



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 work¹*

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Abstract

In recent years, social law across the EU has been shaken by the digital transformation experienced in the world of work. On one hand, new forms of work enabled by this digital transformation, such as platform work, often result in fragmented, precarious and uncertain social protection for the persons who perform work through them. On the other, having access to the data produced by the digitalisation of work (an important feature of platform work) is often key to greatly improving the implementation of social protection systems (including the determination of the correct employment status and social security contributions).

The digital transformation of work has also significantly impacted the implementation of EU law. Forms of work enabled by it, such as telework and platform work, typically permit much greater geographical mobility than normal. This may challenge the application of the relatively strict EU rules for the coordination of social security (resulting in, inter alia, sudden changes in the legislation applicable that may be against the interests of all actors involved). In turn, the data resulting from digitalisation may help to address this further uncertainty, as well as to ensure greater transparency.

Platform work is thus a perfect example of how regulation at the national and EU levels may need to adapt to the impact of digitalisation in the world of work. Hence, it may not be surprising that EU institutions have started suggesting the regulation of platform work as an opportunity to try possible reactions to the digitalisation of work. One of the results of these efforts is the legislative

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process surrounding a proposal for a Directive on improving working conditions in platform work. The proposed Directive, if approved, would be the first EU initiative specifically addressing some of the challenges brought by digitalisation in platform work (following in the footsteps of previous, more general, EU initiatives such as the GDPR or the proposed AI Act).

This contribution uses the proposal for a Directive on improving working conditions in platform work (as well as the amendments and positions that it has gathered through its legislative process up to 12 June 2023²) to analyse some of the abovementioned challenges and opportunities brought by the digitalisation of work to the world of social protection, as perceived by EU institutions and other relevant actors. The contribution then explores the potential practical and legal limitations of addressing these challenges through EU social law. The contribution ends by suggesting potential solutions to overcome these limitations, including the promotion of a more comprehensive approach to social protection under EU law.

1. Introduction: Platform work as an example of opportunities and challenges brought by technology

During the last decades, the world of work has experienced a series of technological and regulatory changes, resulting in a progressive shift from Taylorism and Fordism to a gig and global economy.³ Recent developments as part of the so-called fourth industrial revolution⁴ have further reinforced that trajectory⁵. Through the use of technologies such as the Internet, AI, smartphones, GPS and electronic payments, consumers and workers have easier access than ever to work, services and products.

² The contribution pays special attention to EUROPEAN PARLIAMENT: *Compromise Amendments 1–38. Proposal for a Directive on Improving Working Conditions in Platform Work*. Brussels, 2022. and, to the extent that it is relevant to those issues addressed in this contribution, the COUNCIL OF THE EUROPEAN UNION: *Proposal for a Directive on improving working conditions in platform work – general approach (10107/23)*. 2023. Nevertheless, and unless stated otherwise, the term ‘proposed Directive’ refers in this contribution to the European Commission’s proposal for a Directive on improving working conditions in platform work of 9 December 2021.

³ See, inter alia, Katherine V. W. STONE: *From Widgets to Digits: Employment Regulation for the Changing Workplace*. Cambridge, Cambridge University Press, 2004. 51–64.; Max KOCH – Martin FRITZ – Richard HYMAN: *Non-Standard Employment in Europe: Paradigms, Prevalence and Policy Responses*. London, Palgrave Macmillan, 2013. 122–124.; Julia LOPEZ: Segmentation and the Debate on Labour Laws. *Comparative Labor Law & Policy Journal*, Vol. 36. (2015) 177.; Miriam A. CHERRY: Beyond Misclassification: The Digital Transformation of Work. *Comparative Labor Law & Policy Journal*, Vol. 27, no. 3. (2016) 19.; Frank HENDRICKX: From Digits to Robots: The Privacy Autonomy Nexus in New Labour Law Machinery. *Comparative Labor Law & Policy Journal*, Vol. 40. (2019) 372.; David MANGAN: Ford, Taylor and the Gig: Workplaces in Transition. In: Valeria PULIGNANO – Frank HENDRICKX (eds.): *Employment Relations in the 21st Century: Challenges for Theory and Research in a Changing World of Work*. Alphen aan den Rijn, Kluwer Law International, 2019. 38–50.

