duties.

habitual cross-border telework (hereafter the Framework Agreement), for which the depositary state is Belgium.[34] It has been applicable as of 1 July 2023, when it was signed by 18 EU and EFTA Member States.[35] One more state (Slovenia) has joined as of 1 September 2023, and another one (Italy) as of 2024. However, it seems that not all Member States have an intention to sign it. For instance, Denmark has decided not to sign it, at least for the moment, since the Regulation Rules are there considered to be effective and as the country already has a similar special agreement with Sweden.[36]

Such Framework Agreement raises several legal questions. For instance, can the principle of unicity of applicable legislation with strong and overriding effect be upheld, if not all Member States sign the Framework Agreement on cross-border telework? Does it enable a circumvention of applicable legislation rules by leaving the Member States an option to elect distinctive rules based on the "interest of certain persons or categories of persons"? And if so, a concrete interest of such person(s) has to exist. The question is whether Art. 16 of Regulation (EC) 883/2004 covers such a general Framework Agreement on cross-border telework or whether it is outside its scope.[37] Namely, the Agreement applies generally to "all persons to whom Art. 16(1) of the Basic Regulation can be applied", but excludes specific categories of persons, i.e. self-employed workers. Moreover, a worker has to make a request to be able to telework and teleworking from a residence Member State shall proportionally amount to less than half of the overall working time (under 50%, hence a maximum of 49% of telework). It also excludes teleworking during one's holidays in cases where a person stays outside the residence Member State for his holidays. The Agreement on applicable legislation may last for three years, but may be renewed without any time limit, as long as a new request is presented. Hence, it may

34 See also Cross-Border Telework in the EU, the EEA and Switzerland, https://socialsecurity.belgium.be/en/internationally-active/cross-border-telework-eu-eea-and-switzerland (accessed on 1 September 2024).

35 Initial signatories are Austria, Belgium, Croatia, Czech Republic, Finland, France, Germany, Liechtenstein, Luxembourg, Malta, Norway, Poland, Portugal, Spain, Sweden, Switzerland, the Netherlands and the Slovak Republic, see ibid.

36 *Pihl, Maria Louise/Brink, Christina*, Denmark – EU Social Security Framework Agreement on Telework Declined, GMS Flash Alert 2023-210, https://kpmg.com/xx/en/home/insights/2023/11/flash-alert-2023-210.html (accessed on 1 September 2024).

37 *Eichenhofer, Eberhard*, Sozialer Schutz bei Arbeit vom Homeoffice im Binnenmarkt (fn. 30), p. 358.

become a timeless new social security coordination rule, at least for the signature Member States.

The question is: if general framework agreements are possible under Art. 16 of Regulation (EC) 883/2004, why not conclude them for more specific groups of persons, such as highly mobile workers, cross-border platform workers and others? Would such action not contravene the main principle of democracy, i.e. the separation of powers – in this case the separation between legislative and administrative power? It will be for the third branch, i.e. judicial power to decide whether a case shall be brought before the courts of law and the Court of Justice of the EU (CJEU) would be called upon to construe EU law. However, in order to contribute to legal certainty and predictability, a new conflict rule would have to be introduced[38] (similar to the already existing home base rule, or rules for civil servants, and activities pursued on a board a vessel).

III. Providing Access to Social Assistance

The Social Security Coordination Regulations shall be designed to enable free movement of not only employed and self-employed workers and members of their families, but all Union citizens in general.[39] Especially with platform or teleworkers, the distinction between economic activity and economic inactivity may be difficult. Such persons might or might not be paid well and in the latter case they might have to rely on social assistance. However, they might have limited or no access to social assistance during the initial period of their stay in the host Member State. For a residence of three months to five years, sufficient resources and comprehensive sickness insurance cover are required.[40]

38 *Cornelissen, Rob/Van Limberghen, Guido*, A Plea for an Adaptation of the Conflict Rules in the EU Social Security Regulations, in: Ane Aranguiz et al. (eds.), Pioneering Social Europe, Liber Amicorum Herwig Verschueren, Bruges: die Keure 2023, p. 72.

39 *Lenaerts, Koen/Adam, Stanislas/Van de Velde-Van Rumst, Paulien*, The European Court of Justice and the Two Lighthouse Functions of Social Law in the European Legal Space, in: Jorens, Yves (ed.), The Lighthouse Function of Social Law, Springer 2023, p. 11.

40 Art. 7 Directive 2004/38/EC of 30 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158 (so-called Citizens' Rights Directive or Free Movement Directive); on comprehensive sickness insurance cf. also case C-535/19 A – Public health care, EU:C:2021:595.

For more than a decade there has been a debate concerning the determination of unreasonable "burden on the social assistance system of the host Member State"[41] and the deservingness of free movement of Union citizens.[42] Certain conditions have already been set by the CJEU,[43] but there is a twist in a recent judgment of *The Department for Communities in Northern Ireland*.[44] The Court upheld restricted access to social assistance, but invoked the provisions of the Charter of Fundamental Rights of the EU,[45] especially the articles on human dignity, respect for private and family life, and the rights of a child.[46]

The right to reside was granted solely on the basis of national and not EU law, but national social assistance (in the form of a Universal Credit) was refused. Nevertheless, it was done so in the period during which EU law was still applicable in the UK. The CJEU argued that the authorities of a Member State had to assure that the refusal of a benefit did not expose the Union citizen in question as well as her children to an actual and current risk of violation of the fundamental rights. This decision was evaluated critically.[47]

The Court even restricts access to social assistance by seemingly assuming that every application for social assistance by economically inactive migrating Union citizens is "unreasonable".[48] The proportionality test was not considered, although the notion "unreasonable" suggests that there

41 *Verschueren, Herwig*, Free Movement or Benefit Tourism: The Unreasonable Burden of Brey, European Journal of Migration and Law 16 (2014) 2, pp. 147-179.

42 *Mišič, Luka/Strban, Grega*, Social Security and Free Movement: Why EU Mobility Will Always Come at a Price, in: Jorens, Yves (ed.), The Lighthouse Function of Social Law, Springer 2023, p. 421. *Van Oorschot, Wim*, Making the Difference in Social Europe: Deservingness Perceptions among Citizens of European Welfare States, Journal of European Social Policy, 16 (2006) 1, p. 23.

43 C-333/13 – Dano, EU:C:2014:2358, C-67/14 – Alimanovic, EU:C:2015:597, C-299/14 – Garcia-Nieto and Others, ECLI:EU:C:2016:114.

44 Case C-709/20 CG v. The Department for Communities in Northern Ireland, EU:C:2021:602.

45 OJ C 326 of 26 October 2012.

46 *Lenaerts, Koen/Adam, Stanislas/Van de Velde-Van Rumst, Paulien*, The European Court of Justice and the Two Lighthouse Functions of Social Law in the European Legal Space (fn. 39), p. 15.

47 *Verschueren, Herwig*, The Right to Social Assistance for Economically Inactive Migrating Union Citizens: The Court Disregards the Principle of Proportionality and Lets the Charter Appease the Consequences, Maastricht Journal of European and Comparative Law (MJ) 29 (2022) 4, p. 483.

48 Recitals 10 and 16 of Directive 2004/38/EC.

might also be a reasonable burden and that one has to be accepted by the host Member State.[49] The Court did not refer to social assistance in Art. 34 of the EU Charter, nor has it applied the rules on equal treatment and the prohibition of discrimination based on nationality.

At the same time, the Court refers to the EU Charter as a means for the national judge to grant social assistance after all. The Court primarily refers to Art. 1 of the EU Charter, which states that human dignity should be protected and respected. In the Court's view, this means that the host Member State has to ensure that Union citizens who are in a vulnerable position can live in dignified circumstances. The same shall apply to children living with their parent(s). However, the question is whether all previous cases would be decided differently if the EU Charter was invoked in a similar way. Moreover, should general social assistance (and not merely categorical assistance such as special non-contributory cash benefits) be coordinated as well?[50] If this was the case, then also the non-discrimination rules would have to be applied in a similar way to social security benefits.

IV. Conclusion

The landscape of determining the applicable legislation has become more dynamic than it was at the time when the Social Security Coordination Regulations were passed. It might no longer be valid to apply one single social security legislation with strong and overriding effect (at least not in the case of residence-based benefits). Moreover, people are now moving more often and unpredictably, work for more than one employer and combine work and leisure, business with family life. Hence, the *lex loci laboris* rule as it was conceived has now come to be put into question. It is also no longer clear whether the place of physical work or the place where work "produces effects" shall be considered. It gets even more complex when more than one Member State and several employers are involved. Other possibilities might more faithfully reflect the closest and most genuine link of a moving (employed or self-employed) worker with a certain Member State.

49 *Verschueren, Herwig*, The Right to Social Assistance for Economically Inactive Migrating Union Citizens: The Court Disregards the Principle of Proportionality and Lets the Charter Appease the Consequences (fn. 47), p. 492.

50 *Vonk, Gijsbert*, The EU (Non) Co-Ordination of Minimum Subsistence Benefits: What Went Wrong and What Ways Forward?, European Journal of Social Security (EJSS) 22 (2020) 2, p. 138.

The options range from modernising the existing rule on the place of work and extend it to a longer period, to construe new rules, or even a new scheme. Since it is not easy for the Member States to agree on the new Social Security Coordination Rules (and even more so on a new scheme), they sought refuge in administrative practice with the Framework Agreement. Whether this is the best solution that could be applied also to other fields than telework remains questionable.

Furthermore, human dignity shall be provided to all moving (and non-moving) Union citizens. Social assistance is not restricted to economically inactive persons and may be of vital importance for non-standard cross-border employed and self-employed workers. However, it seems that the interpretation of EU law is more restrictive and calls upon each of the Member States to provide social assistance without coordinating it with other Member States.

This might not be the best solution. Modernising EU social security coordination law is required also by the rule of law. Normative action of the EU legislature has to follow the changing societal relations, also due to new forms of organising work, mobility and living conditions. Solutions should not be left (only) to administrative practice, sometimes undermining the coherent mechanism of social security coordination, or to individual Member States or groups thereof.

Recent Developments of Taxation in the Platform Economy

Katerina Pantazatou

I. Introduction

Tax policy of the digital economy continues to make headlines in the world of taxation. Since 2020 and our last contribution, several legal developments within this particular sector have taken place in the field of EU tax law. As already expected back then, these initiatives – that have meanwhile (partly) materialised, have focused primarily on two points: the minimum taxation of multinational corporations (MNEs) with a very high revenue[1] and the allocation of taxing rights among the involved states. This focus stems from the efforts of the OECD and the OECD Inclusive Framework, and it largely ignores the taxation of *individuals* that fall within the scope of the so-called digital economy and the platform economy.

The COVID-19 pandemic and the ensued need to "work from home" challenged the traditional foundations of source and residence taxation notably for people that resided in countries other than the ones they worked in. In order to avoid disruption, the taxation of cross-border workers, who were the most affected by the pandemic, was resolved through bilateral special agreements based on "exceptional measures and circumstances". These agreements would, usually, create a legal fiction for teleworkers, suggesting that even if these persons worked from "home" (residence country), their time there would not be considered in the calculation of the number of ("working") days spent outside the state of employment (source country). Similar solutions were adopted for social security contributions.

Although the recent COVID crisis highlighted the tax challenges that arise from cross-border teleworking in relation to both "the taxation of wages and the taxation of company profits" in that they may result in double taxation and/or increased administrative burdens for taxpayers, em-

1 Council Directive (EU) 2022/2523 of 14 December 2022 on Ensuring a Global Minimum Level of Taxation for Multinational Enterprise Groups and Large-Scale Domestic Groups in the Union (the "GloBE Directive").

ployers and tax administrations alike,[2] the issues that arise from teleworking or even from digital nomadism are not necessarily the same as those that arise from work in the platform economy, where the interposition of the platform may perplex (or facilitate) the administration and collection of taxes.

As already stated in the previous contribution, the loss in tax revenue from tax evasion in the platform shadow economy is huge.[3] This is due to a series of factors varying from deliberate non-disclosure, inadvertent misreporting, underreporting or non-reporting due to administrative difficulties, and strategic choices or misrepresentations in status qualification (confusion as to whether the worker would qualify as a contractor or as an employee). Some of these problems were partly mitigated through the adoption of the so-called DAC7.[4]

II. The DAC7 and its Implementation

1. DAC7 Content and Relevance

In line with the OECD Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy (MRDP),[5] DAC7 aimed at introducing, at an EU-wide level, the obligation to report income earned through digital platforms and the exchange of such information among Member States. This would be effectuated through common reporting rules facilitated for both platform operators and users alike and would allow Member States to receive a more complete set of data and to collect tax revenues more efficiently. The primary idea behind the adoption of DAC7 was "to protect public finances and limit [...] the socio-economic

2 European Economic and Social Committee, Taxation of Cross-Border Teleworkers and Their Employers (2022).

3 *Pantazatou, Katerina*, Taxation of the Platform Economy: Challenges and Lessons for Social Security, in: Becker, Ulrich/Chesalina, Olga (eds.), Social Law 4.0: New Approaches for Ensuring and Financing Social Security in the Digital Age, Baden-Baden: Nomos 2021, pp. 363-393.

4 Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation, OJ L 104, 25.3.2021, pp. 1-26.

5 OECD, Model Rules for Reporting by Platform Operators with Respect to Sellers in the Sharing and Gig Economy, https://www.oecd.org/tax/exchange-of-tax-information/model-rules-for-reporting-by-platform-operators-with-respect-to-sellers-in-the-sharing-and-gig-economy.htm (accessed on 1 September 2024).

consequences" of the COVID-19 pandemic,[6] and not the coordination or facilitation of the taxation of platform workers. This is in line with the MRDP that acknowledges that the reason for introducing common reporting rules was that certain activities carried out through platforms "may not always be visible to tax administrations or be self-reported by taxpayers", as "the development of the gig economy entails a shift from traditional work relations under employment contracts to the provision of services by individuals on an independent basis, which is not typically subject to third-party reporting".

The same difficulties that arise in the platform economy were acknowledged in the preamble of the Directive:

> "The cross-border dimension of services offered through the use of platform operators has created a complex environment where it can be challenging to enforce tax rules and ensure tax compliance. There is a lack of tax compliance and the value of unreported income is significant. Tax administrations of Member States have insufficient information to correctly assess and control gross income earned in their country from commercial activities performed with the intermediation of digital platforms. This is particularly problematic where the income or taxable amount flows via digital platforms established in another jurisdiction."[7]

To combat the loss of revenue from unreported income in the platform economy, DAC7, in line with previous initiatives in the field of administrative cooperation, built on common reporting rules and the automatic exchange of information. The "burden" of reporting the relevant income to the tax administrations falls on the so-called "platform operators", who are entities that contract with the (so-called) sellers to make available all or part of a platform to such sellers.[8] Sellers, in turn, are platform users, either individuals or entities, that are registered at any moment during the reportable period on the platform and carry out a relevant activity.[9] The "relevant activity" qualification is an important one, as in cases where the activity performed through the platform does not fall within the scope of

6 Communication from the Commission to the European Parliament and the Council COM (2020) 312 final of 15 July 2020, An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy.
7 DAC7 (fn. 4), Preamble, Recital 6.
8 DAC7 (fn. 4), Annex Sec. I, A (2).
9 DAC7 (fn. 4), Annex Sec. I, B (1).

the Directive, the platform is not obliged to report. According to the definitions provided in DAC7, ""Relevant Activity" means an activity carried out for Consideration and being any of the following: (a) the rental of immovable property, including both residential and commercial property, as well as any other immovable property and parking spaces; (b) a Personal Service; (c) the sale of Goods[10]; (d) the rental of any mode of transport. The term "Relevant Activity" does not include an activity carried out by a Seller acting as an employee of the Platform Operator or a related Entity of the Platform Operator."[11] The aforementioned definition encompasses several terms that need further clarification and/or definition. Indeed, DAC7 provides for most of them, including what qualifies as "consideration",[12] as well as what is a "personal service".[13] While all activities that fall under the "relevant activity" scope constitute potential sources of income for the "sellers", the one that comes closer to a professional activity, in the sense of employment and/or a stable profession, is the "personal service". Such personal services could include IT services, data entry, copywriting and/or services that can be carried out physically offline, whereby the platform acts as a mere facilitator between the provider and the recipient (e.g. transportation, delivery, cleaning). As with the OECD MRDP, the main feature for qualifying as a "personal service" for DAC7 purposes is that the service is adapted or modified to some extent based on a specific request from a user.[14] Accordingly, other services provided through platforms, which are not, however, adapted to the users' requests (e.g. with pre-recorded digital

10 The inclusion of the sale of goods under the "relevant activity" largely expands the scope of the Directive as it brings more platform sellers into the scope of DAC7 (e.g. sellers on well-known platforms such as Amazon, e-Bay, Etsy, or even Facebook, which has its own marketplace).

11 DAC7 (fn. 4), Annex Sec. I, A (8). This last sentence has created ambiguity as to whether activities performed by a related entity of the platform operator may fall within the "relevant activity" ambit.

12 "Consideration" means compensation in any form, net of any fees, commissions or taxes withheld or charged by the reporting platform operator, that is paid or credited to a seller in connection with the relevant activity, the amount of which is known or reasonably knowable by the platform operator, DAC7 (fn. 4), Annex Sec. I, A (10).

13 "Personal Service" means a service involving time- or task-based work performed by one or more individuals, acting either independently or on behalf of an entity, and which is carried out at the request of a user, either online or physically offline after having been facilitated via a platform, DAC7 (fn. 4), Annex Sec. I, A (11).

14 See definition above (fn. 13) and OECD (2023), Model Reporting Rules for Digital Platforms: Frequently Asked Questions updated in January 2023, Sec. I, q. 11.

content like online courses) fall outside the "personal service" scope and, thus, outside the scope of DAC7.

DAC7 is premised on the idea that the unreported revenue from the platform economy is due to the difficulties encountered by tax authorities in verifying the tax obligations of the "sellers". This task is now transferred to the "reportable platform" that is responsible for verifying the tax obligations of the sellers. Before the adoption of DAC7 some Member States would have in place unilateral reporting obligations, whereas others would not impose such obligations at all. In some Member States, platforms were even required to collect some types of taxes on behalf of the tax authorities (e.g. Italy, France). In the cases of a complete absence of reporting obligations, reporting would be left completely to the "good will" of the platform users ("sellers"). In addition, the different requirements across Member States often created an additional administrative burden for platform operators, as they had to comply with many national standards of reporting.[15] Therefore, it became essential not only to introduce a reporting obligation, but to do so in a standardised manner that would apply across the internal market. Considering that most of the income or taxable amounts of the sellers on digital platforms flow cross-border, the reporting was complemented by the automatic exchange of information between tax authorities of different Member States that were eligible for taxing the earned income. This way, the different tax authorities had the necessary information to enable them to assess income taxes and value added tax (VAT) due correctly.

2. Remaining Questions and Problems

The adoption of DAC7 is certainly a positive development as regards the taxation of the platform economy – which had previously been largely affected by the black economy and tax evasion. The Directive has not solved many of the existing problems that were identified in our last contribution. In this respect, DAC7 does not add anything to the work relationship conundrum – whether the service providers should qualify as employees or as contractors. This remains an issue for the Member States and is resolved on an ad hoc basis. The Directive is, instead, *income-based*. It aims to ensure that the income made by individuals or corporations through the platform economy – *for the platforms that qualify as reportable platforms*, is reported. It does not, however, aim to resolve how this income should

15 DAC7 (fn. 4), Preamble, Recital 7.

be taxed, nor where should it be taxed or what type of income is produced (income from employment or other type of income). However, the Directive implicitly suggests that if the primary problem of the identification of potential taxpayers and their taxable income is resolved (through reporting and the automatic exchange of information), then the rest should follow.