⁴ While the third industrial revolution was characterized by the use of electronics and (digital) information and communication technologies (ICT), the fourth industrial revolution multiplies the speed and impact of these changes, with the introduction of technologies such as the Internet and artificial intelligence, as noted in HENDRICKX op. cit. 365. See also Klaus SCHWAB: *The Fourth Industrial Revolution*. New York, Crown Publishing, 2017.

⁵ New developments in technology may also be seen as leading to some form of neo or digital Taylorism, albeit without the limitations of scale that the original Taylorism had, as noted by Jeremias PRASSL: What If Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work. *Comparative Labor Law and Policy Journal*, Vol. 41, no. 1. (2019) 134., 146.; Jeremias PRASSL – Martin RISAK: Uber, TaskRabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork. *Comparative Labor Law & Policy Journal*, Vol. 37, no. 3. (2016) 624; Phillip BROWN – Hugh LAUDER – David ASHTON: *The Global Auction: The Broken Promises of Education, Jobs, and Incomes*. Oxford, Oxford University Press, 2011. 72., 75.

Technology undoubtedly presents opportunities for consumers, workers and even the Welfare State⁶. Nevertheless, when these technologies are combined with specific (deregulatory⁷) narratives and economic strategies in order to maximise efficiency and reduce cost, they may also present risks.

Platform work is arguably the perfect example of both these opportunities and risks. This form of work may be defined as the performance of (tightly curated⁸) tasks⁹ on-demand¹⁰ via the digital intermediation and matching¹¹ performed by digital labour platforms.

Digital labour platforms rely on different of the abovementioned technologies in order to enable platform work's features. Automatised monitoring and decision-making systems are used to both match and intermediate between consumers and platform workers (while ensuring a highly curated service). The use of these automatised systems, when combined with digital technologies (such as apps and GPS), allows digital labour platforms to access and manage a broad pool of workers. Platforms are hence able to compensate for the rejection of tasks, redistributing them across a pool of workers. In doing so, platforms are able to fulfil consumers' demands via an on-demand workforce (instead of relying on employment contracts).

Platform work's features and the technologies that enable them are, however, only part of the picture. In order to gain a complete understanding of the opportunities and challenges brought by platform work, it is important to look – beyond these features – at the key elements on which digital platforms' business model relies. In this regard, digital labour platforms' business model is arguably primarily based on a combination of capabilities (i.e. digital matching and work intermediation allowing the delivery of tightly curated services), economic strategies (i.e. market capture and monopoly¹²), market position (i.e. monopsonist power¹³, information asymmetries¹⁴ and network effects¹⁵) and narratives

⁶ See, for example, the internal modernisation of the Swedish Welfare State, as noted in Daniel BUHR: What about Welfare 4.0? *CESifo Forum*, Vol. 18, no. 4. (2017) 15–21.

⁷ Deregulatory narratives are not uncommon in the context of liberalisation and the seek for economic competitiveness, as noted in MANGAN op. cit. 43.

⁸ Jeremias PRASSL: *Humans as a Service: The Promise and Perils of Work in the Gig Economy*. Oxford, Oxford University Press, 2018. 5., 45.

⁹ Rebecca FLORISSON – Irene MANDL: *Platform Work: Types and Implications for Work and Employment – Literature Review*. Dublin, Eurofound, 2018., 2., 13.; Isabelle DAUGAREILH – Christophe DEGRYSE – Philippe POCHET: The Platform Economy and Social Law: Key Issues in Comparative Perspective *ETUI Reseach Paper*, 2019.10. 17., 25–26.

¹⁰ Valerio DE STEFANO: *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowd Work and Labour Protection in the "Gig-Economy"*. (Conditions of Work and Employment Series) Geneva, ILO, 2015. 7.; PRASSL (2018) op. cit. 68–70.

¹¹ PRASSL (2018) op. cit. 18–20.

¹² As noted by Prassl, significant investments from venture capital have enabled digital labour platforms to increase their market share (by, inter alia, subsidising prices), which in turn creates network effects, see PRASSL (2018) op. cit. 22–24.

¹³ Sara KINGSLEY – Mary-Louise GRAY – Siddharth SURI: Monopsony and the Crowd: Labor for Lemons? in *Oxford Internet, Policy and Politics Conference*. Oxford, 2014. 1–41.

¹⁴ Antonio ALOISI – Nastazja POTOCKA-SIONEK: De-Gigging the Labour Market? An Analysis of the "algorithmic Management" Provisions in the Proposed Platform Work Directive. *Italian Labour Law E-Journal*, Vol. 15, no. 1. (2022) 33.

¹⁵ PRASSL (2018) op. cit. 22–24.

(i.e. regulatory arbitrage¹⁶ and entrepreneurship¹⁷). Hence, while digital labour platforms often claim to facilitate access to work and enhance flexibility, these capabilities are tools for a broader narrative and economic strategy that may jeopardise platform workers' welfare (and even social protection systems as a whole). In fact, digital labour platforms' business model has been found to present diverse challenges to some key normative elements on which they rely in order to fulfil their aims and principles¹⁸.

EU institutions have demonstrated concern about the challenges to social protection presented by non-standard work and, in particular, platform work. This was reflected in principle 12 of the European Pillar of Social Rights, which states that “regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, *access to social protection* and training”¹⁹ (emphasis added). This principle has been implemented via the Council Recommendation on access to social protection for workers and the self-employed and, more recently, the Commission's proposal for a Directive on improving working conditions in platform work²⁰.

Through the process of preparation of this proposal, the European Commission highlighted three main reasons for action on the social protection of platform workers and other vulnerable non-standard workers: i) the weak social protection provided for these workers in many Member States²¹; ii) the diversity of approaches to these issues among many Member States (with resulting differences concerning access to social protection)²²; and iii) the interconnection between working conditions (and, specifically, low pay), social protection and tax regulation (with it potentially impacting labour market access and in-work poverty).

¹⁶ Valerio DE STEFANO – Antonio ALOISI: European Legal Framework for “Digital Labour Platforms. Brussels, European Commission, 2018. 5.; PRASSL (2018) op. cit. 20–22.; Cristiano CODAGNONE – Fabienne ABADIE – Federico BIAGI: *The Future of Work in the “Sharing Economy”. Market Efficiency and Equitable Opportunities or Unfair Precarisation?* Seville, Institute for Prospective Technological Studies, 2016. 11. The risk presented by this narrative is arguably increased due to the lack of adaptation of labour law (and, arguably, social protection) narratives to social risks and dimensions of vulnerability in the current world of work, see Brian LANGILLE: “Take These Chains from My Heart and Set Me Free”: How Labor Law Theory Drives Segmentation of Workers' Rights. *Comparative Labor Law & Policy Journal*, Vol. 36. (2015) 66–77.

¹⁷ Fabian BECKMANN: From Loopholes to Deinstitutionalization: The Platform Economy and the Undermining of Labor and Social Security Institutions. *Partecipazione e Conflitto*, 2022. 812–814.

¹⁸ PRASSL–RISAK op. cit. 650.

¹⁹ EUROPEAN PARLIAMENT – COUNCIL OF THE EUROPEAN UNION – EUROPEAN COMMISSION: *European Pillar of Social Rights*. Brussels, 2018. Principle 12.

²⁰ EUROPEAN COMMISSION: *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*. 2021. Rec. (3). [Hereinafter: EUROPEAN COMMISSION (2021a)]

²¹ EUROPEAN COMMISSION: *Analytical Document Accompanying the 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*. Brussels, 2017. 4., 26., 33., 36–37., 41., 51., 55., 60., 73.

²² Ibid. 55.

2. The social protection relevance of the proposed Directive on improving working conditions in platform work

The European Commission's proposal for a Directive on improving working conditions in platform work may be summarised as regulating three main groups of aspects concerning situations of platform work: employment status misclassification (via, inter alia, the establishment of a rebuttable presumption of an employment relationship)²³; fairness, transparency and accountability on the use of automated monitoring and decision-making systems²⁴, and transparency on information regarding platform work²⁵.