Specifically, each reporting platform operator needs to report, with regard to each reportable seller that carries out the reportable activity, "the *total Consideration* paid or credited during each quarter of the Reportable Period and the number of Relevant Activities in respect of which it was paid or credited; [and] any fees, commissions or taxes withheld or charged by the Reporting Platform Operator during each quarter of the Reportable Period."[16] The reporting platform operator is also required to collect from the sellers and provide to the tax authorities more information, including a VAT registration number (if applicable), the Tax Identification Number (TIN), and, under certain conditions, a tax residency certificate. In collecting this information, the platform is obliged to carry out its due diligence obligations as described in the Directive. If a seller does not provide the information required in the Directive "after two reminders following the initial request by the Reporting Platform Operator, but not prior to the expiration of 60 days, the Reporting Platform Operator shall close the account of the Seller and prevent the Seller from re-registering on the Platform or withhold the payment of the Consideration to the Seller as long as the Seller does not provide the information requested."[17]

One problem that has been identified in the context of DAC7 is the possibility given to several "sellers" and "platforms" to fall outside the remit of DAC7, and thus escape the reporting obligations. Specifically, due to the registration requirement on the platform for sellers, it has been pointed out that if a business carries out activities in its own name directly via its own software, it will not qualify as a "seller" because it does not need to register on the platform for the purpose of being connected to users.[18] Similarly, the related party operating software may be considered a platform operator, since it does not contract with sellers.[19] The OECD has also clarified that

16 DAC7 (fn. 4), Annex Sec. III, B (2) (e) and (f).

17 DAC7 (fn. 4), Annex Sec. IV, A (2).

18 *Bravo, Nathalie*, The Meaning of Platform under DAC7: More Clarity Needed, Kluwer International Tax Blog (27 June 2023), https://kluwertaxblog.com/2023/06/27/the-meaning-of-platform-under-dac7-more-clarity-needed/#_ftnref14 (accessed on 1 September 2024).

19 Ibid.

when the platform operator supplies the goods or services to the customers acting in its own name and on its own behalf, it is outside the scope of the reporting obligations.[20] Thus, in case the platform operator acts as an undisclosed agent, supplying goods or services in its own name and on behalf of the seller, the OECD clarifications suggest that such a case would fall outside the scope of the DAC7 reporting obligations. However, this approach largely ignores that the risk of tax avoidance with respect to the income realised by the seller would still exist, triggering the raison d'être of DAC7.[21]

Other problems that have arisen in the context of DAC7 relate to the visibility (on behalf of the platform) of the consideration paid to the seller. In many cases the business model of the platform allows the platform operator to have visibility over the consideration paid to the seller. However, this is not always the case and according to DAC7, there is no expectation that the platform operator puts in place additional procedures to gain access to information on the consideration where it is not otherwise known or reasonably knowable.[22] However, as Bravo notes, there are cases where the knowledge of the consideration (and its amount) is not always clear.[23] Such cases may include software that facilitates the digital (re)ordering of goods sold by well-established wholesalers to retailers. Its operator has knowledge of the number of items ordered and their regular prices, but not of the fulfilment of the orders, the issuing of invoices and the relevant payments, as all the payments are directly made to the wholesalers.[24]

3. Can Social Security Learn Anything from Taxation?

In the past 3 years, the focus of tax law has been on the taxation of *corporations* operating in the sphere of the digital economy. DAC7 has been a modest, yet important step towards combatting the platform shadow economy and facilitating the "workers" income declaration to the tax authorities

20 OECD Optional Module, OECD Model Rules.
21 *Persiani, Alessio*, DAC7: Some Thoughts on the Different Roles of Platform Operators and the Appropriate Definition of the Scope of Reporting Obligations, 4 EC Tax Review (2023), p. 163, 170.
22 See for the definition of "consideration" fn. 12.
23 *Bravo*, *Nathalie*, The Meaning of Platform under DAC7: More Clarity Needed (fn. 18).
24 Ibid.

with the help of the platform. Accordingly, DAC7 contributes to fighting the phenomenon of undeclared work and the concomitant phenomenon of the evasion of taxes and social security contributions.[25] This development further contributes to the financing of social security schemes by providing adequate revenue to the Member States while also providing a framework that assists in fighting bogus self-employment.

However, most of the other problems that were pointed out in the last contribution[26] have not been resolved yet. Thus, the question remains whether social security can learn anything from taxation. By ensuring that the income that arises across different Member States and through different platforms is reported to the relevant tax authorities, DAC7 could prove to be a useful tool also for the purpose of calculating social security contributions, at least those that are (earned) income-related.

In addition, one could reasonably argue that since taxes and social security contributions are so alike, the administration and collection of social security contributions should be carried out by the respective tax authorities. As has been argued in the past, "[r]egardless of whether social security contributions are treated as taxes under the constitution and laws of a particular country, they are justifiably considered as taxes [...] because the contributions are imposed by legislation that involves the same issues as other tax legislation and that interacts with other tax laws, particularly the individual income tax law."[27]

One fundamental difference in the platform economy, however, is the cross-border flows that are somehow inherent to platform work. In this context, more than one state is usually involved; the worker/services provider may reside in a place other than the place where the service is "consumed".[28] At first sight, this is not a problem for taxation that allows different Member States (residence and source countries) to impose taxes on the income that arises, although sometimes double taxation may en-

25 *Mineva, Daniela/Stefanov, Ruslan*, Evasion of Taxes and Social Security Contributions. European Platform Undeclared Work. September 2018, https://www.ela.europa.eu/sites/default/files/2021-09/Evasion%20of%20Taxes%20and%20Social%20Security%20Contributions.pdf (accessed on 1 September 2024).

26 *Pantazatou*, *Katerina*, Taxation of the Platform Economy: Challenges and Lessons for Social Security (fn. 3).

27 *Williams, David*, Social Security Taxation in V. T. Thuronyi (ed.), Tax Law Design and Drafting, Vol. 1, IMF 1996, p. 347.

28 This problem appears much more in the case of digital nomads that may or may not necessarily use "intermediary" platforms to sell their services.

sue.[29] However, this is/would be a problem for social security contributions that are supposed to be paid only in one Member State. In such a case, which state would be responsible for the imposition and collection of the social security contributions? It appears, thus, that the collection of social security contributions by tax authorities could work in cases where both the service and the provider are located in the same place. Despite the shortcomings of DAC7, especially those relating to the Directive's scope (covered platform operators and "relevant activity"), domestic tax authorities should have the relevant income information to, possibly, calculate and collect social security contributions (as long as those are based on earned income through work).

This certainly does not mean that the taxation and tax laws have solved all the problems that could arise in the context of working in the digital and/or platform economy. The OECD and the UN Model Tax Conventions that constitute the model rules upon which most double tax conventions (DTC) are based are not fit to allocate taxing rights in cases of digital work. This is because the relevant rules are (still) linked with the physical presence of the employee at the "workplace".[30] However, in cases of digital and/or platform work, it has become difficult to identify the "workplace", as "workers" are often not physically present in their employer's residence state nor do they perform activities related to businesses in the country where they are working remotely.[31] This situation may allow platform workers to escape taxation in several states (especially if they stay there for short periods) and may jeopardise other states' taxing rights. While the qualification of the "work status" (employee/services provider) is an additional problem to resolve, it is left primarily to national law to decide.

In this sense, EU and international tax law are certainly not yet mature enough to provide a solution to the multiple problems that arise. One first step in fighting undeclared work has been taken with the adoption of DAC7. However, tax law is based on bilateral agreements that allocate taxing rights in cross-border situations. The application of the right provision in these DTCs depends on the qualification of the work relationship, which is, in turn based on national law. The qualification of the "residence" of the

29 See *Pantazatou*, *Katerina*, Taxation of the Platform Economy: Challenges and Lessons for Social Security (fn. 3), p. 363, 378.

30 Ibid.

31 *Pignatari, Leonardo Thomaz*, The Taxation of "Digital Nomads" and the "3 Ws": Between Tax Challenges and Heavenly Beaches, Intertax 51 (2023) 5, p. 384, 392.

"worker" is another difficult hurdle to surpass, especially in cases of digital nomads.

There are, of course, certain cases in which the tax legal framework will be able to identify the state that has the right to tax the income that arises from work in the platform economy. But this would apply to the few, uncomplicated cases, where the "worker" resides in one place for a relatively long period and exercises his work from there. In addition, this may be one of the many taxes workers in the platform economy would have to pay. They may have to pay taxes on income from employment (or the provision of independent services) in other states or even in the same state if their work in the platform economy has an ancillary character. Under these circumstances, it would be difficult for the tax authorities of one state to bear the burden of collecting social security contributions in the state where "taxes are paid", because as income may be obtained in more than one state, taxes may also be paid in multiple states. As long as the state taxes that income, it is not interested in the activity generating the income and whether it has an ancillary character or not, making it irrelevant (and very difficult) to identify the *one state* where the main activity is exercised in order to ensure that social security contributions are paid there.

Part III:
Comparative Perspective

Social Protection of Platform Workers in a Comparative and European Perspective

Ulrich Becker and Olga Chesalina

I. Introduction

1. At the time our Book Social Law 4.0[1] was being prepared for publication, namely the end of 2020, EU countries were just starting to address the challenges digitalisation was posing for the labour market and for social security systems. Since then, these challenges have become even more prominent. Triggered and driven by digitalisation, new forms of economic activity and the number of persons involved in those activities are growing. Yet, legal research has still mostly concentrated on the consequences of these developments for labour law,[2] although the last few years have also seen a rise in activities with a view on social security law, and several articles have dealt with the role of social security law in an era of digitalisation, both from a comparative[3] and from a national[4] perspective.

1 Becker, Ulrich/Chesalina, Olga (eds.), Social Law 4.0: New Approaches for Ensuring and Financing Social Security in the Digital Age, Baden-Baden: Nomos 2021.

2 See as most recent examples, and without any claim of being able to paint a comprehensive picture here: *Jarrett, Kylie*, Digital Labor, Oxford: Polity Press 2022; Gyulavári, Tamás (ed.), Decent Work in the Digital Age, Gordonsville: Hart Publishing 2022; *Kocher, Eva*, Digital Work Platforms at the Interface of Labour Law, London: Hart Publishing 2022; Carinci, Maria Teresa/Dorssemont, Filip (eds.), Platform Work in Europe, Cambridge: Intersentia 2021; *Aloisi, Antonio/De Stefano, Valerio*, Your Boss Is an Algorithm: Artificial Intelligence, Platform Work and Labour, London: Hart Publishing 2022; *Aloisi, Antonio*, Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead, ELLJ 13 (2022) 1, pp. 4-29, *Adams-Prassl, Jeremias/Abraha, Halefom/Kelly-Lyth, Aislinn/Silberman, Michael Six/Rakshita, Sangh*, Regulating Algorithmic Management: A Blueprint, ELLJ 14 (2023) 2, pp. 124-151.

3 *Daugareilh, Isabelle*, Introduction: Social protection for digital platform workers in Europe, ISSR 74 (2021), pp. 5-12; *Barrio, Alberto*, The Role of the EU in Adapting Social Law to the Digital Transformation of Work. Lessons learned from the proposed Directive on improving working conditions in platform work, Hungarian Labour Law E-Journal (2023) 1, pp. 20-45; *De Becker, Eleni/Seo, Hyojin/Pulignano, Valeria/Schoukens, Paul*, Mapping social protection coverage for platform workers: A comparative analysis of Belgium, Italy and the Netherlands, EJSS 26 (2024) 1, pp. 1-24; *Barrio, Alberto*, Unemployment insurance for platform workers: Challenges and approaches from a

Against this background, the observations that follow are intended to achieve a twofold aim: first, they systematically review the challenges of digitalisation for social protection and the reactions to these challenges; secondly, they compare and evaluate these reactions from a social law and social policy perspective. On the one hand, we want to see whether the innovations and proposals on access to social protection of persons in new forms of employment, and in particular platform workers, at national and European levels that were reported in our Book Social Law 4.0 were realised over the last four years. On the other, we want to analyse the present situation in the light of how access to social protection is actually achieved, and how this protection is, or can be, financed. Our observations start with recent developments as the title "Social 4.0: Update" suggests, but not without also going back to the information already published in 2021. Thus, the contributions that were prepared for the two rounds of our joint project form the basis for the following pages. But we also include other sources and information from European states that did not form part of the project.[5]

The focus of our research interest is still on access to social protection and the financing of this protection. The first topic concerns a very elementary aspect of social protection systems, as the legal conditions for access also conceptualise a legal responsibility of a political community for the

comparative perspective, EJSS 26 (2024) 2, pp. 1-15; *Mangold, Sonja*, Platform work and traditional employee protection: The need for alternative legal approaches, ELLJ (2024), pp. 1-14.

4 See contributions to the special issue: Social protection for digital platform workers in Europe, ISSR 74 (2021), vol. 3-4: *Wattecamps, Céline*, From precarity to the denial of social status in the Belgian legal order: The social security rights of platform workers in question, pp. 13-38; *Jacqueson, Catherine*, Platform work, social protection and flexicurity in Denmark, pp. 39-59; *Montebovi, Saskia*, Accommodating platform work as a new form of work in Dutch social security law: New work, same rules?, pp. 61-83; *Daugareilh, Isabelle*, Social protection and the platform economy: The anomalous approach of the French legislator, pp. 85-109; *Borelli, Silvia/Gualandi, Sofia*, Which social security regime for platform workers in Italy?, pp. 133-154; *Roşioru, Felicia*, The social protection of platform workers in Romania: Meeting the growing demand for affordable and adequate coverage?, pp. 155-175; *Pérez Guerrero, María Luisa/Royo, Miguel Rodríguez-Piñero*, Social security for Spain's platform workers: Self-employed or employee status?, pp. 177-194; *Ghorpade, Yashodhan/Rahman, Amanina Abdur/Jasmin, Alyssa*, Social insurance for gig workers: Insights from a discrete choice experiment in Malaysia, ISSR 77 (2024) 3, pp. 3-30.

5 All online sources cited in the footnotes of this chapter were last accessed on 14 March 2025.

welfare of the persons involved. Yet, we also point to the responsibility of private actors, i.e. undertakings or, in our context, platform companies, namely through the voluntary provision of social benefits on the basis of private law, more precisely labour law, especially based on collective agreements. The second topic mentioned above deserves attention because the realisation of social rights is costly, and every social benefits system needs to have a sound financial basis. However, this general observation is not the main point of interest here. In the context of the economic activities of platform workers, the much more specific question that arises is whether platform providers can, or even should, be asked to participate in the financing of social protection systems. This has implications for social law, and consequently legal responsibility.[6]

2. In a first step (II.), we give a brief overview of the factual background as well as the challenges for social protection. This deals with the growing number of platform workers, but positioned within a broader framework of the changes in the way these economic activities are performed. In this step, we also briefly sum up the institutional background to social protection, as both the necessity to adapt existing schemes as well as the options on how to realise these adaptations depend on the characteristics of the social protection systems in place. Action needs to be taken at national level as Member States of the European Union are responsible for the creation and the functioning of their own social protection schemes. Yet, there are also reactions at European level which serve, in the framework of the existing division of powers between the Union and its Member States, as social policy guidelines.

In a second step (III.), we systematise the reactions to the challenges from the perspective of the relevant actors. These reactions relate to the determination of the social protection (or employment) status of platform workers. They may come about in different ways: first by case law and the interpretation of the existing provisions on the concept of employed earners (or of self-employment), secondly by law and by changing the existing provisions. This differentiation is, at one and the same time, one between the role of the judiciary on the one hand, and of the legislator on the other, in other words between social law and social policy. Policy reactions

6 As has been discussed in the context of the German social insurance for artists, see *Becker, Ulrich/Chesalina, Olga*, Social Law 4.0: Challenges and Opportunities in Social Protection, in: Becker/Chesalina, Social Law 4.0 (fn. 1), p. 15, 20 et seq.

can take very different forms: from a reformulation of the legal definition of employed earners to procedural reactions, in particular presumption clauses, to the creation of new legal categories of economic activities, positioned somewhere between employment and self-employment. Thirdly, the reactions of the private actors involved should not be overlooked: the companies involved may determine the status of persons working for them within the framework of existing laws. But also in this context, the legislator may react first and create a specific statutory basis for contractual agreements. In any case, reactions are part of the process, and it is important to follow this process a bit further also, as reactions will often cause re-reactions. This holds particularly true in our context: generally speaking, private parties are allowed to use their autonomy to determine the circumstances of economic activities, and if they choose specific ways of performing those activities with a specific view to the existing laws on social protection, then they can be expected to react to changes in the application and, or, the formulation of those laws.

Our following steps aim to analyse the developments and their outcomes. In relation to access to social protection (IV.), we use some basic normative dimensions of access as a yardstick for an evaluation, as they also form part of the relevant EU Recommendation on access to social protection for workers and the self-employed of 8 November 2019[7]. In the following part (V.), we come back to reactions by private actors in a broader sense. This does not involve the already mentioned determination of a specific status for platform workers but the question of how far social protection is being guaranteed within industrial relations and by use of labour law. This also leads to the more general question (VI.), of how far and why platforms should be involved in the financing of the social security of platform workers. The answer depends on some general observations on the legal meaning of social responsibility, but also on the actual feasibility of the involvement of platforms and aspects of social policy.

Finally, we conclude with a short summary and proposals for the future of social protection of platform workers.

7 OJ C 387/1, 15 November 2019.

II. Factual and Systematic Background

1. Factual Background

a) Definition of Platform Work

Before turning to figures and factual developments, we need to start from a clear concept of platform work. This form of work forms part of online work, which is a more general and broader term, including work activities carried out online on the basis of "traditional" employment relationships (e.g. telework).[8] Today, platform work has become a widely acknowledged[9] and meaningful definition of a specific category of online work, namely of economic activities of persons for platforms.

With a view to the term "platform", Directive 2024/2831 on improving working conditions in platform work[10] provides a definition in the context of work. According to its Art. 2(1)(a), "digital labour platform" means "a natural or legal person providing a service which meets all of the following requirements: (i) it is provided, at least in part, at a distance by electronic means, such as by means of a website or a mobile application; (ii) it is provided at the request of a recipient of the service; (iii) it involves, as a necessary and essential component, the organisation of work performed by individuals in return for payment, irrespective of whether that work is performed online or in a certain location; (iv) it involves the use of automated monitoring systems or automated decision-making systems". This definition implies the involvement of at least three participants: the digital labour platform, the service recipient, and the individual performing platform work. The criterion of "organisation of work" means that digital platforms serving solely as marketplaces do not meet that definition; nevertheless, Member States must ensure that persons who have "a contractual relationship with an intermediary enjoy the same level of protection"[11] (Art. 3 Directive 2024/2831).

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8 *De Stefano, Valerio*, Chapter 55. Online Work, in: Davidov, Guy/Langille, Brian/Lester, Gillian (eds.) The Oxford Handbook of the Law of Work, Oxford: OUP 2024.

9 See for that development Eurofound, Platform work, https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/platform-work.

10 Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 (OJ L, 2024/2831, 11 November 2024).

11 See Art. 2(1)(e) of Directive 2024/2831.

In order to better capture the different phenotypes of platform work, it is useful to distinguish between two forms of digital labour platform in line with the definitions of the International Labour Organization (ILO): location-based platforms and online platforms. The former involves services performed at a specified physical location by individuals. It spans various sectors, such as passenger transport, food and parcel delivery, cleaning, household services, and more. In the case of online platforms, the services are performed online and remotely by workers and are allocated to a crowd (on microtask and competitive programming platforms) or to individuals (on freelance and contest-based platforms).[12] Work delivered by individuals through the first type of digital labour platform can be defined by the terms "on-location platform work" ("location-dependent" / "location-based") and "work on demand".[13] Work provided by individuals on the second type of digital labour platform is named "location-independent" platform work, "crowdwork", web-based work,[14] online work or remote platform work".[15]

In terms of the persons providing services for platforms, Directive 2024/2831 distinguishes between platform workers and persons performing platform work. While "platform worker" means "any person performing platform work who has or is deemed to have an employment contract or an employment relationship as defined by the law, collective agreements or practice" (Art. 2(1)(d)), a "person performing platform work" means any individual performing platform work, irrespective of the nature of the contractual relationship or its designation by the parties involved (Art. 2(1)(c)). We do not follow this concept here, but make use of a broader term in which platform workers includes both employees and the self-employed.

12 ILO, Realizing decent work in the platform economy. International Labour Conference 113th Session, 2025. ILC.113/Report V (1), Geneva: ILO, 2024, https://www.ilo.org/resource/conference-paper/ilc/113/realizing-decent-work-platform-economy, p. 15; Eurofound, Work on demand: Recurrence, effects and challenges, Luxembourg: Publications Office of the European Union, 2018, doi:10.2806/463459, https://www.eurofound.europa.eu/publications/report/2018/work-on-demand-recurrence-effects-and-challenges.

13 Ibid.

14 *Pesole, Annarosa/Urzí Brancati, Maria Cesira/Fernández-Macías, Enrique/Biagi, Federico/González Vázquez, Ignacio*, Platform Workers in Europe, EUR 29275 EN, Publications Office of the European Union, Luxembourg, 2018, ISBN 978-92-79-87996-8, doi:10.2760/742789, JRC112157, p. 14, https://publications.jrc.ec.europa.eu/repository/handle/JRC112157.