The proposed Directive might not be the most evident example of EU regulation of social protection, as social protection is not directly mentioned in either its title or legal basis. And yet, the (few, but importantly placed) references to social protection through both the Commission's proposal for a Directive and its Explanatory Memorandum tell another story (see Annex 1).

This may be observed most clearly in the proposed Directive's aims. In this regard, it should be first noted that the proposed Directive's general aim does not only consists of improving the working conditions of persons performing platform work, but also their social rights²⁶. Confirmation that the proposed Directive seeks to address social protection aspects may be further found in the references to this field in the initiative's specific aims, as well as on Articles 11, 12 and 19 (on transparency concerning platform information, as well as on cooperation in the enforcement of provisions on algorithmic management)²⁷.

Nevertheless, neither the European Commission proposal nor its Impact Assessment, contain references to social protection in their analysis of the proposed Directive's legal basis. Instead, the stated legal basis consists of Article 153(1)(b) TFEU (on working conditions) and Article 16 TFEU (on data protection)²⁸. Hence, the proposed Directive provides the legal basis for the direct legislation of social protection aspects that are considered as either working conditions²⁹ or related to data protection.

²³ EUROPEAN COMMISSION (2021a) op. cit. Arts. 3–5.

²⁴ Ibid. Arts. 6–10.

²⁵ Ibid. Arts. 11–12.

²⁶ Ibid. 3.

²⁷ These references, however, are deleted in the Council's general approach that was adopted on 12 June 2023, see COUNCIL OF THE EUROPEAN UNION (2023) op. cit. 52–53.

²⁸ Ibid. 8–10., 15., 20. See also EUROPEAN COMMISSION: *Impact Assessment Report Accompanying the Document Proposal for a Directive of the European Parliament and of the Council On Improving Working Conditions in Platform Work*. Brussels, 2021. 16–17. [Hereinafter: EUROPEAN COMMISSION (2021b)]

²⁹ This was for example the case in Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, Rec. 22 and Art. 4(2)(o) (which requires employers to inform employees on the identity of social security institutions).

Competences and policy areas under EU law, however, are not to be siloed but, instead, they should be interpreted holistically³⁰. As a result, a specific legal basis may cover aspects that are ancillary to a main aim, even if they are not explicitly included in said legal basis³¹.

This regulatory practice has been explored on multiple occasions by the CJEU in connection with other policy areas³² (such as it regards criminal law in connection with issues like the transfer of information regarding road traffic offences³³ or the transfer of suspected pirates³⁴). Nevertheless, its use is not free of controversy, given how it may question the principle of conferral. In fact, some have described forms of indirect legislation as a “politically expedient way” for the legislator to achieve “extraneous objectives” regardless of “constitutional niceties”³⁵.

Moreover, it may be unclear up to which point social protection is necessary and ancillary. It might be argued that at least labour-related social protection (concerning work accidents, unemployment, sickness and old age³⁶) should be regarded as such. Social assistance, moreover, may still be impacted by provisions of the proposed Directive that rely on Article 16(2) TFEU as their legal basis.

An ancillary basis cannot be seen as a *carte blanche* for regulating social protection. However, the cautious use of this legal basis may facilitate a more homogenous implementation of the Directive (that is not primarily dependent on the national interpretation of the notion of ‘working conditions’).

Such an interpretation might at least reinforce the argument of applying for social protection purposes those provisions of the Directive in which social protection is explicitly mentioned (i.e. Arts. 11, 12 and 19 of the proposed Directive)³⁷. Applying the legal presumption to tax, criminal and social security proceedings, in contrast, may be found with the opposition of some Member States, as has been clearly shown by the Council of the European Union’s general approach of 12 June 2023 (which explicitly eliminates that possibility unless otherwise provided by the Member States)³⁸. And yet, not applying for social protection purposes the legal presumption may hinder the achievement of some of the proposed Directive’s intended impacts, such as addressing regulatory arbitrage³⁹ and fragmentation⁴⁰.