15 *Piasna, Agnieszka*, Counting Gigs. How can we measure the scale of online platform work? Working Paper 2020.06, ETUI, Brussels: ETUI 2020, p. 11, https://www.etui.org/sites/default/files/2020-09/Counting%20gigs_2020_web.pdf.

First, this follows a common understanding of the term workers, which includes all individuals who perform work through digital labour platforms. Second, and more importantly, we need to start with a general term that does not depend on the type of employment status of the persons involved as this status is exactly what is at issue in our analysis.

b) Figures

There is still a lack of reliable data on the size and development of platform work in the European Union and in the Member States.[16] No official data is available at EU level with the exception of the results from a 2022 experimental statistical product.[17] Few studies have been published since 2021[18] when the European Commission predicted that the number of platform workers would increase from 28.3 million in 2022 to 43 million in 2025.[19] Numerous publications and statements have circulated these figures.[20] However, the European Commission's scenario remains questionable. The figure projected by the European Commission for 2024 is significantly higher than the total number of self-employed workers in the European Union in 2023 (approximately 27.97 million).[21] In addition, the European Commission's projection does not take into account the highly adaptable and flexible nature of platform work. In 2021 it was not possible to predict

16 European Commission, Study to support the impact assessment of an EU initiative to improve the working conditions in platform work, Final Report, Luxembourg: Publications Office of the European Union 2021, p. 38, https://op.europa.eu/en/publication-detail/-/publication/454966ce-6dd6-11ec-9136-01aa75ed71a1/language-en; *Chesalina, Olga*, Platform Work: Critical Assessment of Empirical Findings and its Implications for Social Security, in: Becker/Chesalina, Social Law 4.0 (fn. 1), p. 39, 49 et seq.

17 Eurostat, Experimental statistics on digital platform employment, https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20240718-1.

18 Spotlight on digital platform workers in the EU, https://www.consilium.europa.eu/en/infographics/digital-platform-workers.

19 Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, p. 1, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52021PC0762.

20 *Beckmann, Fabian/Glanz, Sabrina/Hoose, Fabian/Topal, Serkan*, Investigating social protection amongst platform workers in Germany: forced individualisation, hybrid income generation and undesired regulation, Journal of Social Policy 2024, pp. 1-19.

21 Statista, Number of self-employed people in the European Union from 2002 to 2023, https://www.statista.com/statistics/946989/self-employed-persons-in-eu/.

whether some of the platform providers would withdraw their business from certain Member States, due to legal disputes on the employment status of platform workers. During the COVID-19 pandemic, on-location platform work reached a peak in 2022 in certain sectors; its growth has slowed considerably since then.[22]

Notwithstanding these uncertainties, studies indicate that engagement in platform work has increased steadily across Europe in recent years.[23] Unfortunately, these studies are based on different parameters which make it difficult to compare them. According to a pilot survey on Digital Platform Employment in 2022, 3% of all people aged 15 to 64 were involved (to various degrees) in digital platform employment.[24] The number of platforms connecting businesses and clients to workers has grown significantly, rising from 193 in 2010 to 1,070 in 2023.[25] Among these, the largest concentration of on-location platforms was found in the delivery sector (334), followed by individual passenger transport (119) and care work (121).[26]

It is, important to note, in particular in the context of social protection, that there is a significant variation in the prevalence of platform work across EU countries. One study has shown that platform work accounts for as much as 6.5% of the workforce in Ireland, compared to just 2.2% in Romania.[27] There is also variation in trends. While platform work is developing at a slower pace in some countries – particularly in Central and Eastern Europe[28], but also in some Western European countries like

22 IAB-Forum, Gig-work in the German delivery-services sector: Employment has increased significantly in recent years, 9 July 2024, https://www.iab-forum.de/en/gig-work-in-the-german-delivery-services-sector-employment-has-increased-significantly-in-recent-years/.

23 Eurofound, Self-employment in the EU: Job quality and developments in social protection, Publications Office of the European Union, Luxembourg 2024, p. 59, https://www.eurofound.europa.eu/en/publications/2024/self-employment-eu-job-quality-and-developments-social-protection.

24 Eurostat, Employment statistics - digital platform workers, June 2023, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_statistics_-_digital_platform_workers#Main_concept_and_data_collection.

25 ILO, Realizing decent work in the platform economy (fn. 12), p. 15.

26 Ibid.

27 *Piasna, Agnieszka/Zwysen, Wouter/Drahokoupil, Jan*, The platform economy in Europe, ETUI, The European Trade Union Institute 2022, p. 16, https://www.etui.org/publications/platform-economy-europe.

28 European Commission, Study to support the impact assessment (fn. 16), p. 39.

Belgium[29] – it has experienced rapid growth in other Western European nations, such as the UK, France[30] and Germany[31] in recent years, even if the absolute number of platform workers might still be relatively low. To put this in a broader framework: nowhere in Europe is the percentage of platform workers as high as in some Asian countries. In China, the number of platform workers is increasing, and its proportion in total employment reached 9.7% in 2018.[32] According to the China Sharing Economy Development Report of 2020, about 78 million workers were relying on internet platforms for employment.[33]

A critical issue in evaluating the development of platform work is the lack of standardised measurement methods. An experimental statistic on "Digital Platform Employment"[34] has been developed by a Eurostat's task force on Digital Platform Employment dedicated to this topic. The methodology applied followed the principles of the OECD-ILO-Eurostat Handbook on Measuring Digital Platform Employment and Work[35]. The statistics cover in particular digital platform employment where the platform or the phone app controls and/or organises essential aspects of the activities.[36] Considering that such control is an indicator of an employment relationship, it is questionable whether self-employed platform work is encompassed by the experimental statistic. In this context, it is important to include information on the economic activities of the self-employed.

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29 *De Becker, Eleni/Bruynseraede, Charlotte*, Unemployment protection for self-employed and platform workers in Belgium, EJSS 26 (2024) 2, p. 123, 125 et seq.

30 See *Larkin, Philip*, in: Social Law 4.0: Update, p. 32 and *Kessler, Francis*, in: Social Law 4.0: Update, p. 61.

31 IAB-Forum, Gig-work in the German delivery-services sector (fn. 22).

32 ILO, Digital Labour Platforms and Labour Protection in China, https://webapps.ilo.org/static/english/intserv/working-papers/wp011/index.html.

33 Sharing Economy Research Center of State Information Center: Report on the Development of China's Sharing Economy (2020), p. 8. Cited by *Xiaohui, Ban/Beck, Tobias/Bormann, René/Däubler, Wolfgang/Kungang, Li/Fayang, Wang/Qian, Wang/Yang, Yang*, Platform Economy in China and Germany. Labour Law Policy Recommendations for Decent Work, FES 2023, https://library.fes.de/pdf-files/bueros/china/20528.pdf.

34 Eurostat, Experimental statistics on digital platform employment, https://ec.europa.eu/eurostat/de/web/products-eurostat-news/w/ddn-20240718-1#:~:text=In%202022%2C%203.0%25%20of%20people,countries%20and%201%20EFTA%20country.

35 European Commission, Eurostat, Methodological Note, p. 2, https://ec.europa.eu/eurostat/documents/7894008/19514151/methodological-note.pdf/28785edd-6b75-c7c8-f99c-66bafee98e42?t=1720022363891.

36 Ibid.

According to a 2024 Eurofound study[37], the proportion of the self-employed among platform workers has fallen from 15.4% in 2010 to 13.7% in 2022. However, these numbers are based on the official EU Labour Force Survey, which tends to focus on the main occupation. Therefore, accurate data on self-employment in a secondary occupation is lacking.[38] Similar problems exist at national level. In Germany,[39] national statistics are based on microcensus data which only consider the main activity, excluding hybrid forms of employment,[40] and do not adequately capture individuals in liberal professions.[41] These matters here as, for most persons involved, platform work serves as a secondary activity – which brings us to different types of activity from the perspective of platform workers.

c) Types of Activity

Two aspects of work activities are important as they can also serve as indicators for the need for social protection, namely time and earnings. In terms of the first, there seems to be a consistent trend: for most persons involved, platform work serves as a secondary activity, supplementing their primary employment or main source of income.[42] There are exceptions though, in particular among certain on-location platform workers in transport and delivery services.[43] In terms of earnings, platform work encompasses a range of activities with varying levels of remuneration, from low to high.

If we distinguish two categories within both aspects, namely the main activities as against additional ones in the case of time, and low-paid as against medium- or high-paid work in the case of earnings, this leads to the following combinations:

37 Eurofound, Self-employment in the EU (fn. 23), p. 1.
38 Ibid., p. 11.
39 Selbstständige im Inland nach Wirtschaftssektoren, https://www.destatis.de/DE/Themen/Wirtschaft/Konjunkturindikatoren/Lange-Reihen/Arbeitsmarkt/lrerw15a.html.
40 *Langer, Cosima/Mauch, Katrin*, Datenlücke Solo-Selbstständigkeit Anforderungen zur Verbesserung der Datenlage, 2023, p. 10, 31, https://hausderselbststaendigen.info/wp-content/uploads/2023/09/230914-HDS-Datenluecke_Solo-Selbststaendigkeit-Digital.pdf.
41 IfM, Selbstständige/Freie Berufe, https://www.ifm-bonn.org/statistiken/selbststaendige/freie-berufe/selbststaendige.
42 European Commission, Study to support the impact assessment (fn. 16), p. 43; ILO, Realizing decent work in the platform economy (fn. 12), p. 21.
43 *De Becker et. al.,* EJSS 26 (2024) 1, (fn. 3), p. 8.

– Highly skilled workers may use platform work as their main occupation or as a supplement to their income. In the case of the first alternative, they will have sufficient resources at their disposal to finance insurance covering social risks; in the case of the second and the existence of a stable work relationship outside the platform economy, they will regularly be protected against social risks via their main activity.
– Low-skilled platform workers without a main occupation beyond the platform economy are likely to become economically dependent on platform work, and they are covered the least by social protection.[44] They share the same challenges in access to social protection as other workers in precarious non-standard employment (short-term contracts, zero-hours contracts, marginal and unstable employment).

This rough categorisation helps to make a potential need for social protection visible. However, before we turn to the institutional aspects, some practical ones need to be emphasised. First, it is often difficult to assess the status of platform workers, which is the reason why the Council of the EU has adopted the argument that the main barriers to accessing social security systems for platform workers are their atypical self-employment status (both false self-employment status and genuine self-employment status) and the non-standard employment arrangements[45] (see below, III.1. and IV.1.). Second, one can assume that given the specific nature of platform work which is often characterised by an uncertain employment status, by low pay, short-term or part-time engagements, a high proportion of unpaid work, and irregular working hours,[46] access to social protection is particularly challenging. Third, platform companies leverage their monopsony positions to benefit from informational asymmetries, withholding critical information (e.g. ratings mechanisms, pricing mechanisms). This practice restricts the range of potential buyers for the services provided by platform workers.[47] Additional obstacles include algorithmic management systems

44 *Zachary, Kilhoffer/Pieter De Groen, Willem/Lenaerts, Karolien/Smits, Ine/Hauben, Harald/Waeyaert, Willem/Giacumacatos, Elisa/Lhernould, Jean-Philippe/Robin-Olivier, Sophie,* Study to gather evidence on the working conditions of platform workers, VT/2018/032, Final Report, 13 March 2020, European Commission, 2020, p. 72.

45 See European Commission, Study to support the impact assessment (fn. 16), p. 60 and also fn. 7.

46 *Schoukens, Paul/Bruynseraede, Charlotte*, in: Social Law 4.0: Update, p. 78 et seq.

47 *Barrio, Alberto*, The further extension of social security to non-wage earners, in: Pennings, Frans/Vonk, Gijsbert (eds.), Research Handbook on European Social Security Law, 2nd ed., Cheltenham: Edward Elgar Publishing 2023, p. 130, 136.

designed to minimise compensable working hours and the prevalence of piece-rate or task-based payment methods (see below, IV.3.).

2. Needs and Options for Legal Responses

a) Types of Benefit Systems

aa) Systematisation

Whether and how social policy should react to the growing phenomenon of platform work depends not only on the numbers of persons involved in such activities, but also on the institutional structure of the existing social protection schemes. Again, this structure varies from one state to the other. Nevertheless, and from a comparative perspective, there are certain fundamental characteristics of social protection schemes that have been shaped over time by the common functions of those schemes[48] and the need to set up effective administrative bodies to organise the distribution of social benefits. Therefore, we can observe a typology of social protection schemes, even if there is still some variety with regard to the way in which they are set up in practice, and also with regard to the combination of schemes being used in each state.

The most relevant criteria for the identification of specific social protection schemes are their financing, in other words the differentiation between contributions on the one hand and taxes on the other as financial sources. Of course, there are some mixtures between these two basic forms of financial sources, as many social insurance schemes receive a certain amount of state subsidies or certain basic infrastructure is paid for from the general budget. Sometimes, even the distinction between contributions and taxes is blurred, as can be learned from the most prominent example of the *Contribution social généralisée* in France.[49] However, that does not call into

48 See for the role of historical developments in a comparative perspective *Zacher, Hans*, Vorfragen zu den Methoden der Sozialrechtsvergleichung, in: Zacher H. F., Abhandlungen zum Sozialrecht, edited by von Maydell, Bernd/Eichenhofer, Eberhard, Heidelberg: C.F. Müller Juristischer Verlag 1993, pp. 337, 368 et seq.

49 See for the CSG and the Contribution au remboursement de la dette sociale (CRDS) information of the French Treasury, https://www.economie.gouv.fr/particuliers/contribution-sociale-generalisee-csg and https://www.vie-publique.fr/fiches/21973-quest-ce-que-la-csg-contribution-sociale-generalisee.

question the importance of this distinction.[50] Contributions always have a specific legal relationship with the benefits they are paid in for: not in the strict sense of equivalence as far as social insurance is concerned, as there has to be some financial redistribution between the contributors (and the insured) in order to establish solidarity; but in the sense that there is a subjective right to benefits, that these benefits may not be made conditional on individual means tests, and that the amount of benefits may vary according to the amount of contributions. This can justify the use of social benefits as an instrument to secure different individual levels of living. With a view to the last aspect, the level of social protection plays a crucial role. If the aim of this protection is to cover a major part of the population, low contributions and low benefits will be the preferred choice. This allows for universalism, but it also reduces the role of social insurance to a basic protection, leaving more room for individual responsibility (including occupational protection). That explains the differences often characterised as the so-called *Bismarckian* and *Beveridgean* systems, which are also often wrongly confused with the fundamental differentiation between different sources of financing.

If we add to this institutional-based categorisation a functional one that takes different social policy aims into account, we arrive at four different types of social protection schemes:

	Social Insurance	Social Support	Social Assistance	Social Compensation
Aim	Precaution against social risks	Support in situations of specific social need = positive situation	Alleviation of poverty = negative situation	Compensation for damages in cases of community responsibility
Financing	Contributions	Tax	Tax	Tax
Means test	No	Partially	Yes	No

Whereas tax-financed benefits for social support and social assistance are open to anyone falling under the respective jurisdiction, contribution-financed social insurance benefits are rather selective. They will only be granted to persons who belong to the group of the insured, and they will often require a certain period of insurance. Traditionally, social insurance

50 See *Becker, Ulrich*, Das Sozialrecht: Systematisierung, Verortung und Institutionalisierung, in: Ruland, Franz/Becker, Ulrich/Axer, Peter (eds.), Sozialrechtshandbuch (SRH), Baden-Baden: Nomos 2022, § 1, par. 15.

is aimed at risk provisioning, covering social risks, namely those addressed by ILO Convention No. 102 on minimum standards of social security[51] and the European Code of Social Security[52] (EOSS), as revised in 1990.[53] The respective benefits constitute social security in a narrow sense; they include family benefits although these are often granted in the form of social support.

bb) Possible Gaps

It follows from this functional and institutional background that platform workers are at risk of falling short of appropriate prevention against social risks in those countries in which social security is organised in the traditional way. In general, the protection gaps arise in particular with regard to those cash benefits which aim to replace earnings, i.e.:

- in case of sickness (sickness benefits),
- in case of maternity,
- in case of accidents at work (industrial injuries) and occupational diseases,
- in case of unemployment,
- in case of invalidity,
- in old-age (old-age pensions), and
- possibly also in relation to long-term care benefits.

The same holds true with regard to benefits in kind which are designed to enable persons to get back to work in cases of accident and illness (rehabilitation measures).

51 https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312247.

52 ETS No. 139 of 6.11.1990, text available at: https://www.coe.int/de/web/conventions/full-list?module=treaty-detail&treatynum=139.

53 ETS No. 48 of 16.4.1964, text available at: https://www.coe.int/de/web/conventions/full-list?module=treaty-detail&treatynum=048.

b) Options for Responses

aa) Role of Status

Whether the above-mentioned protection gaps actually exist, how far-reaching they are, and how they might be filled, depends on the coverage of the existing schemes. Following historical pathways, social insurance started for employed earners, and those persons still form the core category of the insured. After the Second World War, social protection for the self-employed became widespread, partly by integrating the self-employed into the traditional social security schemes, partly by setting up new schemes, which could also include the integration of existing traditional forms of insurance.[54]

Where universal schemes cover both employed earners and the self-employed, the status of economically active persons will not matter that much. Nevertheless, it will remain of some importance, as universal schemes, as a rule, also include some differentiated rules, in particular with a view to contributions. Where there are specific schemes for the self-employed, one can assume that their aim is to provide social protection that differs from that for employed earners: be it with regard to the social risk covered, be it with regard to the level of protection. And, here again, there will be specific rules for financing, including the possibility of state subsidies.

There is only one possible solution which would overcome the necessity of determining the economic status in order to answer the question whether, and to what extent, a person enjoys social protection: to make this protection independent from economic activities. Such a solution has been discussed for a long time, mostly under the term Universal Basic Income (UBI), although both terms and exact shape of possible transfer systems vary. Respective discussions flare up time and again.[55] It is interesting to note that the most recent discussions reflect two very different approaches to liberalism: one that reduces self-responsibility as an socio-economic counterpart to individual freedoms, in the sense of a societal expectation that everybody who is able to work should do so in order to maintain

54 See for an overview *Becker, Ulrich*, Die soziale Sicherung Selbständiger in Europa, Zeitschrift für europäisches Sozial- und Arbeitsrecht (ZESAR) 17 (2018) 8, pp. 307, 313 et seq.

55 Recently *Torry, Malcolm*, Unconditional, Towards Unconditionality in Social Policy, Cheltenham: Edward Elgar 2024; for other publications from the same author see: https://torry.org.uk/basic-income.

themselves; a second that reduces the responsibility of undertakings for the well-being of persons performing work for them, in the sense of reducing labour costs, in particular contributions owned by employers, following the neo-liberal ideal of free markets. There are good reasons to remain sceptical about both the underlying philosophy and the actual feasibility of UBI. That need not be discussed further as, at least up to now, UBI has not left the world of ideas and become available in practice – at least for filling in the gaps considered here (see above, II. 2.a)bb)).

bb) Consequences

As a consequence, to determine the status of platform workers remains essential.

- If a platform worker meets the conditions for being an employed earner, he or she will be covered by social insurance. In some countries, there might be specific provisions for specific social risks, i.e. differences between schemes.[56] Yet, and generally speaking, it is the definition of employed earner where labour law and social security law meet.
- If a platform worker is assessed as being self-employed, three options are possible, depending on which national security schemes are in place:
  - social security may have the same content as for employed earners but has to be financed without employer contributions;
  - specific schemes for the self-employed may cover social risks, either comprehensively or partly;
  - there is no social protection.

This simple overview explains why the interpretation of the national provisions used to define employee status has once again become the centre of attention. Administrative authorities and courts have to apply these provisions case by case, and they may use the opportunity to further develop their line of interpretation (or their doctrinal approach).[57] And legislators may step in, trying to enhance legal certainty by reformulating the text of

56 Which might come close to a specific status as discussed below. In Germany, for example, see § 2 Social Code Book VI, which lists specific self-employed groups subject to mandatory pension insurance, such as teachers, caregivers, artists, craftsmen, and solo self-employed individuals primarily working for one client.

57 *Becker/Chesalina*, in: Becker/Chesalina, Social Law 4.0 (fn. 6), p. 15, 17 et. seq; *Becker*, ZESAR 17 (2018) 8 (fn. 54), p. 307, 315 et seq.

the respective provisions, or by defining a new category of persons who should enjoy social security.

cc) Strategies for the Extension of Social Protection

The "doctrinal strategy" is not limited to countries with a binary divide model. Especially in countries with a third category (e.g. dependent self-employed like TRADE in Spain[58] or "coordinated and continuous collaborators" in Italy[59]), the boundaries of this category may be widened to cover persons in new forms of employment as these forms often tend to be in-between salaried employment and self-employment. Nevertheless, this strategy remains necessarily limited, namely within the methodological framework for the interpretation of legal provisions.

Legislators, in contrast, have more room for manoeuvre, and they may pursue different strategies in order to extend coverage:

- First, they can include some of the groups of persons previously excluded from social insurance in the existing schemes. This option may be used either to guarantee particular labour rights[60] and the coverage of specific social risks, such as old age pensions or unemployment insurance, or for the full set of social insurance schemes. The choice must be justified in terms of social policy goals, and also, at least in some jurisdictions, in relation to constitutional law, as mandatory social protection comes with a restriction on individual freedoms. In other words, there has to be a "need" for social protection, even if this is a broad term which leaves much room for legislative discretion.
- Second, the legislator may decide to create new social insurance schemes for new forms of economic activities. This solution comes with pros and

58 European Commission, Case study – gaps in access to social protection for economically dependent self-employed in Spain, Luxembourg: Publications Office of the European Union, 2018, p. 8 et seq.

59 *Ales, Edoardo*, Is the Classification of the Work Relationships Still a Relevant Issue for Social Security? An Italian Point of View in the Era of Platform Work, in: Becker/Chesalina, Social Law 4.0 (fn. 1), p. 97, 104.

60 E.g. Austria, Germany, Ireland, Slovenia, Sweden, Ireland and the UK have extended special labour law statutes to economically dependent workers. See *Schubert, Claudia*, Social Protection for Economically-Dependent Workers through Labour Law, in: Schubert, Claudia (ed.), Economically-Dependent Workers as Part of a Decent Economy. International, European and Comparative Perspective. A Handbook, Beck, Hart, Nomos 2022, p. 188, 200 et seq.

cons.[61] On the one hand, special schemes can be tailored to the characteristics of a specific group of workers, taking into account a certain heterogeneity of the workforce in general. As a rule, this will lead to labour law and social law drifting apart, because the persons covered will enjoy protection under social law, but not under labour law. This may also be a reaction to the results of studies which show that the majority of platform workers (even in low-paid and precarious activities) do not want to become employees.[62] On the other hand, however, the introduction of specific schemes and a new category of workers also poses the risk of fragmentation and can hamper the switches between different social security schemes. Therefore, the introduction of specific schemes only seems to be justifiable if the advantages of tailor-made schemes clearly outweigh the disadvantages. Such advantages can lie above all in a flexibilisation of financing, because special schemes at least facilitate the reduction in contribution burdens for the insured and the use of further sources of financing, namely contributions from third parties or state subsidies.

c) The Role of the EU

Before we start the overview in the next section, it is necessary to add some remarks on the level at which reactions need to take place, namely on the role of the EU in this context. On the one hand, platforms often operate across borders, and their activities call for a legal framework that goes beyond national borders. On the other, the EU is based inter alia on "solidarity" (Art. 2 sent. 2 of the Treaty on European Union – TEU), it should establish an internal "social market" with "social progress" (Art. 3(3) of the TEU) and in all its actions also take into account "the guarantee of adequate social protection" (Art. 9 of the Treaty on the Functioning of

61 See also *Behrendt, Christina/Nguyen, Quynh Anh*, Innovative approaches for ensuring universal social protection for the future of work, International Labour Office – Geneva: ILO 2018, p. 17, https://researchrepository.ilo.org/esploro/outputs/encyclopediaEntry/Innovative-approaches-for-ensuring-universal-social/995219078602676.

62 *Greiner, Stefan/Baumann, Patrik*, Der Beschäftigungsstatus von Plattformbeschäftigten und die Richtlinie zur Verbesserung der Arbeitsbedingungen in der Plattformarbeit, ZESAR 22 (2023) 10, p. 409, 410; *Gräf, Stephan*, Der Richtlinienentwurf zur Plattformarbeit – Analyse, Umsetzungsperspektiven und Alternativen, ZFA 2023, 2, p. 209; *Beckmann et. al.*, Journal of Social Policy 2024 (fn. 20), p. 1, 16.

the European Union – TFEU), yet without having the powers to establish social protection schemes on its own (see Art. 151 et seq. of the TFEU). Over the past years, the European Union has started to put more emphasis on its social policy agenda. The most obvious expression of this approach is the so-called European Pillar of Social Rights.[63] The ambition of realising minimum social standards within the whole Union has gained particular attention with experiences drawn from the recent crises, in particular the financial crisis and the pandemic. As far as social protection is concerned, one measure aimed at implementing the European Pillar of Social Rights is of particular interest, namely the Council Recommendation on access to social protection for workers and the self-employed.[64] It is of a non-binding nature, taking into account the restricted powers of the European Union in this policy field, but such Recommendations are intended to provide guidance for national policies.

A legally binding measure is the already mentioned Directive 2024/2831 on improving working conditions in platform work of 23 October 2024.[65] The proposal of 2021 on which the Directive is based[66] included a legal presumption, that read as follows: "The contractual relationship between a digital labour platform that controls, within the meaning of paragraph 2, the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship."[67] However, after years of discussion, the Commission's original attempt to harmonise the definition of facts that shall indicate the existence of an employment relationship in the platform economy failed. In the final text, Art. 5(1) only sets out the requirement that a "contractual relationship between a digital labour platform and a person performing platform work" shall be "legally presumed to be an employment relationship when facts indicating control and direction, according to national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice, are found." This leaves it up to the national legislators to regulate what kind of "facts" indicate "control and

63 Available at: https://commission.europa.eu/system/files/2017-11/social-summit-european-pillar-social-rights-booklet_en.pdf.
64 See fn. 7.
65 See fn. 10. The Directive is based on Art. 153(2)(b) in conjunction with Art. 153(1)(b) and 16(2) TFEU.
66 COM(2021) 762 final.
67 Art. 4(1) of the proposal.

direction" and thus "trigger" the presumption.[68] Even more important is the fact that the legal presumption "shall not apply to proceedings which concern tax, criminal or social security matters", although Member States may apply it in such proceedings "as a matter of national law", an addition which seems rather self-evident.

III. Determination of the Status of Platform Workers

1. Reactions

a) Interpretation: The Role of Courts

Several studies have highlighted that one of the most significant factors limiting access of platform workers to social protection is their classification as self-employed workers.[69] In the case of platform work managed chiefly by algorithmic management[70], it remains challenging to determine whether platform workers are employees or self-employed persons.

The national courts' first decisions regarding the classification of platform workers for labour and social law purposes were controversial. Over the past four years case law in many EU countries, particularly that of courts of higher instance (courts of second instance and supreme courts), has shown a tendency to reclassify self-employed platform workers, such as couriers and riders, as employees.[71] For example, the Labour Tribunal of Brussels decided in 2021 that Deliveroo couriers should be considered

68 See *Brameshuber, Elisabeth/Höllwarth, Julia*, Die EU-Arbeitsplattformrichtlinie: Ein Game-Changer für das Arbeitsrecht?, Arbeits- und SozialrechtsKartei (ASoK) 28 (2024) 5, pp. 170, 175 et seq.

69 *Zachary et. al.,* Study to Gather Evidence on the Working Conditions of Platform Workers (fn. 44), p. 71.

70 The elements of algorithmic management are starting to be used in traditional employment relationships, while algorithmic management remains a characteristic feature of platform work. Compare Rec. 8 of Directive 2024/2831: "Digital labour platforms, in particular, use such algorithmic systems as a standard way of organising and managing platform work through their infrastructure."

71 Germany (Micro-tasking Platform Roamler): Federal Labour Court, Decision of 1 December 2020, 9 AZR 102/20, Neue Zeitschrift für Arbeitsrecht (NZA) 2021, 552; the Netherlands (Deliveroo drivers): Supreme Court of the Netherlands, 24 March 2023 - 21/02090, ECLI:NL:HR:2023:443; France (Uber drivers): Cour de Cassation, Chambre sociale, 3 March 2020–19-13.316, arrêt no. 374, ECLI: FR:CCAS:2020:SO00374.

as self-employed; in December 2023, the Labour Appeals Court of Brussels reclassified Deliveroo couriers as employees.[72] Researchers have underlined the shift in court proceedings on the classification of platform workers from subordination criteria towards criteria of integration in the organisation.[73] Interestingly, in Member States where a third (intermediate) category already exists (like hetero-organised in Italy[74], TRADE in Spain[75]), platform workers have rarely been classified by the courts or administrative authorities as belonging to this third category but rather as employees.[76] In contrast, the results of court proceedings involving cleaners and micro-taskers have been more mixed, with no clear trend towards reclassifying self-employed workers as employees.[77] Simultaneously, there is a very small share of litigation concerning the employment status of other categories of platform workers. In other words, the case law primarily addresses a very narrow group of platform workers.

Claims concerning the employment status of platform workers are still predominantly addressed on a case-by-case basis.[78] On the one hand, this approach can provide at least minimum labour and social rights to individuals who have been reclassified as employees or dependent self-employed through the process of litigation. For example, the reclassification of certain categories of platform workers as workers in the UK has the potential to change the character of their work (and in particular their working time) from casual to more regular. As a result, the number of platform workers may be reduced. This opens up the possibility for the remaining platform workers to enhance their working time since many of them worked previously only a limited number of hours per week/day on the basis of zero-

72 See *Jorens, Yves*, in: Social Law 4.0: Update, p. 13 et. seq.; see for a parallel case in Spain (Glovo riders): Tribunal Supremo, 25 September 2020, 805/2020, etc.

73 *Hießl, Christina*, Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions (March 12, 2024). Forthcoming, Comparative Labour Law & Policy Journal, p. 82, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839603.

74 *Ales*, in: Becker/Chesalina, Social Law 4.0 (fn. 59), p. 97, 106-107.

75 See fn. 58.

76 Cf. Spain (Glovo riders): Tribunal Supremo, 25 September 2020, 805/2020; Germany (Micro-tasking Platform Roamler): Federal Labour Court, 1 December 2020, 9 AZR 102/20.

77 Eurofound, Self-employment in the EU (fn. 23), p. 64.

78 Platform workers and social security: Recent developments in Europe, https://www.issa.int/analysis/platform-workers-and-social-security-recent-developments-europe.

hours-contracts.[79] On the other hand, the case-by-case approach can lead to uncertainty of outcomes in all (potential) instances and to conflicting conclusions concerning one and the same platform both within and across courts.[80] Ongoing changes in the business model of platform work make the situation even more unpredictable.

b) Creation: The Role of the Legislator

aa) New Categories

The issues surrounding the classification of platform workers, their working conditions and social protection have been extensively debated in national social policy discussions in the last four years. The legislative procedure on the Directive on improving working conditions in platform work spanned the period from December 2021 to April 2024 and triggered such discussions. Numerous scientific and political assessments of the drafts of the Directive and their compliance with European and national law were published.[81]

In the majority of the Member States, these extensive discussions did not lead to concrete legislative measures. Eurofound stresses that "for the time being, none of the EU Member States has clear regulations specifying

79 See *Larkin, Philip*, in: Social Law 4.0: Update, p. 35.

80 Ibid.

81 https://data.consilium.europa.eu/doc/document/ST-9227-2022-REV-1/en/pdf; EU: Swedish presidency of the EU Council makes new attempt at platform workers directive and proposes narrowing down the derogation for the presumption of employment, https://www.business-humanrights.org/en/latest-news/eu-swedish-presidency-of-the-eu-council-makes-new-attempt-at-platform-workers-directive-and-proposes-narrowing-down-the-derogation-for-the-presumption-of-employment/; ETUC resolution on the proposal of the European Commission of a Directive on improving working conditions in platform work and way forward ahead of the ordinary legislative procedure, https://www.etuc.org/en/etuc-resolution-proposal-european-commission-directive-improving-working-conditions-platform-work#:~:text=The%20proposal%20for%20a%20Directive,completed%20with%20a%20reversal%20of; *De Stefano, Valerio*, The EU Commission's proposal for a Directive on Platform Work: an overview, Italian Labour Law e-Journal 15 (2022) 1, https://illej.unibo.it/article/view/15233; *Krause, Rüdiger*, Auf dem Weg zur unionsrechtlichen Regelung von Plattformtätigkeiten, NZA, 2022, 521; *Eichenhofer, Eberhard*, Kommissionsvorschlag zur Regelung der Plattformarbeit, ZESAR 21 (2022) 11, p. 11-12, pp. 459-465; *Barrio,* EJSS 26 (2024) 2 (fn. 3).

the employment status of platform workers".[82] Recent years have seen proposals made by legislators in some countries, and also by academics, to introduce a third or intermediate category for platform workers.[83] However, these proposals have not been successful. The experience of some countries with an intermediary category has shown that its introduction contributes to the circumvention of the existing "employee" category and becomes an obstacle for workers to achieve appropriate social law protection.[84] An exception to this trend is Italy where a new category of employment, so called "hetero-organisation" was introduced by Act No. 128 of 2019.[85]

Some Member States (e.g. Belgium, France, Italy, Spain) have followed a more targeted line and adopted regulations that explicitly address specific categories of on-location platform workers as their labour and social protection needs have been the most visible and most articulated in research and practice.[86] However, only a few of these provisions relate to social security. France was a pioneer in regulating social and labour rights of platform workers with the amendments of the Labour Code adopted in 2016.[87] According to Art. L. 7341-1 the requirements of the newly introduced chapter apply to self-employed persons who access one or more platforms by means of electronic networking in order to carry out their professional activity. Italy decided not to regulate all forms of platform work but to introduce special regulations protecting autonomous workers who carry out goods delivery activities on behalf of others in urban areas by bicycle or motor vehicle (Art 47-bis of Act No. 128 of 2019[88]). These regulations demonstrate that the legislator has considered the atypical character of the self-employment activity of these categories of platform workers and

82 Eurofound, Platform Work: Employment status, employment rights and social protection, https://www.eurofound.europa.eu/en/platform-work-employment-status-employment-rights-and-social-protection.

83 See *Kessler, Francis*, in: Social Law 4.0: Update, p. 71.

84 *Cherry, A. Miriam/Aloisi, Antonio*, "Dependent Contractors" in the Gig Economy: A Comparative Approach, American University Law Review 66 (2017) 3, p. 663, 665 et seq.

85 *Ales*, in: Becker/Chesalina, Social Law 4.0 (fn. 59), p. 97, 104 et seq.

86 Report from the Commission to the Council on the Implementation of the Council Recommendation on Access to Social Protection for Workers and the Self-Employed, Brussels, COM (2023), 43 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023DC0043&qid=1676473347749.

87 https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072050/LEGISCTA000033013014/#LEGISCTA000033013014.

88 *Ales*, in: Becker/Chesalina, Social Law 4.0 (fn. 59), p. 97, 110 et seq.

provided some labour and social rights that are usually associated with the employment status of employees. In other Member States, proposals along the same lines have not succeeded, as in the Netherlands in the proposal to extent the notion "fictitious employment relationship" to other categories of solo self-employed and non-standard workers.[89]

bb) Weaknesses

Where platform work has been regulated at the national level, it is often fragmented[90] – addressing only a limited number of labour law and social security issues and covering only a small group of platform workers (e.g. in Italy only autonomous riders, in Spain delivery platform workers)[91]. The status and rights of all other categories of platform workers remain uncertain. In cases where a legislator has attempted to reconcile the conflicting interests of participating counterparts, such regulation has often resulted in conflicts between labour law and social security principles and regulations (e.g. the regulation of the application of collective agreements of employees to autonomous platform workers in Italy[92] or regulation of the protection of self-employed platform workers against accidents at work in France[93]).

Furthermore, no few of the special provisions introduced over the last few years are controversial because the legislator not only sought to take the need for social protection of platform workers into account but also to reconcile conflicting interests of participating counterparts or to promote the platform economy. For example, in Italy, despite the absence of complete subordination and integration within the organisation, the guaranteed level of labour and social protection of hetero-organised persons can be equivalent to that of employees.[94] In France only marginal, fragmented social protection for platform workers is provided for in the Labour Code

89 *Vonk, Gijsbert*, Extending Social Insurance Schemes to "Non-Employees": The Dutch Example, in: Becker/Chesalina, Social Law 4.0 (fn. 1), p. 147, 163.
90 See Eurofound, Self-employment in the EU (fn. 23), p. 62.
91 *Ales,* in: Becker/Chesalina, Social Law 4.0 (fn. 59), p. 97 et seq.; European Agency for Safety and Health at Work, Spain: The "Riders' Law", New Regulation on Digital Platform Work, https://osha.europa.eu/sites/default/files/2022-01/Spain_Riders_Law_new_regulation_digital_platform_work.pdf.
92 See *Ales, Edoardo/D'Avino, Emilia,* in: Social Law 4.0: Update, p. 24 et seq.
93 See *Kessler, Francis*, in: Social Law 4.0: Update, p. 64 et seq.
94 See *Ales, Edoardo/D'Avino, Emilia*, in: Social Law 4.0: Update, p. 21 et seq.

despite the fact that there is a similar situation of subordination and need for social protection as employees.[95]

cc) Background: Labour Market Policy

The last point in the previous sections hints at the broader background of national responses to platform work, namely employment patterns and labour market policies. Several countries initially promoted new forms of work, such as platform work (e.g. Belgium, France, the UK) and/or flex-work, self-employment (e.g. the Netherlands[96]). In recent years some of these countries have recognised that tax and social security incentives, like exemptions from social contributions and taxes, contribute to the growth of part-time and marginal platform work and incentivise self-employment over dependent employment. For example, in Belgium, specific regulations on taxation of and the payment of social contributions by platform workers were abandoned just a few years after their implementation.[97] Furthermore, some countries (e.g. the Netherlands) have decided to reduce the use of non-standard forms of employment either to ensure equal treatment of different forms of employment or to create a level playing field, including employers who use short-term contracts. These measures can help to decrease the use of non-standard contracts and therefore facilitate access to social protection.

However, some countries view platform work as a suitable job option or a means to reduce crime rates or a way to avoid poverty.[98] Platform work, as well as zero-hours work, are considered suitable jobs for recipients of Universal Credit (UC) in the UK.[99] In this context, it should be taken into account that individuals who are incentivised to accept casual work often face challenges in establishing a stable relationship with the labour market and finding better positions within it. This may lead to a danger of platform work becoming a second-class solution to unemployment.

95 See *Kessler, Francis*, in: Social Law 4.0: Update, p. 67.
96 *Vonk*, in: Becker/Chesalina, Social Law 4.0 (fn. 89), p. 147 et seq.
97 See *Jorens, Yves*, in: Social Law 4.0: Update, p. 11 et seq.
98 See for France *Abdelnour, Sarah/Julliard, Émilien/Méda, Dominique*, Promoting employed worker status on digital platforms: how Frances's labour inspection and social security agencies address 'uberisation', Transfer 29 (2023) 3, p. 339, 343.
99 See *Larkin, Philip*, in: Social Law 4.0: Update, p. 32.

dd) Procedures: Presumption Rules

As already mentioned above (see II.2.c)), the centrepiece measure in Directive 2024/2831 for facilitating the correct determination of platform workers is a rebuttable presumption of an employment relationship. In 2021, before the proposal for a Directive, some Member States had already provided for a legal presumption for the existence of an employment relationship for the purposes of labour law.[100] Discussions on the proposal for the Directive motivated other Member States to introduce a presumption rule targeting a specific group of persons – platform workers: in Spain, the so-called "Riders' Law", which was adopted on 11 May 2021, provides for a legal presumption of a dependent employment relationship for digital platform workers in the delivery sector (Additional Provision 23 of the Workers' Statute).[101] In Portugal the Labour Code was amended by the Decent Work Agenda (*Agenda de Trabalho Digno*), Law No. 13/2023 of 3 April 2023, and now also includes a presumption rule on an employment relationship between platform operators and self-employed workers.[102] In Belgium as well, the amendments of 15 February 2023 to Chapter 4 of the Labour Relations Act defined criteria for a "rebuttable presumption of an employment contract" for platform workers.[103] In addition, the Dutch government tabled a bill of 6 October 2023 with the aim of adapting the concept of a rebuttable presumption for platform workers and for all workers earning below a certain hourly rate.[104] Evidence from Spain indicates that the introduction of the legal presumption rule has already had an impact in terms of empow-

100 *Aloisi, Antonio/Rainone, Silvia/Countouris, Nicola*, An unfinished task? Matching the Platform Work Directive with the EU and international "social acquis", ILO Working paper 101, Geneva: International Labour Office 2023, p. 11; *Kullman, Miriam*, 'Platformisation' of work: an EU perspective on Introducing a Legal Presumption, ELLJ 13 (2021) 1, pp. 66-80.