³⁰ Sacha GARBEN: From Sneaking to Striding: Combatting Competence Creep and Consolidating the EU Legislative Process. *European Law Journal*, Vol. 26, no. 5–6. (2020) 431.

³¹ Samuli MIETTINEN: Criminal Competence and the Choice of Legal Basis: Space in the Margins? *European Criminal Law Review*, Vol. 5, no. 2. (2015) 223–228.

³² Ibid. 223–228.

³³ Case C-43/12, *Commission v Parliament and Council*, Judgment of the Court (Grand Chamber) of 6 May 2014.

³⁴ C-658/11, *Parliament v Council*, Judgment of the Court (Grand Chamber) of 24 June 2014.

³⁵ Michael DOUGAN: Legal Developments. *Journal of Common Market Studies*, Vol. 48. (2010) 172. As noted by GARBEN op. cit. 437.

³⁶ EUROPEAN COMMISSION (2021a) op. cit. 2.

³⁷ Articles 11 and 12 of the proposed Directive, in any case, might be considered as relying on Article 16(2) TFEU as their legal basis, and hence fully applicable for social protection purposes as far as they relate to the free movement of personal data.

³⁸ COUNCIL OF THE EUROPEAN UNION (2023) op. cit. 43. The same explicit exclusion of the application of the legal presumption for social protection purposes was contained in the (rejected) compromise proposal for a Directive on platform work prepared by the Czech Presidency of the Council, see COUNCIL OF THE EUROPEAN UNION: *Presidency Compromise Proposal for a Directive on Improving Working Conditions in Platform Work*. Brussels, 2022. 32.

³⁹ EUROPEAN COMMISSION (2021a) op. cit. 3.

⁴⁰ Ibid. 9.

3. Challenges presented by platform work and how they are addressed by the proposed Directive

Both existing literature⁴¹ and the preparatory works⁴² leading to the Commission's proposal for a Directive on platform work highlight a series of key aspects for social protection systems that are often challenged by digital labour platforms' features and business model. If boiled down to their very essence, many of these challenges relate to three key notions: autonomy, access to social protection, and transparency.

In this regard, platform work seems to question, by both nature and design, the very idea of access to social protection by persons performing platform work. By facilitating solo self-employed⁴³, fragmented⁴⁴ and marginal work⁴⁵, platform work often results in exclusion from social protection (as well as no social security responsibilities for the digital labour platform⁴⁶). The challenges presented by platform work extend further than just coverage and contributory obligations, however, as they also impact aspects such as enforcement⁴⁷ and transparency⁴⁸. This section explores the importance of these notions for social protection purposes, how they are challenged by platform work, and how these challenges are tackled by the proposed Directive.

⁴¹ See, inter alia, Paul SCHOUKENS – Alberto BARRIO – Saskia MONTEBOVI: The EU Social Pillar: An Answer to the Challenge of the Social Protection of Platform Workers? *European Journal of Social Security*, Vol. 20, no. 3. (2018) 237–239.; Felix SIEKER: Platform Work and Access to Social Protection across Major European Countries. *Journal of International and Comparative Social Policy*, 2022. 12–13.

⁴² EUROPEAN COMMISSION: *Consultation Document Accompanying the First Phase Consultation of Social Partners under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work*. Brussels, 2021. paras. 2–3., 14–15. [hereinafter: EUROPEAN COMMISSION (2021c)]; EUROPEAN COMMISSION: *Analytical Document Accompanying the Second-Phase Consultation of Social Partners under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work*. Brussels, 2021. paras. 3–8., 16–18. [hereinafter: EUROPEAN COMMISSION (2021d)]

⁴³ Zachary KILHOFFER et al.: *Study to Gather Evidence on the Working Conditions of Platform Workers*. Brussels, 2020. 22.