101 See European Agency for Safety and Health at Work, Spain: The "Riders' Law", New Regulation on Digital Platform Work, https://osha.europa.eu/sites/default/files/2022-01/Spain_Riders_Law_new_regulation_digital_platform_work.pdf.

102 Eurofound, Portugal Enters New Legal Framework for Decent Work Agenda into Labour Code (Initiative), Record number 4270, Platform economy database, Dublin, 2023, https://apps.eurofound.europa.eu/platformeconomydb/portugal-enters-new-legal-framework-for-decent-work-agenda-into-labour-code-110033.

103 Eurofound, Amendments to the Labour Relations Act to Recognise the Platform Economy (Initiative), Record number 4257, Platform economy database, Dublin, 2023, https://apps.eurofound.europa.eu/platformeconomydb/amendments-to-the-labour-relations-act-to-recognise-the-platform-economy-110020.

104 See *Montebovi, Saskia/Vonk, Gijsbert*, in: Social Law 4.0: Update, p. 56.

ering labour inspectorates with the authority to challenge the self-employed status of workers in the ride-hailing sector.[105]

Directive 2024/2831 gives national legislators a wide margin of discretion in determining the scope of application of the presumption rule. Looking at those EU Member States that have already introduced a presumption rule on the existence of an employment relationship in their national law, a differentiated picture emerges. These presumptions are either general (covering all types of working relationships: Belgium, Estonia, Netherlands, Portugal, Spain) or are (also) specific to certain groups of workers (Belgium, Portugal and Spain). The number of criteria for the presumption varies from country to country. Some Member States have provided for a (direct or indirect) presumption of self-employment (e.g. in France).

If a legal presumption of an employment relationship is provided for and applied in labour law or in labour case law (e.g. in Estonia), this has a direct impact on access to social security schemes as the person becomes entitled to benefits from the national social insurance system for employees. Presumption rules in social law remain an insufficiently investigated issue in comparative social law. They are not very common, and their practical impact seems to be limited. For instance, in Germany, a legal presumption of an employment relationship in the context of social security law was stipulated from 1999 to 2002 under Art. 7 of the Social Code Book IV with the aim of combating false self-employment.[106] However, as this did not materially alter the applicable criteria, the competent social security authorities nevertheless had to continue investigating all the facts that supported or ran contrary to salaried employment, and the presumption turned out not to be effective and was removed.

Future outcomes of the implementation of legal presumptions in national legislation may depend on various factors (e.g. enforcement challenges, changes in the business model of platform work, as well as the development of the platform economy in each country, and the framework of the presumption rule). Furthermore, the exclusion, in particular, of social law from the application of the presumption rule may lead to a situation where in some Member States one and the same activity is defined differently under

105 Eurofound, Self-employment in the EU (fn. 23), p. 64.

106 *Bieback, Karl-Jürgen*, Neue Selbständigkeit und soziale Sicherheit – Notwendigkeit einer Neuorientierung, Sozialer Fortschritt 48 (1999) 7, pp. 166-174.

labour law and under social law.[107] This could be the case in Scandinavian countries, where the definition of "employee" varies between labour law, social law and tax law.[108] In this context, it should be noted that these countries (especially Sweden) were opposed to the extension and application of the legal presumption to tax and social security law.[109] Consequently, the application of the (eventually modified) term in labour law will probably not be extended to social law and tax law in these countries and vice versa. For example, in Denmark, the Danish Tax Agency (SKAT) decided in 2022 that the food delivery company Wolt is an employer and platform workers are employees for the purposes of tax law. In 2023, the Labour Market Insurance Organisation (AES) decided that Wolt is liable as an employer for injuries. Despite these developments, the question of whether platform workers should be considered employees under Danish labour law remains unresolved.[110] Possible scenarios for the implementation of the legal presumption (Art. 5 of Directive 2024/2831) therefore include synchronised or divergent approaches in labour law, social law and tax law. However, it can be assumed that in countries with a tradition of uniform criteria for the concept of "employee" and "employed earner" in labour law and social law, the adjustment of the criteria will continue in a harmonised manner, irrespective of the non-introduction of the legal presumption in social law.

c) Contractual Determination: The Role of Private Parties

In Social Law 4.0, we presented some innovations in the possibility of the parties to an employment contract or collective agreement to *determine* the employment status of platform workers. The first example was from

107 *Pärli, Kurt*, Neue Richtlinie zu Arbeitsbedingungen bei Plattformarbeit in der EU, Jusletter 24, June 2024, p. 1, 16.

108 *Hießl, Christina*, The legal status of platform workers: regulatory approaches and prospects of a European solution, Italian Labour Law e-Journal 15 (2022) 1, https://illej.unibo.it/article/view/15210, p. 13, 16.

109 The Platform worker: Employee or Entrepreneur?, 8 Oktober 2024, https://www.lusem.lu.se/internal/article/platform-worker-employee-or-entrepreneur; see also *Westregård, Annamaria*, in: Social Law 4.0: Update, p. 47; *Glavind, Kristoffer Lind/Oosterwijk, Gerard Rinse*, Employment Terms of Platform Workers, Policy Study January 2024, p. 11; see also fn. 78.

110 *Froberg, Tom*, Platform economy businesses dealt a blow by the Danish tax authorities, https://www.magnussonlaw.com/news/platform-economy-businesses-dealt-a-blow-by-the-danish-tax-authorities/.

Denmark, where in 2018 the first collective agreement concerning cleaners was concluded between the Hilfr platform and the 3F trade union (a trade union for unskilled workers). This collective agreement stipulated that cleaners would automatically be given employee status after 100 hours of work via the Hilfr platform. Furthermore, the agreement allowed the cleaners to opt to obtain the status of employee even earlier by giving respective notice to the platform.[111] However, the Danish Competition and Consumer Authority (DCCA) raised questions about this agreement for the following reasons: (1) the regulated minimum hourly rate for the freelance cleaners created a "price floor", which could limit competition between freelance cleaners, and (2) the cleaners with employment status (in accordance with the collective agreement) were not actually employees of Hilfr from a competition law point of view. The DCCA did not void the collective agreement, but settled the case by making binding on Hilfr the following undertakings that Hilfr had given as part of the proceedings (commitment decision of 26 August 2020): the freelance cleaners will be free to set their own prices, i.e. Hilfr would ensure that there was legal subordination between Hilfr and the cleaners employed (in accordance with the collective agreement) and that Hilfr would bear the financial risk for the cleaning work of the employed cleaners.[112]

In France, the draft of the "Law on Mobilities" passed in 2019 proposed that platforms be able voluntarily to adopt a "charter" granting additional social rights to riders (such as delivery drivers, couriers, and drivers associated with companies like Uber, Deliveroo, etc.) In exchange for adopting the charter, the platforms would retain the right to continue classifying their riders as independent contractors.[113] However, the French Constitutional Court in its decision No. 2019-794 of 20 December 2019[114] on the "Law on Mobilities" deemed it partly unconstitutional as it allowed the

111 *Munkholm, Natalie,* Collective Agreements and Social Security Protection for Non-Standard Workers and Particularly for Platform Workers: The Danish Experience, in: Becker/Chesalina, Social Law 4.0 (fn. 1), p. 171, 192.

112 Press release of the Danish Competition and Consumer Authority of 26 August 2020 concerning the Commitment decision on the use of a minimum hourly fee, https://en.kfst.dk/nyheder/kfst/english/decisions/20200826-commitment-decision-on-the-use-of-a-minimum-hourly-fee-hilfr.

113 *Kessler, Francis*, Social Security in the Platform Economy: The French Example – New Actors, New Regulations, Old Problems, in: Becker/Chesalina, Social Law 4.0 (fn. 1), p. 257, 271 et seq.

114 Decision of the French Constitutional Court No. 2019-794 of 20 December 2019, https://www.conseil-constitutionnel.fr/decision/2019/2019794DC.htm.

platform operators to lay down elements of their relationship with the workers that could not be used by the courts to establish the existence of a legal relationship of subordination and, consequently, the existence of a contract of employment. The Constitutional Court held that only the legislature itself had the right to lay down binding rules for the courts in the form of legislation. Delegating this competence to platform providers was deemed unconstitutional.[115]

The decisions by the Danish Competition and Consumer Authority and the French Constitutional Court highlight the complexity of determining employment status for social security purposes through individual and collective agreements. Additionally, legal-political considerations argue against such an approach: social security law is a branch of public law that serves a dual purpose – it not only provides social benefits but also safeguards the interests of all contributors to social security funds, ensuring the sustainability and feasibility of social security financing. These interests should not be put at the disposal of the parties to an individual or collective agreement.

From a broader perspective, taking not only questions of social protection into account but generally from the point of view of protection of workers' rights, it could be added that allowing labour law agreements to determine employment status could undermine the protective aims of labour laws, which are designed to address the power imbalances and prevent exploitation. The principle of non-waivability is crucial to safeguard workers' rights, as it ensures that certain fundamental protections cannot be contractually waived, thus maintaining fair and consistent standards across the labour market.[116]

While employers are often motivated by the desire to minimise the financial obligations associated with the application of social security schemes to employees, such as contribution requirements, self-employed individuals often wish to have access to the social protection scheme for employees (a problem commonly referred to as false dependent employment). For instance, depending on the structure of the national social security system, the strategy of using umbrella companies can pose issues of "false employee" or "false temporary agency work".[117] However, the decision in favour

115 Ibid., sec. 28.

116 *Davidov, Guy*, Nonwaivability in Labour Law, Oxford Journal of Legal Studies 40 (2020) 3, pp. 482-507.

117 *Pärli, Kurt*, Arbeits- und sozialversicherungsrechtliche Fragen der Sharing Economy, Zürich/Basel/Genf: Schulthess Juristische Medien AG 2019, p. 68.

of a protection scheme for employees can also have other reasons, such as the reduction of administrative burdens. In Sweden, where the level of social contributions is almost identical for employees and self-employed individuals,[118] the expansion of the phenomenon of umbrella companies has been explained by the aim to reduce the substantial administrative burden connected with social security schemes for the self-employed. Harmonizing social security contributions for employees and for self-employed (particularly in income replacement schemes) and extending social security coverage to specific categories of atypical self-employed persons, together with simplifying the administrative requirements and improving their transparency, could significantly reduce the desire to change the employment status.

2. Re-Reaction: Avoidance Strategy of Platform Providers

Alongside the further development of case law and legislation on the classification of platform workers, platforms use different avoidance strategies to overcome case law or legislation that aims to treat platform workers as employees. They tend to restrict the employment status to those individuals who have won court proceedings rather than to grant it to the entire group or type of platform workers (e.g. all couriers).[119] For instance, despite the French Supreme Court's decision of 4 March 2020 that an Uber driver must be classified as an employee, Uber drivers generally continue to have self-employed status. A decision by the Lyon Court of Appeal of 15 January 2021 confirmed this trend.[120]

In many cases, court decisions in favour of the employee status of platform workers or in favour of an intermediate status have led to platforms altering their initial strategy and amending their terms and conditions in order to find new ways to avoid the application of employee status to

118 *Westregård, Annamaria*, Looking for the (Fictitious) Employer – Umbrella Companies: The Swedish Example, in: Becker/Chesalina, Social Law 4.0 (fn. 1), pp. 203-227.

119 ILO, ISSA and OECD, Providing adequate and sustainable social protection for workers in the gig and platform economy. Technical paper prepared for the 1st meeting of the Employment Working Group under the Indian presidency, January 2023, p. 6, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@dgreports/@ddg_p/documents/publication/wcms_867535.pdf; European Commission, Study to support the impact assessment (fn. 16), p. 137.

120 European Commission, Study to support the impact assessment (fn. 16), p. 137.

platform workers and the labour and social law requirements connected with this status[121] or with the status of worker/dependent self-employed. For example, after Uber drivers were classified as workers in the UK, Deliveroo introduced a new clause allowing the appointment of a substitute.[122] As a result, the UK Supreme Court concluded that Deliveroo riders were not in an employment relationship.[123] To provide another example: in Italy, after courts recognised that riders have the status of hetero-organised collaborators, several platforms restructured their management system in order to eliminate or limit the elements of hetero-organisation.[124] In the Netherlands, after a first-instance judgement, Deliveroo abolished shift schedules and other elements penalizing certain behaviours.[125] Hence, the business model of labour platforms is highly adaptable. Some elements previously considered essential features of this business model, such as workers' autonomy and flexible working arrangements, have proven to be changeable and not inherent to the business model after the reclassification of platform workers as employees or workers.[126] This context is also challenging the platforms' promise of flexible working conditions. It appears that the main motivation for offering flexible working conditions is the cost-effectiveness of this model.[127] Where platform workers have been reclassified as employees, the promise of flexibility has been replaced by fixed working hours.[128] Similarly, the "voluntary" provision of social benefits can serve as an avoidance strategy determined by cost-effectiveness or necessity – if it is advantageous to provide some social benefits in order to avoid

121 *Zachary et. al.*, Study to Gather Evidence on the Working Conditions of Platform Workers (fn. 44), p. 122.

122 The UK example is somewhat of an exception to European case law on food delivery drivers where this "substitute clause" was considered by the courts as a decisive criterion against the classification as employee. See: *Hießl*, Case Law on the Classification of Platform Workers (fn. 73), p. 77.

123 Decision of 21 November 2023. For more information: *Kountouris, Nicola*, Not Delivering: the UK 'worker' concept before the UK Supreme Court in *Deliveroo – IWGB v CAC and another* [2023] UKSC 43, EJLL 15 (2024) 4, https://journals.sagepub.com/doi/10.1177/20319525241242796.

124 *Borelli, Silvia*, Fitting the panoply in a binary perspective. The Italian platform workers in the European Context, Comparative Labor Law & Policy Journal 41 (2020) 1, p. 365, 393.

125 *Hießl*, Case Law on the Classification of Platform Workers (fn. 73), p. 82.

126 *Hießl*, Italian Labour Law e-Journal 15 (2022) 1 (fn. 108), pp. 13-28.

127 *Adams, Zoe*, The Legal Concept of Work, Oxford: OUP 2022.

128 *Hießl,* Italian Labour Law e-Journal 15 (2022) 1 (fn. 108).

reclassifying self-employed platform workers as employees and having to meet employers' obligations in the field of social protection (see below, V.1.).

Finally, legislative measures can lead not only to platforms altering their strategy but even ceasing their operations in a country. The Spanish example of the Riders' Law shows that, on the one hand, the number of employment contracts with platform workers doubled, while on the other hand, some platforms ceased their operations or resorted to subcontracting.[129] The implementation of Directive 2024/2831 may also lead to platform providers exploiting an expected regulatory diversity between the Member States to their advantage. This could perpetuate the issue of the playing field not being level. However, an exit strategy is not an option for all platforms, as a transfer of the business to another country is rather unlikely in cases of on-location platform work (e.g. ride, delivery or tradesmen's services).

IV. Extension of Access to Social Protection

As already mentioned, the Council of the EU in 2019 adopted a Recommendation on access to social protection for workers and the self-employed.[130] It addresses the problem that up to half those in non-standard work and self-employment across the EU are at risk of not having sufficient access to social protection and employment services. This has been assessed as a growing impediment to the sustainability of social protection systems and to the welfare of an increasing proportion of the workforce.[131] The main objective of the Recommendation is to provide access to adequate social protection to all workers and the self-employed, and to establish minimum standards in the field of social protection of workers and the self-employed.[132] It addresses four dimension of access. Although it is not

129 *Martin-Caballero, Angel*, New regulations in platform work: Fragmented responses to issues of work fragmentation, Capital and Class 2024, p. 3.

130 Based on Art. 292 in conjunction with Art. 153 and 352 TFEU, see fn. 7.

131 European Commission, Commission Staff Working Document, 'Analytical Document' accompanying the Consultation Document 'Second phase consultation of social partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights', Brussels, 20 November 2017, p. 25.

132 See point 1 of the Recommendation, fn. 7.

legally binding, this differentiation provides a normative yardstick for the assessment of access to social protection.[133]

1. Formal Access

Persons involved in low-paid and low-qualified platform work do not enjoy (full) autonomy and freedom to organise their work as would be inherent in traditional self-employment.[134] In practice, they are nevertheless mostly classified as self-employed. Numerous studies have highlighted that the most significant factor limiting the access of platform workers to social protection is their de facto classification as self-employed workers.[135] According to a report of 31 January 2023 from the Commission to the Council on the implementation of the Council Recommendation on access to social protection for workers and the self-employed, there were in 2022 formal gaps in the social protection of the self-employed in 19 Member States with regard to at least one of the branches of social protection. These mostly concerned unemployment benefits (13 Member States), followed by benefits for accidents at work and occupational diseases (9), paternity benefits (5) and sickness benefits (3).[136] To this situation contributes the fact that access for the self-employed (and also for some categories of non-standard workers) is voluntary, often through "opt-in systems" in particularly for unemployment, old-age, invalidity, sickness and maternity benefits.[137] It is argued that the Recommendation provides a wrong incentive by promoting access to social protection for the self-employed "at least" on a voluntary basis.[138] This can erode the principle of solidarity, simultaneously jeopardising the financial sustainability of social security schemes as the self-employed with high incomes may opt out, while the economically dependent may be compelled not to opt in, resulting in a lack of protection.[139] This

133 See also *Schoukens, Paul/Bruynseraede, Charlotte,* in: Social Law 4.0: Update , p. 77 et seq.
134 Eurofound, Self-employment in the EU (fn. 23), p. 29.
135 *Zachary et. al.*, Study to Gather Evidence on the Working Conditions of Platform Workers (fn. 44), p. 71.
136 Report from the Commission (fn. 86), p. 11.
137 Ibid.
138 *Schoukens, Paul*, Building Up and Implementing the European Standards for Platform Workers, in: Becker/Chesalina, Social Law 4.0 (fn. 1), p. 309, 320.
139 *Van Limberghen, Guido*, Setting European Social Security Standards for the Self-Employed: The Interaction Between the European Code of Social Security and the

leads to a difference in treatment between employed earners (who cannot opt out) and the self-employed. It is questionable whether such a difference in treatment (mandatory versus voluntary participation) is still justified even if a legislator assumes that the voluntarily insured have a lower need for protection.[140]

We have shown above (see III.1.a)) that some categories of on-location platform workers have received the same level of protection as employed earners due to broad interpretation by the courts. Furthermore, since 2019, the extension of existing schemes to new categories of self-employed had been observed in five of 27 Member States and reforms for non-standard workers were only foreseen in three Member States.[141] Italy introduced an extension of the unemployment scheme for self-employed by Law 213/2023.[142] The example of the Netherlands illustrates that it is easy to abolish a social insurance scheme for the self-employed[143] but very difficult to reinstate such a scheme: numerous proposals have been made to improve the protection of the self-employed, including the creation of insurance against disability for the self-employed, but these have not yet been adopted.[144]

As individuals in non-standard forms of employment and self-employed workers often face challenges in accessing social schemes (or cannot fulfil the conditions to receive benefits or receive lower benefits), harmonisation and the approximation of social security schemes for employees and the self-employed[145] can help meet the challenges of the changing world of work. This strategy is currently being more commonly used in healthcare and family benefits than in income replacement schemes.[146] An exception to this trend is social insurance against accidents at work. Not only in the

EU Recommendation on Access to Social Protection, in: Jorens, Yves (ed.), The Lighthouse Function of Social Law, Springer 2023, p. 281, 286.

140 *Hahn, Erik*, Stabile Finanzierung der Sozialversicherungssysteme durch horizontale und vertikale Ausweitung des Kreises beitragspflichtiger Einnahmen, VSSAR 2024, 2, p. 65, 68.

141 Report from the Commission (fn. 86), p. 12.

142 *Ales, Edoardo/D'Avino, Emilia*, in: Social Law 4.0: Update, p. 20.

143 *Vonk*, in: Becker/Chesalina, Social Law 4.0 (fn. 89), pp. 147-169.

144 See *Montebovi, Saskia/Vonk, Gijsbert*, in: Social Law 4.0: Update, p. 54-55.

145 The future of social protection and of the welfare state in the EU, Luxembourg: Publications Office of the European Union 2023, p. 84, https://op.europa.eu/en/publication-detail/-/publication/842d8006-c3b3-11ed-a05c-01aa75ed71a1.