⁴⁴ SCHOUKENS–BARRIO–MONTEBOVI op. cit. 238.; Natalie VIDEBÆK MUNKHOLM: Collective Agreements and Social Security Protection for Non-Standard Workers and Particularly for Platform Workers: The Danish Experience. In: Ulrich BECKER – Olga CHESALINA: *Social Law 4.0: New Approaches for Ensuring and Financing Social Security in the Digital Age*. Baden-Baden, Nomos, 2020. 181–182., 200–201.

⁴⁵ Paul SCHOUKENS – Alberto BARRIO: Platform Work in Self-Employment: New Challenges for Social Protection? *Revista Del Ministerio de Trabajo y Asuntos Sociales*, Vol. 144. (2019) 49–51.; SCHOUKENS–BARRIO–MONTEBOVI op. cit. 221., 226–229.; Paul SCHOUKENS – Charlotte BRUYNSEAEDE: *Access to Social Protection for Self-Employed and Non-Standard Workers: An Analysis Based upon the EU Recommendation on Access to Social Protection*. Leuven, Acco, 2021. 91–92., 99–100. See also, concerning cross-border situations, Grega STRBAN: Social Law 4.0 and the Future of Social Security Coordination. In: BECKER–CHESALINA op. cit. 46., 48.

⁴⁶ This, in turn, may “threaten to starve Welfare States of resources”, as noted in Isabelle DAUGAREILH: Social Protection and the Platform Economy: The Anomalous Approach of the French Legislator. *International Social Security Review*, Vol. 74, no. 3–4. (2021) 89.

⁴⁷ Chris FORDE et al.: *The Social Protection of Workers in the Platform Economy*. Brussels, 2017. 64., 81–82.

⁴⁸ Alberto BARRIO: *Social Security and Platform Work: Towards a More Transparent and Inclusive Path*. Tilburg, Tilburg University, 2021. 166., 322–323., 334–352.; FORDE op. cit. 106.

3.1. *Autonomy*

Autonomy (as an indicator of lack of subordination⁴⁹) is key for employment status classification, which in turn often determines social protection entitlements and obligations. Reliance on the definition of employment relationship is particularly important in Bismarckian social protection systems, as systems following such a model are typically characterised by differing protection depending on employment status (with self-employed persons often excluded from the scope of some or all labour-related schemes). Autonomy, however, is an important notion for social protection systems no matter the model, as they generally rely on it in order to place rights and obligations (e.g. as it regards the employer).

Platform work's business model challenges this key notion by both exercising indirect methods of control and taking advantage of information and power inequalities.

In this regard, digital labour platforms may replace the traditional exercise of control and authority typically linked with an employment relationship with indirect methods of control, such as the use of ratings, the allocation of tasks, the imposition of sanctions and the monitoring of platform workers' location⁵⁰. This, in turn, has shown to be problematic for the determination of platform workers' employment status⁵¹ (as these forms of ex-post control⁵² are not always foreseen under national law).

Issues of employment status misclassification are addressed in the proposed Directive by i) requiring procedures to ascertain the existence of an employment relationship based on the facts and "taking into account the use of algorithms in the organisation of work"⁵³, ii) obliging digital labour platforms to report on information as it regards algorithmic management⁵⁴ (which may allow platform workers and relevant authorities to detect when autonomy is being reduced by it), and iii) establishing a rebuttable presumption of an employment relationship in situations of platform work⁵⁵.

The presumption applies to persons performing work through platforms that exercise control over such performance. Control, in the context of said presumption, is found to be performed if at least two out of five criteria (concerning the setting of remuneration, appearance or conduct, the supervision of the performance of work, and the restriction of an individual's freedom to organise his work or to build a business⁵⁶) are fulfilled.

⁴⁹ Marta GLOWACKA: A Little Less Autonomy? The Future of Working Time Flexibility and Its Limits. *European Labour Law Journal*, Vol. 12, no. 2. (2021) 122.

⁵⁰ See, in this line, EUROPEAN COMMISSION (2021a) op. cit. Rec. (8).

⁵¹ See, for example, Christina HIESSL: Jurisprudence of National Courts Confronted with Cases of Alleged Misclassification of Platform Workers: Comparative Analysis and Tentative Conclusions, 2022. 22., 56., 72.