146 See for the reasons above, II.2.a). See also *De Becker/Bruynseraede*, EJSS 26 (2024) 2 (fn. 29), p. 123, 124.

Scandinavian countries, but also in some other European countries (e.g. in Austria, Italy, Luxembourg, Spain) benefit systems covering accidents at work and occupational diseases have been extended to the self-employed[147] or the dependent self-employed ("para-subordinate workers" in Italy). In numerous countries, the self-employed may voluntarily join the insurance against accidents at work (e.g. Denmark, France). In most cases, the self-employed are insured within the general scheme alongside employees. Insurance exclusively within a special scheme for self-employed workers is rather the exception (e.g. in Spain). For many self-employed freelancers the scheme for accidents at work and occupational diseases is often organised around an appropriate professional group, irrespective of the employment status.[148] Some Member States have already extended social insurance against accidents at work to all or certain categories of platform workers (e.g. riders) irrespective of their employment status (e.g. France, Italy).[149] Belgium by the Law of 13 June 2024 further expanded its law on accident insurance and compensation for the self-employed platform workers.[150] Such regulation confirms the rationale of extending social protection based on affiliation with the same professional group.[151]

2. Effective Access

Factors limiting platform workers' access to effective social protection in particular are low payment and the marginal or sometimes irregular char-

147 MISSOC: Gegenseitiges Informationssystem für soziale Sicherheit. Sozialschutz von Selbstständigen, https://www.missoc.org/?lang=de.

148 *Schoukens, Paul*, The Social Security Systems for Self-Employed People in the Applicant EU Countries of Central and Eastern Europe, Antwerp Oxford New York: Intersentia 2002, p. 236.

149 *Kessler*, in: Becker/Chesalina, Social Law 4.0 (fn. 113), p. 257, 268; *Ales, Edoardo/D'Avino, Emilia*, in: Social Law 4.0: Update, p. 25.

150 Eurofound, Amendments to the Labour Relations Act to Recognise the Platform Economy (Initiative), Record number 4257, Platform economy database, Dublin, 2023, https://apps.eurofound.europa.eu/platformeconomydb/amendments-to-the-labour-relations-act-to-recognise-the-platform-economy-110020; *Bérastégui, Pierre*, Belgium: platform workers now compensated following work accidents, ETUI, 10 June 2024, https://www.etui.org/news/belgium-platform-workers-now-compensated-following-work-accidents.

151 Ibid.

acter of their work.[152] These challenges are similar to those faced by individuals in non-standard forms of employment (e.g. zero-hours-contracts, casual workers). In this context it may be difficult to meet the minimum qualifying conditions (insurance periods) for social benefits. A particular problem of platform work is that it involves unpaid and uncalculated periods. Unpaid working time also exists in other occupations. It often happens that employees carry out their work (answering emails and phone calls, preparing for negotiations, meetings or presentations, etc.) outside working hours (including during holidays or weekends). In platform work, however, unpaid working time is a structural feature of the business model.[153] It involves "working time compression" due to the task-based remuneration: e.g. time spent waiting for orders or travelling time to clients is not taken into account. This phenomenon has its origins in casual work (in particular, zero-hours contracts). This phenomenon reaches its quintessence in platform work. This has an impact on effective access to social protection, as it makes it more difficult to meet certain thresholds. It also has an impact on formal access to social insurance against accidents and, possibly, sickness benefits. The issue of unpaid working time or, in other words, not insured working time (in terms of social law), also needs to be addressed in social legislation. According to the rules in private insurance contracts or in the general terms and conditions of platforms, accidents occurring during the waiting time between two errands or while traveling to pick up a passenger or time required to return to the hub or engage in equipment maintenance often do not form part of the insured risks.[154]

Merely reclassifying atypical workers as employees would not address the challenges they face regarding adequate access to social protection effectively.[155] In order to facilitate effective access, more flexibility would be

152 *Schoukens, Paul/Barrio, Alberto/Montebovi, Saskia*, The EU social pillar: An Answer to the challenge of the social protection of platform workers?, EJSS 20 (2018) 3, pp. 219-241.

153 *Mangan, David/Muszynski, Karol/Pulignano, Valeria*, The platform discount: Addressing unpaid work as a structural feature of labour platforms, ELLJ 14 (2023) 4, pp. 541-569.

154 See *Kessler, Francis*, in: Social Law 4.0: Update, p. 66 and *Mangan/Muszynski/Pulignano*, ELLJ 14 (2023) 4 (fn. 153).

155 The ILO, ISSA and OECD Technical paper "Providing adequate and sustainable social protection for workers in the gig and platform economy" stresses: "Our focus needs to go beyond mere reclassification of platform workers to employees, and should guarantee adequate access to social protection, as stated in the Council

necessary concerning interrupted periods of work.[156] It may be necessary, in particular, to redefine the calculation of qualifying periods, to extend some qualifying (reference) periods concerning working time or concerning the time during which income has to be earned,[157] and to shorten minimum waiting periods (especially for unemployment, sickness or maternity benefits). The introduction of longer reference periods would help better reflect the contribution capacity of atypical workers, including platform workers. The Recommendation does not provide for a maximum duration of qualifying periods and waiting periods nor for a minimum payment period of benefits as it respects the competence of the Member States to organise their social protection systems.[158]

Our Update confirms, in line with the outcomes of other studies,[159] that only a few national measures have addressed the issue of effective access to social protection. Numerous barriers still persist for atypical workers, including platform workers, in this regard. While Sweden in 2022 broadened (formal) access to sickness benefits, extending this support to workers on demand, including those employed by umbrella companies, challenges remain in calculating sickness benefits for part-time workers.[160] Several measures implemented during the COVID-19 pandemic that improved effective access to social protection were temporary and short-lived. For example, the suspension of the Minimum Income Floor for the self-employed in the UK during the COVID-19 pandemic notably improved their social protection.[161] Even in countries where reforms aimed at equal treatment of different forms of employment have been launched, social security benefits/schemes still favour employees in standard employment relationships (e.g. the calculation of the Universal Credit in the UK, access for atypical workers to the sickness benefit in Denmark, access to unemployment insurance in Denmark and Sweden[162]).

Recommendation, in order to build more inclusive social protection across Europe" (fn. 119), p. 23.

156 *Behrendt/Nguyen,* Innovative approaches for ensuring universal social protection (fn. 61), p. 19.

157 *Schoukens,* in: Becker/Chesalina, Social Law 4.0 (fn. 138), p. 309, 322.

158 *Van Limberghen,* Setting European Social Security Standards for the Self-Employed (fn. 139), p. 281, 289.

159 Report from the Commission (fn. 86), p. 17.

160 *Westregård, Annamaria*, in: Social Law 4.0: Update, p. 44 et seq.

161 *Larkin, Philip,* in: Social Law 4.0: Update, p. 28.

162 See for the UK: *Larkin, Philip*, Relationship between Employment Status and Scope of Social Security Protection: The United Kingdom Example, in: Becker/Chesalina,

Moreover, social security systems predominantly base their structure on the assumption of a single employment relationship, neglecting new working patterns characterised by multiple jobs and multiple employers throughout an individual's career.[163] This poses a challenge to the transferability of social rights and entitlements. The reform of social security schemes to accommodate new working patterns and multiple jobholding is still in its nascent stages. Denmark stands out as having made a significant shift in 2018 with the reform of unemployment insurance, moving from assessing an individual's employment status to evaluating the activities they engage in. As a result, income from all activities is now cumulated to determine eligibility for unemployment benefits. In Sweden, a proposal in 2023 suggested cumulating income from dependent employment and self-employment for the calculation of sickness benefits. It remains to be seen whether or how soon this structural reform will be realised. Nevertheless, this example illustrates that innovative structural approaches can be transferred from one jurisdiction to another.

3. Transparent Access

According to the Council Recommendation, transparent access means that the conditions and rules for all social protection schemes are transparent and that individuals have access to updated, comprehensive, accessible, user-friendly and clearly understandable information about their individual entitlements and obligations free of charge.[164] The Report from the Commission on its implementation showed that shortcomings in the information provided by public or private providers involved in the various social protection branches had been explicitly identified as an issue in 17 Member States. In several Member States, it is possible to observe information gaps and shortcomings affecting (sub-groups of) non-standard workers and the self-employed specifically.[165]

Social Law 4.0 (fn. 1), p. 134 et seq.; for Denmark: *Munkholm,* in: Becker/Chesalina, Social Law 4.0 (fn. 111), p. 174 et seq. and p. 181 et seq.; for Sweden: *Westregård, Annamaria*, in: Social Law 4.0: Update, p. 45.

163 The future of social protection and of the welfare state in the EU (fn. 145), p. 46; *De Becker et. al*., EJSS 26 (2024) 1, (fn. 3), p. 22.

164 Point 15 of the Recommendation, fn. 7.

165 Report from the Commission (fn. 86), p. 23.

The issue of transparency in all its dimensions is particularly relevant for platform work.[166] Specific challenges are: (1) The lack of clarity on parties participating in relationship(s); (2) algorithmic management of the organisation of work, including ratings and surveillance mechanisms; (3) the vague, unclear character of working activity and of the form of employment without written contracts and formal obligations; and (4) often the informal character of platform work. Legal and factual developments may help to meet these challenges:

- Directive 2024/2831 introduced obligations for digital labour platforms to provide information on automated monitoring, in particular, to persons performing platform work and competent national authorities (Art. 9). According to Art. 16 the Member States must require digital labour platforms to declare work performed by platform workers to the competent authorities of the Member State in which the work is performed. Unfortunately, this obligation extends only to platform workers with employee status. In contrast to draft versions of the Directive, the final text does not specify which authorities should be informed. Previously social security authorities were mentioned explicitly. At the same time, the Directive empowers competent national authorities to request relevant information on platform work and contains the obligation of digital labour platforms to provide this information (Art. 17).
- The pervasive adoption of digital technologies and the concomitant expansion of online and digital services will facilitate the assimilation of information and the streamlining of the administrative processes. The European Union's objective is "to ensure that social security and protection online will be fully accessible for everyone by 2030. This involves transformation of all communications between the social security institutions, beneficiaries, and contributors, and third parties where relevant".[167]

For the time being, we can already observe two processes where there has been improvement, one in data transparency, the other in simplification of the implementation of social protection schemes:

166 *Barrio*, EJSS 26 (2024) 2 (fn. 3), p. 7, 10.

167 United Nations University, Case studies on digital transformation of social security administration and services, ILO 2022, p. 186, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40asia/%40ro-bangkok/%40ilo-beijing/documents/publication/wcms_864806.pdf.

– Despite the fact that platform workers may have economic incentives to waive the assertion of their labour and social rights,[168] they also often do not consider their activity as "work" connected with the respective obligations to pay contributions and taxes. For this reason also, some Member States have enacted or are in the process of implementing legislation requiring platform operators to inform their users about their tax and social obligations. France was a pioneer in that regard, introducing this obligation through the Anti-Fraud Act of 23 October 2018.[169] Additionally, public bodies, such as the French ARPE, *Autorité des relations sociales des plateformes d'emploi* (Employment Platforms Social Relations Authority), a public administrative body created in 2022, can facilitate the dissemination of information on rights and obligations. Furthermore, some Member States (Denmark, Estonia, France) have introduced systems enabling them to receive data on individuals' earnings directly from platform companies.[170] At the European level, a first step in combating undeclared work was taken with the adoption of DAC7[171], which introduced the obligation to report income earned through digital platforms and to facilitate the exchange of such information among Member States.[172]
– Simplification of the administrative requirements of social protection schemes can relate to the formalities of protection, administrative structure or the application and receipt process for benefits.[173] In this connection, our previous observations indicate that the primary goal of certain innovations and their success was the desire for the simplification of the administration of social security schemes for the self-employed. The significant growth of umbrella companies in Sweden has been attributed to the need to reduce the considerable administrative burden connected with social security schemes for the self-employed. Through the conclusion of the Hilfr collective agreement in Denmark (see also V.2.), the platform was expected to attract more platform workers because they often struggled to report their earnings to SKAT, as they are not report-

168 *Jorens, Yves*, in: Social Law 4.0: Update, p. 13.
169 *Kessler,* in: Becker/Chesalina, Social Law 4.0 (fn. 113), p. 257, 277.
170 *Lehdonvirta, Vili/Ogembo, Daisy*, A Digital Single Window for income data from platform work, Oxford 2019.
171 Council Directive (EU) 2021/514 of 22 March 2021 Amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L 104/1, 25 March 2021.
172 *Pantazatou, Katerina*, in: Social Law 4.0: Update, pp. 105-114.
173 Report from the Commission (fn. 86), p. 24.

ed automatically for freelancers.[174] The objective of the entrepreneur account in Estonia was to simplify tax and social security obligations, while also guaranteeing social security protection in some branches in a more simplified manner.[175] The expansion from 1,702 active entrepreneur accounts in 2020[176] to 6,908 in 2022[177] confirms that this innovative model has demonstrated efficacy in reducing the administrative burden for the self-employed, although it has not yet been shown to enhance formal and effective access to social protection.

V. Social Protection through Private Parties

1. Individual Solutions

Even though platform companies still often consider themselves as a mere marketplace, some digital labour platforms do at least (either themselves or via private insurance companies) voluntarily provide on-location platform workers with some kind of social benefits in the event of certain social risks (sickness benefit, child allowance, sick leave, parental leave, etc.). So far, this protection has targeted social risks that are inherent to working life. Platforms do not, or only rarely, provide social benefits for deferred social risks like "old age", "invalidity", or "long-term care". Furthermore, there is also a lack of social protection in the case of unemployment. In contrast to social protection provided for by statutory social legislation, this form of provision of social benefits is fragmentary and cannot be seen as the development of a separate private system or scheme. The existing schemes are rare, limited to certain platforms and often to certain forms of social services.[178]

174 *Ilsøe, Anna/Larsen, Trine Pernille*, Why do labour platforms negotiate? Platform strategies in tax-based welfare states, Economic and Industrial Democracy 44 (2023) 1, p. 6, 13.

175 *Tavits, Gaabriel*, New Forms of Employment and Innovative Ways for the Collection of Social Security Contributions: The Example of Estonia, in: Becker/Chesalina, Social Law 4.0 (fn. 1), pp. 299-304.

176 Ibid.

177 *Vallistu, Johanna*, Digital social security accounts for platform workers: The case of Estonia's entrepreneur account, International Social Security Review 76 (2023) 3, pp. 3-24.

178 E.g. the Amazon Care "telemedicine" system, see *Lehdonvirta, Vili*, Cloud Empires, MA, USA: The MIT Press 2022, p. 202. Amazon India launched a comprehensive

In line with their business model, platforms avoid the use of the terms "employee", "employment relationship", "employment", "work" etc. in their terms and conditions. In relation to social protection, they avoid terms like "social benefits", "waiting period", "accident at work insurance". Instead, they use words like "payment", "earnings support for illness"[179], "rider accident insurance", "on-trip/off-trip benefits"[180].

The most widespread form of voluntary social protection by platform companies is insurance against accidents at work. Some platforms have their own insurance, while many platforms conclude contracts with different private insurance companies. As mentioned, these companies provide only fragmented social protection. Their schemes often cover only low-wage earners, and the insured risks are less redistributive and equitable than in public schemes based on large risk pooling.[181] Some platforms require the costs of the insurance to be carried by the platform workers (e.g. drivers) themselves (e.g. partly Deliveroo, Uber), while other platforms provide injury insurance at no cost to the courier (e.g. Glovo). Location-based platforms like Deliveroo, Glovo, Ola, Swiggy and Uber offer riders and drivers different schemes against accidents. The level of protection can vary.[182] Deliveroo offers a food delivery insurance through Zego which covers riders against injuries while they are online and for one hour after they have gone offline; it provides riders with payments when they are injured and unable to work.[183] Uber offers its drivers optional injury pro-

health program for truck drivers and their families, including teleconsultation, see https://www.aboutamazon.in/news/operations/amazon-new-health-program-for-truck-drivers.

179 For example, Deliveroo offers a "rider accident insurance" that covers all riders injured while they are working and a lump sum payment for many injury types as well as "earnings support for illness". Eligible riders can claim around £ 35 per day if they are medically unable to work due to sickness, see https://riders.deliveroo.co.uk/en/support/insurance/what-is-covered-by-deliveroo-insurance.

180 For example, Uber's Partner Protection program in Europe provides drivers and couriers with insurance benefits for "on-trip" accidents as well as certain "off-trip" life events, see https://help.uber.com/driving-and-delivering/article/partner-protection?nodeId=ee7b6bc6-920c-4749-b716-a843af90e1c8.

181 ILO, ISSA and OECD, Providing adequate and sustainable social protection for workers in the gig and platform economy (fn. 119), p. 17.

182 Ibid., p. 16.

183 https://www.zego.com/promotions/get-on-the-road-with-deliveroo/.

tection through Affinity Insurance Services Inc. Furthermore, Uber has a partnership with the insurer AXA.[184]

In addition, many location-based platforms (such as Deliveroo, Uber, Swiggy) provide some protection in the case of illness or childbirth or free childcare.[185] The COVID-19 pandemic imposed immense risks to the health and life of workers on demand (riders, drivers etc.) At the beginning of the pandemic, platforms refused to provide any social benefits to platform workers due to their self-employed status.[186] Strong pressure from regulators, drivers' advocates and the media forced platforms to respond to the health risks caused by COVID-19. Empirical studies indicate that during the COVID-19 pandemic about half the platforms examined in 23 countries provided some payment for ill platform workers.[187] For example, on 7 March 2020, Uber launched a global financial assistance policy for drivers diagnosed with COVID-19; on 15 March 2020 and on 17 April 2020, the scope of the coverage was extended to drivers required to self-isolate.[188] In fact, the eligibility conditions for an individual payment were similar to the conditions for payment on the part of an employer to an employee to continue remuneration in case of temporary incapacity to work: a waiting period; at least one trip in the 30 days before the application for assistance; calculation of payment on the basis of the average weekly earnings over the three months before the application; a maximum amount of the payment and maximum duration of the payment (up to 14 days). However, Uber stopped applying the COVID-19 financial assistance policy in early autumn 2021. At that time the pandemic was still at a high level. This practice shows that platforms that voluntarily provide some form of social protection reserve the right to change and cut these benefits at their discretion.

In general, there is still a lack of a clear policy for providing platform workers with comprehensive and adequate social protection through plat-

184 Uber and AXA join forces to set a new standard for protection of independent drivers and couriers, 23 May 2018, https://www.axa.com/en/press/press-releases/uber-and-axa-join-forces-to-set-a-new-standard-for-protection-of-independent-drivers-and-couriers.

185 *Lancefield, Neil*, Uber offers drivers free childcare, Independent, 13 March 2023, https://www.independent.co.uk/news/uk/uber-london-coram-b2299320.html.

186 Fairwork, The Gig Economy and Covid-19: Looking Ahead, Oxford 2020, p. 13.

187 Ibid., p. 3.

188 *Katta, Srujana/Badger, Adam/Graham, Mark/Howson, Kelli/Ustek-Spilda, Funda/Bertolini, Alessio*, (Dis)embeddedness and (de)commodification: COVID-19, Uber, and the unravelling logics of the gig economy, Dialogues in Human Geography 10 (2010) 2, p. 203, 205.

form providers.[189] The examples above illustrate that platforms only provide a few social benefits via private insurance companies. This holds true for occupational arrangements in every form, including private insurance products which are not within the scope of the Recommendation of the EU.[190] A key reason is that, as underlined by the ILO, private insurance schemes risks are less redistributive, equitable and effective than public schemes based on large risk pooling. In addition, the creation of separate social protection schemes for specific categories of workers can lead to a fragmentation of schemes.[191]

The literature has only begun to address the issue of social benefit provision through platforms.[192] Different reasons can influence a decision by platform companies to provide social benefits:

– Often the voluntary provision of social benefits is (in the logic of the whole business model) linked to the desire of platforms to avoid the reclassification of self-employed platform workers as employees and prevent future possible litigation as to their employment status (see also above, III.2.). Therefore, the platforms are more willing to provide some social benefits to those persons who, in the case of litigation, most likely might be reclassified as employees. The strategy used by the digital labour platforms creates an additional incentive for other (potential) employers to outsource work to the self-employed[193] and to attract them with a small number of social benefits. By adopting private regulations (including concerning provision of social benefits), platforms are seeking to prevent state regulation in this field. The platforms are trying to fill legislative gaps or to substitute for state regulation as well as social partners' regulations with their own regulations.[194] In contrast to known

189 ILO, ISSA and OECD, Providing adequate and sustainable social protection for workers in the gig and platform economy (fn. 119), p. 16.

190 See fn. 7.

191 ILO, ISSA and OECD, Providing adequate and sustainable social protection for workers in the gig and platform economy (fn. 119), p. 17.