⁵² See HENDRICKX op. cit. 376.; KILHOFFER et al. op. cit. 56–59.

⁵³ EUROPEAN COMMISSION (2021a) op. cit. Art. 3(2).

⁵⁴ Ibid. Art. 6.

⁵⁵ Ibid. Art. 4.

⁵⁶ The introduction of this last criterion is, arguably, of special significance, given the traditionally limited relevance of economic factors within the CJEU's notion of 'worker', see Martin RISAK – Thomas DULLINGER: *The Concept of "worker" in EU Law: Status Quo and Potential for Change*. Brussels, 2018. 30–31.

Many of the features of digital labour platforms (such as the use of ratings or their intermediary role) may result in significant information asymmetries and monopsonies, which in turn may restrict platform workers' autonomy to build a business and/or negotiate working conditions. In this regard, monopsony may be defined as a situation in which, due to imperfect competition, companies (as buyers of labour) are able to decide key aspects of their relationship with the providers of labour, such as pay (instead of the market doing so).⁵⁷ They may occur when ratings and other important information for the performance and organisation of the platform worker's activity are under the sole control of the digital labour platform, as platform workers may be as a result restricted in the number of actors that may buy their labour.⁵⁸ Provisions on transparency of algorithmic management and platform work information have the potential to reduce some of the information asymmetries existing in platform work. The European Parliament's compromise amendments, moreover, add specific provisions requiring data portability (including reputational data)⁵⁹.

Finally, autonomy (in its individual, social and political dimensions⁶⁰) has also been considered a philosophical core concept for Welfare States⁶¹. This role may be seen, for example, in the increasing degree of access to social protection information that authorities provide to individuals through the use of ICT and other (digital) technologies⁶². The provisions of the Directive may facilitate such practices by, inter alia, ensuring access to the required data⁶³.

3.2. Access to social protection

Ensuring formal and effective access to adequate social protection has been shown to be an issue in situations of non-standard work such as platform work⁶⁴. In this context, the Council Recommendation on access to social protection for workers and the self-employed was enacted⁶⁵. The EU initiative recommends a series of minimum standards for Member States to ensure formal and effective access

⁵⁷ KINGSLEY–GRAY–SURI op. cit. 48–54.

⁵⁸ Ibid.

⁵⁹ EUROPEAN PARLIAMENT: *Compromise Amendments 1–38. Proposal for a Directive on Improving Working Conditions in Platform Work*. Brussels, 2022. 78.

⁶⁰ Silke BOTHFELD – Sigrid BETZELT: How Do Activation Policies Affect Social Citizenship? The Issue of Autonomy. In: Gaby RAMIA – Kevin FARNSWORTH – Zoë IRVING (eds.): *Social Policy Review 25: Analysis and Debate in Social Policy, 2013*. Bristol, Bristol University Press, 2013. 251–256.

⁶¹ bid. 251.

⁶² Slavina SPASOVA et al.: *Making Access to Social Protection for Workers and the Self-Employed More Transparent through Information and Simplification*. Brussels, 2022. 19–22.

⁶³ The provisions of the proposed Directive, however, do not address potential data protection and privacy risks linked to the gathering and processing of such data by public authorities (see below on limitations of the proposed Directive).

⁶⁴ BARRIO op. cit. 356–357.

⁶⁵ Council Recommendation 2019/C 387/01 of 8 November 2019 on Access to Social Protection for Workers and the Self-Employed (2019).

to adequate social protection for all workers and the self-employed⁶⁶. Many Member States have made reforms in line with the Council Recommendation since its enactment in 2019⁶⁷. This, however, has not eliminated the (formal or effective) exclusion of non-standard workers (including platform workers) from social protection in some instances⁶⁸.

As noted by Schoukens, such exclusion of non-standard workers from social protection in some Member States may be primarily due to the categorical and/or work-centred design of social protection schemes, as well as income thresholds⁶⁹. The proposed Directive does not directly address these challenges. What it does, however, is to improve enforcement in social protection, something on which the Council Recommendation does not primarily focus⁷⁰. In a way, the proposed Directive seems to share similarities with the theory of labour status specificity⁷¹, in that it adapts implementation rules but maintains the general (labour law and social protection) principles.