192 *Rolfs, Steven/O'Reilly, Jacqueline/Meryon, Marc*, Towards privatized social and employment protections in the platform economy? Evidence from the UK courier sector, Research Policy (2022) 51, pp. 1-13.

193 *Nullmeier, Frank*, The Structural Adaptability of Bismarckian Social Insurance Systems in the Digital Age, in: Busemeyer M. et.al. (eds.), Digitalization and the Welfare State, Oxford: OUP 2022, p. 297.

194 *Cohen, Julie E.*, Review of Zuboff's The Age of Surveillance Capitalism, Surveillance and Society 17 (2019) 1/2, pp. 240-245.

forms of employers' norm-setting, platforms do not want to supplement legislative regulations but to replace the legislator.[195]

- Another motivation for the platforms is to paint a positive picture of their business or to improve their public image. This became particularly visible during the COVID-19 pandemic. But even before then, the public image of some platforms had suffered, especially after a rider had died from exhaustion after long working hours. The measures taken to counter critics of working conditions in the platform industry have also been called "crowdwashing", consisting of two elements, namely platforms' non-compliance with minimum labour standards and covering that up by telling a story that improves the reputation of the company.[196]
- By providing social benefits, platforms may also be trying to gain a competitive advantage over other platforms.[197] However, this will only play a role for on-location platforms, since online platforms can attract workers from all over the world.[198] A similar motive for offering social benefits is seen in retention and reproduction of workforce.[199] From this point of view social benefits and entitlements are an instrument to make this form of employment more attractive.
- But it is also assumed that offering social benefits can be designed to enhance control over the platform workers and make them more dependent.[200] Labour and social entitlements depend on ratings, number of rides or fully worked days. Labour and social benefits may be offered in a way that platform workers who work full time profit more from them than those who work only part-time. At the same time, (low-skilled) platform workers for whom this work is the main source of income are to a higher degree dependent on the platform and the social benefits it provides than other groups of platform workers. Simultaneously, in relation to other groups of platform workers, platforms use the strategy

195 Some argue that if platforms were allowed to stipulate such private law regulations, there might be a problem with equal treatment with other companies, see *Pärli,* Arbeits- und sozialversicherungsrechtliche Fragen der Sharing Economy (fn. 117), p. 61; but as long as a legislator wants to leave room for private autonomy, this argument is less convincing than the one of a need for stable public protection.

196 *Cherry, Miriam*, Corporate Social Responsibility and Crowdwashing in the Gig Economy, Saint Louis University Law Journal 63 (2018) 1, p. 1, 8.

197 *Lehdonvirta,* Cloud Empires (fn. 178), p. 203.

198 Ibid., p. 202.

199 *Rolfs/O'Reilly/Meryon*, Research Policy 2022, 51 (fn. 192).

200 Ibid., p. 10.

of free riders in their social protection, because these workers may earn enough for private social protection or have another main job covered by statutory social protection.[201]

Regardless of the platforms' motive for providing social benefits and entitlements, their active role in granting social protection indicates that they acknowledge a certain responsibility for some social risks. In this sense, the provision of additional social benefits may be seen as an example of corporate social responsibility, inasmuch as "corporate social responsibility entails the voluntary engagement of corporations for social and environmental ends above legally defined minimum standards"[202]. However, at least as long as it is used as a strategy to avoid status reclassification, the level of private social protection will remain below the level of social security schemes for employees.

2. Collective Agreements

The role of social partners in the improvement of social protection depends strongly on the national architecture for organising social protection and the configuration of the national system of industrial relations. In Eastern and in Central Europe, the role of social partners and social dialogue in this field is relatively limited, whereas in Scandinavian countries trade unions are actively involved in establishing social protection. These countries are known for the important role of collective agreements in regulating working conditions and providing additional social protection, such as sickness benefits, occupational injury benefits or supplementary social benefits and payments for parental leave; in these cases, collective agreements usually include the obligation on employers to take part in social insurance schemes, such as occupational pension schemes, etc. At the same time, access to occupational social protection depends on the existence of collective agreements. In this context too, and in line with what was said above about direct provision of social benefits, employers may have different reasons for participating in collective agreements that are similar to the

201 *Hoose, Fabian/Beckmann, Fabian/Topal, Serkan/Glanz, Sabina*, Zwischen institutioneller Verwilderung und Restrukturierung: Soziale Sicherung und industrielle Beziehungen in der Plattformökonomie. IAQ Report 2022, p. 8.

202 *Kinderman, Daniel*, 'Free us up so we can be responsible!' The co-evolution of Corporate Social Responsibility and neo-liberalism in the UK, 1977–2010, Socio-Economic Review 10 (2012) 1, p. 29, 30.

direct provision of social benefits through platforms companies: to paint a positive picture of their business (as a socially responsible employer) and to ensure a competitive advantage.[203] The main difference is that platforms are rather seeking, through contractual regulation, to comply with the rules of existing social protection systems. This is the reason why, at one and the same time, some platforms are not prepared from the outset to participate in collective agreements, namely those platforms which in principle reject such agreements, a determining role for trade unions and collective labour rights.

In Scandinavia, we can observe some examples of social protection through collective agreements. In Denmark, the 3F trade union plays an active role in the improvement of working conditions for platform workers.[204] In 2018 the world's first collective agreement for platform workers was concluded between 3F and the platform for cleaning services Hilfr (as a pilot project). The agreement specifically introduced a pension plan and a healthcare plan. The parties renegotiated a Hilfr2 collective agreement in May 2024 for 2024-2025.[205] Furthermore, in 2023 delivery drivers and the delivery firm Nemlig concluded a collective agreement that, among other issues, regulates additional pensions (with the employer paying an amount equivalent to 8% of the wage).[206] In Sweden, no collective agreements for umbrella company workers or for platform workers were concluded in the early stages of the platform economy. The first collective agreements were concluded in 2021, one for umbrella company workers and one for platform workers (Bike Delivery Agreement between Foodora and the Swedish Transport Worker's Union). It is worth noting that collective agreements in

203 *Ilsøe/Larsen,* Economic and Industrial Democracy 44 (2023) 1 (fn. 174), pp. 6-24.

204 Eurofound, The Danish Trade Union 3F (Initiative), Record Number 3098, Platform economy database, Dublin, 2021, https://apps.eurofound.europa.eu/platformeconomydb/the-danish-trade-union-3f-signs-collective-agreements-with-platform-companies-103030.

205 https://www.google.de/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.3f.dk/-/media/files/artikler/overenskomst/privat-service/overenskomster/overenskomst-hilfr-2024.pdf&ved=2ahUKEwjkkeCS0PWKAxXcHhAIHUVuJjMQFnoECBcQAQ&usg=AOvVaw3tNPtRLlh6IsoyhRI_7oh1.

206 Nemlig.com, Agreement Proves E-Commerce Companies Can Strengthen Workers' Rights, 8 February 2023, https://www.itfglobal.org/en/news/nemligcom-agreement-proves-e-commerce-companies-can-strengthen-workers-rights; Eurofound, The Danish Trade Union 3F (Initiative), Record number 3098 (fn. 204).

Sweden provide substantial supplementary compensation over and above state social insurance and pensions.[207]

Nevertheless, there are two reasons why the role of collective agreements remains rather weak. First, in both Denmark and Sweden, collective agreements cover only a small group of on-location platform workers with employee status, mainly in the transportation and delivery sectors where poor working conditions are a pressing problem.[208] No collective agreements have yet been concluded at sectoral level. Second, all the collective agreements mentioned here cover platform workers who have an employment contract with the platform. Moreover, trade unions in Sweden are reluctant to enter into agreements for workers employed on the basis of short fixed-term contracts.[209] In other words, trade unions, even in Scandinavian countries, follow the traditional industrial relations approach. This approach is not well suited for improving the working conditions and social security of self-employed platform workers. In the case of the innovative Hilfr collective agreement that initially (in 2018) allowed platform workers to choose their employment status, the Danish Competition and Consumer Authority imposed on the parties the obligation to ensure that there is legal subordination between Hilfr and the cleaners employed (in accordance with the collective agreement).

The situation is even more difficult in other Western European countries. Although collective agreements for platform workers have also been established there, they are an even more marginal phenomenon. One exception is a collective agreement for bicycle couriers (with employee status) concluded in Austria and valid from 1 January 2023.[210] The agreement contains a provision on the payment of wages in the event of absence from work due to illness or accident. However, the agreement only cross-refers to the provisions of the Continued Payment of Remuneration Act (*Entgeltfortzahlungsgesetz*) and lacks its own substantive regulations. Otherwise, collective agreements concluded in Western Europe concentrate on the

207 *Westregård*, in: Becker/Chesalina, Social Law 4.0 (fn. 118), p. 224.

208 *Bonvin, Jean-Michel/Cianferoni, Nicola/Mexi, Maria, Conclusion*, The rise and growth of the gig economy. Challenges and opportunities for social dialogue and decent work, in: Jean-Michel Bonvin, Nicola Cianferoni and Maria Mexi (eds.), Social Dialogue in the Gig Economy, Cheltenham/Northampton: Edward Elgar 2023, p. 146.

209 *Westregård, Annamaria*, in: Social Law 4.0: Update, p. 42.

210 Kollektivvertrag Fahrradboten, Arbeiter/innen, gültig ab 1. Januar 2023, https://www.wko.at/kollektivvertrag/kollektivvertrag-fahrradboten-2023#heading_ii.

improvement of working conditions, information rights and transparency with regard to algorithmic management (e.g. provision of rides, deactivation of accounts, possibility of choosing between different riders).[211] In France, the Employment Platforms Social Relations Authority has been set up at the initiative of the French government to enhance social dialogue between platforms and workers; even though, social dialogue and negotiations for supplementary complementary social protection benefits are legally regulated and encouraged, the collective agreements signed in May 2024 in the VTCs (Vehicle for Hire) and goods delivery sectors did not contain provisions providing additional social benefits.[212]

Last but not least, it is an open question as to how to include the self-employed in a legal framework of collective agreements and concomitantly organised occupational social protection. Directive 2024/2831 considers the conclusion of collective agreements for self-employed platform workers as a means to enhance working conditions and social protection,[213] and the European Commission's Communication of 30 September 2022 provides non-binding guidelines on the application of Union competition law to collective agreements on the working conditions for solo self-employed persons.[214] While we share the view that collective agreements between the self-employed persons and digital labour platforms on working conditions are not subject to Art. 101 TFEU,[215] it is hard to see how the self-employed could reach a sufficient level of joint organisation to be able to negotiate collectively.[216]

211 See Eurofound Platform economy database, https://apps.eurofound.europa.eu/platformeconomydb/.

212 *Kessler, Francis*, in: Social Law 4.0: Update, p. 69.

213 Fn. 10.

214 OJ C 374/02, 30 September 2022.

215 See ECJ 17 February 1993, C 159/91 and C 160/91, Poucet and Pistre v. AGF and Cancava; ECJ 21 September 1999, C-67/96, Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie, EU:C:1999:430; ECJ 4 December 2014, C-413/13, FNV Kunsten Informatie en Media/Staat der Nederlanden, EU:C:2014:2411.

216 See also for practical problems *Stylogiannis, Charalampos*, The effective application of the right to collective bargaining for self-employed (platform) workers: "Not Such an Easy Task", ELLJ 14 (2023) 4, p. 494, 506; *Mangan/Muszynski/Pulignano*, ELLJ 14 (2023) 4 (fn. 153), p. 541, 564.

VI. Financing

1. Involving Platforms in the Financing of Social Security for Platform Workers

To the extent to which platform workers can be assessed as being employed earners, platforms will have to pay social security contributions in accordance with national provisions and their application – and in line with international law, as contributions paid by employers are (still) seen first and fundamentally as a financial source of social security in international law.[217] With regard to other persons who work for platforms, namely the self-employed, the question is whether platforms are actually also obliged, and whether they could be, obliged to pay contributions. Such an obligation would go beyond voluntary participation in private social protection (see above, V.), and it would facilitate the implementation of social security schemes, be it general schemes for the self-employed, be it specific schemes for platform workers, as financing of those schemes is a major challenge in practice.

Looking at the actual situation today, we can observe that some countries have imposed legal obligations on platforms to provide some kind of social protection to platform workers: in France, the term and the concept of social responsibility were introduced into the Labour Code in 2016. However, this term has not yet been defined.[218] In 2022 a proposal was made in Sweden to introduce a concept of a responsible principal (responsible for the work environment) which could be either the platform or the service consumer. Unfortunately, this proposal did not result in any legislative changes, thus underlining the challenges of the political process in implementing innovative strategies to extend social responsibility to third parties beyond the traditional employment relationship.[219] Even in these countries, such social responsibility has not led to comprehensive social

217 See Art. 71 of ILO Convention No. 102 on Social Security (Minimum Standards), fn. 51 and Art. 70 of the European Code of Social Security, ETS No. 48, https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=048.

218 This is part of a broader issue concerning the introduction of new categories/terms without their definition and theoretical justification. For example, in Italy, the meaning of the categories hetero-organised and autonomous platform workers has not so far been explained. See *Ales, Edoardo/D'Avino, Emilia*, in: Social Law 4.0: Update, p. 20 et seq.

219 *Westregård, Annamaria*, in: Social Law 4.0: Update, p. 43.

protection. In France, while fragmentary and limited protection for atypical self-employed platform workers has been provided for in the Labour Code, this cannot be legally enforced by the platform workers.[220] In addition, the absence of a legal obligation allows platform providers to further limit the scope of their already limited social responsibility in terms of the number of insured risks by recourse to private insurance companies and setting low-priced clauses in collective insurance contracts.[221]

The question is whether states should go beyond this and introduce an obligation on platforms to contribute even to the social protection of their self-employed workers. From a legal point of view, such an obligation needs to be justified as it forms a restriction of the right of platforms to conduct a business.[222] As already discussed in Social 4.0, Germany's social insurance for the creative and media industries[223] could serve as a model in this context.[224] Introduced in 1981 and entering into force in 1983,[225] it is a compulsory social insurance for the self-employed in the creative and media industries to which contributions have to be paid by those who make use of the work of the self-employed in these industries, irrespective of whether in a given individual case the recipient of the remuneration is insured under the Artists' Social Insurance Act or not. This obligation was challenged before Germany's Federal Constitutional Court, and its decision[226] is remarkable and deserves to be repeated here, as the Court stated that it would be inappropriate "to deny that artists and publicists are in need of social protection and that marketers have a social responsibility simply because there is no formal employer-employee relationship"; it argued that this relationship might be the most important case of "social responsibility" as a justification for the obligation to contribute to a social insurance scheme which protects third persons, but that this is not exclusive; and it follows

220 *Daugareilh*, ISSR 74 (2021) 3-4 (fn. 4), p. 85, 90 et seq.
221 *Kessler, Francis*, in: Social Law 4.0: Update, p. 67.
222 As protected by national constitutional law; see also Art. 15 and 16 of the Charta of fundamental rights of the European Union (CFR EU); for an overview Ruffert, Matthias, § 6.I., in: Ehler, Dirk/Germelmann, Claas Friedrich (eds.), Europäische Grundrechte und Grundfreiheiten, Berlin: de Gruyter, 5th ed. 2023, p. 612, 615 et seq.
223 The German wording reads "*Künster und Publizisten*" but refers to a publishing activity as defined in § 1 of the Act of 27 July 1981 (BGBl. I, 705).
224 See *Becker/Chesalina*, in: Becker/Chesalina, Social Law 4.0 (fn. 6), p. 15, 20 et seq.
225 Act of 27 July 1981 (fn. 223).
226 Decision of 8 April 1987, 2 BvR 909, 934, 935, 936, 938, 941, 942, 947/82, 64/83 and 142/84, BVerfGE 75, 108.

that laws have to take social facts into account, that they should react to these facts and establish institutions fitting the particularities of a given economic activity "instead of making it a condition in advance that this form of existence be dissolved and transferred to a formal employment relationship".[227]

Following this line of argument, it can be argued that the position of platform providers is comparable to that of using the works of artists and publicists.[228] As in the case of someone marketing the work of an artist, a platform offers a space through which the work of others can be sold to clients and as in the case of artists the platform has a major influence on the circumstances and conditions under which business is concluded between the person actually performing the work and the client. This is because the platforms are much more than intermediaries. They intervene with algorithms and advertising, and they also provide other settings for the work.[229] These settings include in particular the General Terms and Conditions of the platforms in accordance with which platform workers provide their services (which is akin to the situation of artists who sell their work in accordance with the rules set up by whoever markets or makes use of their work).[230] Finally, many platform workers are in need of social protection in a similar way to artists. Available empirical data on platform workers shows that they are disproportionately affected by poverty in old age,[231] even if, at the same time, there are numerous solo self-employed people working via platforms in areas that require a high level of qualifications (e.g. IT staff, tax and business consultants, translators,[232] etc.)

227 BVerfGE 75, 108, 158 et seq.

228 *Knorr, Petra*, Soziale Sicherung der selbständigen Künstler und Publizisten, in: Soziale Sicherung Selbständiger. Bundestagung des Deutschen Sozialrechtsverbandes e. V. 5/6. Oktober 2023 in Düsseldorf, Erich Schmidt Verlag, Berlin 2024, p. 67, 87.

229 Ibid, p. 82 et seq.

230 Ibid., p. 88.

231 *Schneider-Dörr, Andreja*, Erwerbsarbeit in der Plattformökonomie: Eine kritische Einordnung von Umfang, Schutzbedürftigkeit und arbeitsrechtlichen Herausforderungen, Working Paper Forschungsförderung, No. 116, Hans-Böckler-Stiftung. Düsseldorf 2019, p. 34, https://nbn-resolving.de/urn:nbn:de:101:1-20190521133808511102502.

232 Depending on the type of translation activity (literary or artistic or translation of business texts or advertising texts), a translation activity may also be directly covered by the Artists' Social Insurance Act, see *Knop, Markus*, Arbeitsrechtliche Fragen der Plattformarbeit, Berlin: Duncker & Humblot 2024, p. 298.

With regard to the heterogeneity of the platform industry, consideration should be given to differentiation. A particular social responsibility is more obvious for those atypical self-employed platform workers who do not have a high level of negotiating power and cannot influence the level of remuneration and conditions of provision of services themselves. This is particularly the case in areas where employees do not necessarily have to be highly qualified, such as delivery, rider, cleaning and care services, but also in the context of micro-tasking by location-independent platform work, etc. It was stressed previously that the most vulnerable are platform workers without a main occupation beyond the platform economy. And it is specifically obvious for those workers for whom platform work forms a main occupation.

Whether such a differentiation is actually possible also depends on the configuration of social protection schemes, in particular on the scope of personal coverage. And any obligation to contribute would also have to be discussed in the light of the social policy implications and possible implementation. In terms of the method of calculation, platforms could be required to pay a form of flat-rate contribution, as is the case with social insurance for artists in Germany, e.g. a contribution on the total volume of the annual turnover the platform provider generates. Furthermore, it would have to be taken into account that platform companies often use intermediaries or partners. These actors should also share the social responsibilities; otherwise, the involvement of intermediaries or partners could be used as a strategy by the platform companies to evade responsibility. The territorial-bound powers of national social security administration could also pose a challenge as a particular difficulty arises with location-independent platform work, as this work can be carried out from any place, which presupposes a cross-border situation.

This leads to the conclusion that any obligation to contribute to the financing of social protection would, at least for location-independent work, but also for other work dependent on the organisational structure and the home state of platforms, require specific coordination regulations at EU level. Therefore, a more suitable pathway could be to introduce a payment along the lines of the French *Contribution social généralisée* (see II.2.a)aa), i.e. specific tax-like contribution in order to subsidise social security schemes but tailored to platforms and the social protection of the

self-employed. This would lead to discussions on digital services taxes[233] and also on the question of how to implement such taxes and whether there is the willingness, or also the necessity, to introduce a respective competence of the EU. This discussion cannot be taken up here. Yet, it is clear that every form of obligation of platforms to contribute to social protection systems would need the exchange of information and adequate digital tools.

2. Income Reporting Systems and Collection of Social Contributions

Income reporting systems are one of these tools. They serve a dual purpose: on the one hand, they improve transparency; on the other, they help combat undeclared work as well as evasion of taxes and social security contributions. Some Member States (Denmark, Estonia, France) introduced systems to receive data on individuals' income directly from platform companies in 2017 and 2018, years before this obligation was introduced at European level.[234] Estonia introduced a voluntary semi-automatic income reporting system in 2017, which was open for all platforms but primarily targeted the rider sector.[235] In Denmark, the obligation to provide users' income data to the Danish tax authority was imposed in 2018 on letting platforms (offering accommodation rental and car rental) registered in Denmark, whereas digital labour platforms were not included due to the complexity of the social security system and, in particular, the rules for the collection of social contributions.[236] In France the initial idea behind the income reporting obligation was twofold: to eliminate tax and social contribution evasion and to abolish outdated tax rules.[237] Since October 2018, the French *Anti-Fraud Act* of 23 October 2018 has obliged platforms to share detailed information on workers' income with the social security authorities.[238]

233 See *Borders, Kane/Balladares, Sofia/Barake, Mona/Baselgia, Enea*, Digital Services Taxes, June 2023 (available at: https://www.taxobservatory.eu/publications/), and for the respective position of the EU information available at: https://www.consilium.europa.eu/en/policies/digital-taxation/.

234 *Lehdonvirta, Vili/Ogembo, Daisy*, A Digital Single Window for income data from platform work (fn. 170).

235 Ibid., p. 21 et seq.

236 Ibid., p. 15 et seq.

237 Ibid., p. 26.

238 *Kessler, Francis*, in: Social Law 4.0: Update, p. 63.

At European level, the Commission's high-level expert report on Digital Transformation in 2019 recommended the creation of a "Single Digital Window" in Europe for the reporting of contributions and taxes, as well as for the optional deduction of contributions on behalf of the participating national institutions in 2019. The main target groups would be the self-employed working on online platforms for multiple and rapidly changing employers.[239] For implementation, the high-level experts proposed the creation of a central agency which would receive income data from all platforms with users in the Member States and forward the information to national tax and social security authorities in order not only to share data with Member States, but also to facilitate obtaining data from international web-based platforms based outside the EU. [240] They also identified obstacles to the realisation of this proposal, such as data protection, but in particular a lack of harmonisation of national income tax and social security systems[241]; and they hinted at different approaches in the Member States concerning the goals of reporting systems (reduction of compliance costs for taxpayers or reduction of tax evasion).[242] Given the existing division of competences between the EU and its Member States, it is clear that the creation of a central agency is not a suitable solution, at least as long as the EU is not allowed to collect its own taxes on trans-border economic activities – which should be the case in a longer run, based on a fundamental rethinking of the role of the EU as a regional political community in the future. In the meantime, the exchange of information remains the focal point, as information on the economic activities and the actors involved also form the basis for the calculation and collection of social security contributions. The main problem here is to ensure the availability of reliable and sufficiently detailed data, including on cash flows between platforms and platform workers (in a broad sense).

239 Report of the High-Level Expert Group on the Impact of the Digital Transformation on EU Labour Markets. Luxembourg: Publications Office of the European Union 2019, https://digital-strategy.ec.europa.eu/en/news/final-report-high-level-expert-group-impact-digital-transformation-eu-labour-markets.

240 *Lehdonvirta, Vili/Ogembo, Daisy*, Taxing Earnings from the Platform Economy: An EU Digital Single Window for Income Data?, British Tax Review (2020) 1, pp. 82-101.

241 *Hießl*, Case Law on the Classification of Platform Workers (fn. 73), p. 30.

242 A Digital Single Window for income data from platform work, https://www.oii.ox.ac.uk/research/projects/a-digital-single-window-for-income-data-from-platform-work/.

In March 2021, the Council of the EU adopted new amendments (DAC7)[243] to Directive 2011/16/EU on administrative cooperation in the field of taxation. The aim of these amendments was to improve administrative cooperation between the Member States in the field of taxation; to prevent tax fraud, tax evasion and tax avoidance; to reduce the administrative burden on digital platforms; and to ensure a level playing field by covering both cross-border and non-cross-border activities. To achieve these objectives, DAC7 introduced at EU level the obligation to report income earned through digital platforms and the exchange of such information between Member States. These rules have applied since 1 January 2023 and cover platforms based inside and outside the EU[244], including digital labour platforms. It is important to stress that DAC7 did not introduce a (new) pan-European agency but rather promotes the direct exchange of data between Member States.

Although DAC7 does not address social security, its provisions may also have an impact at the transnational level on the protection of social security revenues and the fight against social security fraud and the evasion of social contributions through the exchange of data between the social security authorities of the Member States. Regulation (EU) 2016/679[245] in Art. 6(e) allows data processing if it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. The fight against social security fraud, against the evasion of social security contributions and to protect social security revenues serves a general public interest. Furthermore, Recital 5 of Regulation 2016/679 underlines the objective of administrative cooperation: "national authorities in the Member States are being called upon by Union law to cooperate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State".

Art. 17 of Directive 2024/2831 empowers competent (national) authorities to request from platforms relevant information on platform work (e.g. employment status, the general terms and conditions and the average income from platform work) and includes an obligation for digital labour

243 See fn. 171.

244 *Pantazatou, Katerina*, in: Social Law 4.0: Update, p. 106 et seq.

245 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, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1, 4 May 2016.

platforms to provide this information. For this reason, closer cooperation between labour, social security and tax authorities is necessary and desirable. Data exchange between the authorities should be organised on an ongoing basis. Therefore, the technical possibilities for the automatic exchange of information between the authorities need to be explored and barriers to the interoperability of data across national borders should be removed. At the same time, the implementation of Directive 2024/2831 should not have as an outcome that platforms have to report data (including on income) to numerous different institutions (tax, social security, labour inspectorates),[246] but should rather contribute to reducing tax and social security compliance costs.

As already mentioned above (IV.3.), the main driver for the different innovative solutions has been the reduction in the administrative burden and simplification of reporting and other obligations. Platform operators are better equipped than platform workers to collect and verify the necessary information on platform workers operating on a digital platform and also to provide digital payment of taxes and social contributions for them. The assumption of these responsibilities by platforms can also contribute to the growth of the platform economy and reduce the (additional) administrative burden, improving compliance with tax and social security legislation. A uniform reporting form could be developed that includes information relevant for tax, labour and social security authorities.

Recital 37 of Directive 2024/2831 encourages cooperation between the competent authorities of the Member States, including through the exchange of information, in order to ensure the determination of the correct employment status of persons performing platform work. The European Labour Authority is required to facilitate and enhance such cooperation and the information exchange between Member States as well.[247] The 2025 Work Plan of the European Platform tackling undeclared work (within the European Labour Authority) foresees the organisation of a plenary meeting addressing misclassification of platform workers' employment. In our opinion, cooperation and data exchange between Member States should not be shrunk to the issue of misclassification of employment but should simultaneously pursue other objectives (relevant for different authorities),

246 Report of the High-Level Expert Group on the Impact of the Digital Transformation on EU Labour Markets (fn. 239), p. 43.

247 In our opinion, Directive 2014/2831 should be added to the scope of activities of the ELA (to Art. 1 Point 4 of Regulation 2019/1149).

including the protection of social security revenues. It would be desirable if the activities of this Platform were to include the creation and evaluation of specific tools to tackle undeclared work in the platform economy, as the use of traditional tools like labour ID-cards[248] or written contracts, is not common in this sector. Finally, the spread of e-services can help combat undeclared work. A study by the Platform shows that the use of e-services for receiving social benefits can encourage users to purchase services from the formal economy.[249]

The income reporting obligation in DAC7 does not include the obligation to clarify the nature of the activity (in particular, whether it is salaried employment or whether it is dependent employment). In addition, taxes, unlike social contributions, may be paid in more than one Member State.[250] For these reasons, income reporting data collected in accordance with DAC7 may be used rather for the identification of the potential payers of social contributions[251] (e.g. those not identified through the declaration of platform work by digital labour platforms in accordance with Art. 16 of Directive 2024/2831) than for the direct collection of social contributions.

This collection could turn out to be difficult for several reasons. One is the peculiarity of the platform economy, with its task-based and short-term assignments, the use of algorithmic management, the cross-border dimension of the services offered through the use of platform operators, the involvement of at least three parties in the relationship, constantly changing clients, difficulties in determining the identity of the platform worker and where (geographically) the work was carried out. Second, there are problems with the legal foundations, such as the lack of a uniform definition of the terms "employee" and "self-employed" for the purposes of social law in the Member States, the complexity of social security systems and the rules on the payment of social contributions in the case of a second job, with

248 See for example: Platform Tackling Undeclared Work. Platform subgroup on evaluating social/labour ID cards as a tool for tackling undeclared work, including in subcontracting chains. Output Paper, July 2023, European Labour Authority 2023, https://www.ela.europa.eu/sites/default/files/2023-12/output-paper-evaluating-social-labour-ID-cards-2023.pdf.

249 European Platform tackling undeclared work. E-services to facilitate declared work, May 2023, European Labour Authority 2023, https://www.ela.europa.eu/sites/default/files/2023-12/UDW-learning-paper_e-services-digital-solutions-facilitate-declared-work.pdf.

250 See *Pantazatou, Katerina*, in: Social Law 4.0: Update, p. 109 et seq.

251 The main goal of DAC7 was the identification of potential taxpayers and their taxable income. See *Pantazatou, Katerina*, in: Social Law 4.0: Update, p. 110.

numerous exceptions and thresholds, and last but not least, difficulties in determining the Member State responsible for deducting contributions in a cross-border situation due to gaps in the coordination rules[252] in relation to the platform economy.[253] Third, to introduce cross-border automatic deduction of social contributions, it would be necessary for each Member State to develop (its own) interoperable data API able to collect the different data that would need to be regularly collected for the calculation of social contributions.

Overcoming these difficulties would create great advantages. Withholding social contributions at the source helps tackle the challenge of undeclared work and reduce compliance costs. It can also facilitate effective access to social protection, as every task performed and every hour worked can be easily tracked and taken into account in the calculation of social contributions thanks to the digital infrastructure. At national level, we can observe some examples (Estonia and France) that show how sharing income reporting data with social security authorities can facilitate the automatic collection of social contributions – at least if platform workers use unified or simplified tax systems and are likely to have a single identification number or code, as this helps to ensure compliance with both tax and social security contributions.[254] In addition, the infrastructure created for income reporting, and in particular for the collection of user data can be adapted for the collection of social contributions. France is also pioneer in the automatic deduction of social contributions: it is planned that by 2027 the social contributions of micro-entrepreneurs (using simplified tax schemes) will be directly deducted by platforms, regardless of the employment status.[255]

252 Regulation (EC) 883/2004 of the European Parliament and of the Council on the coordination of social security systems, OJ L 166, 30 April 2004 (amended), and Regulation (EC) 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30 October 2009 (amended).

253 See *Strban, Grega*, in: Social Law 4.0: Update, p. 100.

254 Platform workers and social security (fn. 78).

255 See *Kessler, Francis*, in: Social Law 4.0: Update, p. 72.

VII. Conclusion

1. Platform work is a growing sector of the labour market, even though its share differs between European and other states, as well as within the European Union (see above, II.1.b)). Also growing is the case law concerning the classification of on-location platform workers. This is still controversial, except for couriers and riders. In some cases, there has been a tendency of the courts to decide in favour of employee status.[256] But generally speaking, it seems clear that there will continue to be different forms of platform work, and self-employment will be one of them.

2. Generally speaking, the case-by-case approach will remain necessary as no attempt to redefine the legal criteria that mark the threshold between employment and self-employment can circumvent the fact that these criteria have to be interpreted and applied to individual cases. This comes with two disadvantages. First, proceedings can take years, and by the time the final judgement is issued, the platform may have adjusted its business model, may have gone bankrupt or moved out of the country. Second, this approach can lead to uncertain outcomes even for workers on one and the same platform but using different work equipment – car, moped or bicycle, (as the Swedish update shows[257]), not to mention between different platforms and jurisdictions.

   Administrative procedures aiming to determine employment status also have their limitations for different reasons (e.g. incorrectly selected indicators in the status determination procedure or shortage of administrative personal). In the Netherlands, for example, the results of using an online questionnaire to clarify the (future) employment relationship were not promising enough as in more than 25% of the cases the qualification of the relationship was not clear.[258]

3. In our previous volume on Social Law 4.0, we presented some specific and innovative solutions for persons in non-standard forms of employment, including platform workers, e.g. the umbrella company model

256 See above III.1.a).
257 Ibid.
258 See *Montebovi, Saskia/Vonk, Gijsbert*, in: Social Law 4.0: Update, p. 50.

in Sweden[259]; the entrepreneurial account in Estonia[260]; the concept of social responsibility in France[261]; hetero-organised workers in Italy[262]; a collective agreement for self-employed platform workers in Denmark[263]; a special tax and social security regime for platform workers in Belgium[264], etc.).

As our Update shows, it seems as if most Member States do not intend to introduce new substantial regulations or special tax and social security regimes for platform workers. Moreover, some special regulations have been abandoned in favour of the application of already existing general social law provisions. As the Belgium update shows, the special tax and social security regime for platform workers was abolished and there are no longer any special rules applying to this economic sector.[265] In Italy and in France, special regulations for platform workers remain in effect, however. Unfortunately, these solutions lack a systematic approach, and they are fragmented and controversial, which in some aspects results in conflicts between labour law and social law. The legislator has so far not defined the new notion of "social responsibility" (introduced in France) and the new employment category "hetero-organisation" (in Italy), conceptual thought on these phenomena are still missing.[266] Neither the legislator nor private actors have created special social insurance schemes for platform workers.

4. The Update indicates that, notwithstanding some innovations and reforms, the core of social protection still lies (to varying degrees) in standard employment relationships. Neither digitalisation (as a plurality of opportunities and challenges) nor the COVID-19 pandemic[267] have

259 *Westregård*, in: Becker/Chesalina, Social Law 4.0 (fn. 118), pp. 203-227.
260 *Tavits,* in: Becker/Chesalina, Social Law 4.0 (fn. 175), p. 281, 299 et seq.
261 *Kessler,* in: Becker/Chesalina, Social Law 4.0 (fn. 113), p. 257, 268 et seq.
262 *Ales,* in: Becker/Chesalina, Social Law 4.0 (fn. 59), p. 97, 104 et seq.
263 *Munkholm,* in: Becker/Chesalina, Social Law 4.0 (fn. 111), p. 171, 191 et seq.
264 *Jorens, Yves*, The Sharing Economy in Belgium: Status due to Taxation or Non-Status?, in: Becker/Chesalina, Social Law 4.0 (fn. 1), pp. 75-96.
265 *Jorens, Yves*, in: Social Law 4.0: Update, p. 11 et seq.
266 *Ales, Edoardo/D'Avino*, *Emilia*, in: Social Law 4.0: Update, p. 22 et seq.; *Kessler, Francis*, in: Social Law 4.0: Update, p. 65.
267 See *Seemann, Anika*, Conclusions – On Risk and Solidarity in Times of Global Crises, in: Becker, Ulrich/Seemann, Anika (eds.), Protecting Livelihoods: A Global Comparison of Social Law Responses to the COVID-19 Crises, Baden-Baden: Nomos 2022, p. 521, 536.

called this into question. Most crisis-related measures that had the effect of improving access to social protection during the pandemic were temporary and short-lived. Ultimately, there is a high degree of adherence to traditional patterns (such as the binary divide and employer responsibility) and established social security systems. By addressing the issue of the determination of the employment status of platform workers with the presumption rule in Directive 2024/2831 as well as in the national legislation (Belgium, Portugal and Spain), Member States have made this clear.

At the same time, it would be wrong to claim that the challenges of new employment patterns in general (associated with irregular work and income, transition between different forms of employment, multiple employment) have not been recognised in the Member States and in the United Kingdom. There have been various proposals from political parties, legislators and academics aimed at harmonising social security schemes for employees and the self-employed, such as the introduction of more contract-neutral insurance or the provision of some new social security benefits for the self-employed. For example, in Sweden, in 2023 a proposal was made to cumulate income from dependent employment and self-employment for the calculation of sickness benefits (a proposal that goes in the same direction as the unemployment reform in Denmark in 2018). This example confirms that innovative structural approaches do exist, and also that they can be transferred from one country to another. However, their realisation presupposes that there is sufficient political will to deviate from path-dependency.

5. As a consequence, and as our Update confirms (see IV.), there are still considerable gaps in formal access to social protection, and even more so in effective access to social protection for self-employed and non-standard workers. Ensuring access to social protection for low-paid platform workers and other categories of atypical worker remains a significant challenge for social security at national and European levels.

6. Privately organised social protection, including along the lines of collective agreements, can address the newest challenges of the platform economy like algorithmic control. Some platforms provide a relatively small number of social benefits voluntarily (sickness benefit, child allowance, sick leave, parental leave, etc.), especially to on-location platform workers. Their provision can pursue different objectives (see V.). However,

private provision is, all in all, not suited to closing protection gaps in public social security systems. Moreover, up to now, the respective benefits do not cover a large proportion of platform workers and their importance does not seem to be increasing, which is due to the fact that only some platforms take part actively in their provision it also remains unclear how to include the self-employed in collective agreements.

Therefore, this form of social protection can be used primarily as a complementary tier of social protection. This function, in turn, may play an important role particularly for the self-employed as the level of their statutory social protection is often not sufficient.

7. Measures to improve social protection for individuals in non-standard forms of employment who earn below a certain threshold, particularly those who are considered as the "working poor", mostly come with additional costs which require additional sources of financing. The same holds true for the improvement of social protection for those self-employed who are not in a position to purchase private social security. Their level of protection under statutory systems often remains rather low due to the fact that they have to rely on their own contributions.

   One solution for attracting additional sources of financing could be to involve digital labour platforms in the financing of the social security of platform workers. While this appears to be legally permissible, a number of questions remain (see VI.1.): whether this form of social responsibility should be restricted to specific groups of workers, and even more importantly, how it could be implemented. The arguments to take into account include the fact that the structure of platform work is heterogeneous, as some platform workers are low-paid workers in non-standard forms of employment, while others are highly qualified and highly paid. There are also good reasons to assume that new forms of contributions need to be introduced, and that organising this requires a close relationship with tax administrations.

8. In conclusion, and with a view to the observations just made, the following proposals may be helpful in order to improve social protection for platform workers:
   – Even if the standard employment relationship remains the prevalent employment pattern, other employment patterns should not be regarded as an (uncommon) exception but rather be regulated as new options. Nevertheless, through provisions in labour law (presumption

rules, limitation of fixed-term or zero-hours contracts, introduction of a minimum working time for casual work, etc.), the legislator should favour the model of the standard employment relationship as the most robust model for protecting labour and social rights. However, social protection needs to be as universal as possible. In addition, it is important to abolish tax and social security incentives, such as exemptions from social security contributions and taxes, which contribute to the growth of casual work and incentivise atypical self-employment.

- The EU Council Recommendation on access to social protection for workers and the self-employed aims to facilitate access to adequate social protection for all workers and self-employed persons in the Member States, irrespective of their employment status. In this context, the adjustment and adaptation of existing schemes seems to be a better solution than the creation of new special schemes for special groups of persons. At the same time, rules governing social insurance schemes should reflect the (working and professional) situation of the employed person (e.g. by adjusting rules governing contributions and benefits) as well as individual preferences for more flexible work patterns. Providing access for the atypical self-employed requires an understanding of the sometimes-non-linear character of their activities and income development, and of their wish for simplification of registration with the scheme and calculation and reporting of social contributions and taxes.
- The private regulation by platform providers and private insurers needs to be monitored. In particular, the same rules should apply for the purposes of private insurance against accidents at work as in social security legislation as regards the definition of work (as an insured activity, including paid breaks and interruptions in work) and the definition of the time spent travelling to and from work, in order to avoid misuse of working time regulations for platform workers. This will help address the problem of unpaid and uncalculated time inherent in platform work.
- Regarding the social responsibility of platform providers, digital labour platforms should be involved in the financing of social protection. This can be accomplished through social security contributions, if appropriate social security systems are in place at national level, but it can also be achieved indirectly via tax-like contributions or taxes.
- The development of digital technologies can contribute to enhancing access to social protection as well as to financing social security. Such

possibilities should be used more extensively. For instance, access to social security can be facilitated by further development of e-services as well as by using digital tools to account for each working unit. Automatic income reporting coordinated between different authorities can decrease the volume of reporting obligations and simplify the administrative requirements within the respective social security schemes. Although there are numerous obstacles to the automatic collection of social contributions via platform providers at the European level, collecting contributions in this way could ensure compliance of both tax and social security contributions, prevent undeclared work and social fraud, and protect social revenue at national level.

– More intensive cooperation between labour, tax and social security authorities at national and European levels is necessary. Such cooperation and data sharing between Member States (including sharing of income data) would facilitate identification of the potential payers of social contributions, fight social fraud and evasion of social contributions as well as protect social security revenues. Therefore, technical possibilities for the automatic exchange of information between the authorities should be explored and barriers to the interoperability of data across national borders should be removed.

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