In this regard, a social protection system whose rules take into account the specific situation of beneficiaries⁷² may risk failing in achieving its aims if a key aspect of that situation (i.e. the beneficiaries' employment status) is misclassified. This risk of lack of protection due to incorrect employment status classification was in fact one of the key concerns behind the proposed Directive on platform work⁷³, as it is the correct gathering of social security contributions. With its provisions on employment status misclassification (including those on a rebuttable presumption of employment relationship), the proposed Directive may tackle both concerns (as well as reduce in-work poverty and precariousness). Whether these aims are achieved, however, may depend in no insignificant part on the interpretation of the material scope of these provisions⁷⁴.

Social protection systems not only face the question of whether platform workers should be covered by social protection (i.e. formal access), but also of how to integrate the features of this form of work to ensure that they may also have effective and formal access⁷⁵. One of these features is platform work's complex and multiparty nature, which may sometimes make determining who exercises the

⁶⁶ Ibid. Recommendation 1.

⁶⁷ EUROPEAN COMMISSION: *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, 2016. 26.

⁶⁸ SIEKER op. cit. 1–15.

⁶⁹ Paul SCHOUKENS: *Improving Access to Social Protection for the Self-Employed in the EU State of Play and Possible Policy Reforms*. Brussels, 2022. 14–17.

⁷⁰ Except concerning some aspects of transparency, see Council Recommendation 2019/C 387/01 of 8 November 2019 on access to social protection for workers and the self-employed, Rec. 15–16. It should be noted that this is not an issue only concerning the Council Recommendation, as enforcement is an area that is often neglected, as noted in Miriam KULLMANN: "Platformisation" of Work: An EU Perspective on Introducing a Legal Presumption. *European Labour Law Journal*, 2021. 6.

⁷¹ Paul SCHOUKENS: *De Sociale Zekerheid van de Zelfstandige En Het Europese Gemeenschapsrecht: De Impact van Het Vrije Verkeer van Zelfstandigen*. Leuven, Acco, 1999.; SCHOUKENS (2022) op. cit. 26., 30.

⁷² Council Recommendation 2019/C 387/01 of 8 November 2019 on access to social protection for workers and the self-employed, recommendation 9(b).

⁷³ EUROPEAN COMMISSION (2021a) op. cit. 2.

⁷⁴ See above the discussion on the legal basis of the proposed Directive as it regards social protection.

⁷⁵ SCHOUKENS–BARRIO op. cit. 45–55.

functions of the employer (and hence is responsible for his obligations) difficult. The Commission's proposal, however, does not seem to address this issue⁷⁶.

Challenges also exist concerning the enforcement of rules in cross-border situations⁷⁷. Some of these rules (such as those for the determination of the legislation applicable for social security purposes) rely heavily on certain working conditions (such as employment status, location and duration of work performed). Platform work, allows for significant flexibility as it regards many of these elements, which in turn may hinder the implementation of (and hence compliance with) said rules⁷⁸ (something that fits into digital labour platforms' narrative of regulatory arbitration).

Welfare States, moreover, may be seen as protecting against more risks than just the loss of income related to the (lack of) performance of work⁷⁹. It might be argued that the proposed Directive address two of these other needs and risks, namely those relational (via the obligation of digital labour platforms to set channels for platform workers to communicate among each other and with their representatives⁸⁰), and those related to individuals' physical and mental health. The latter is represented by, inter alia, a prohibition on the use of automated monitoring and decision-making systems that put undue pressure on platform workers or otherwise puts at risk the physical and mental health⁸¹ of platform workers⁸².

3.3. *Transparency in algorithmic management and platform work information*

As mentioned above, digital labour platforms rely on algorithmic management in order to achieve efficiencies in the matching of supply and demand (as well as a curated service). This has a clear impact on the working conditions of platform workers (including as it regards income, working time and the concealment of subordination)⁸³, which in turn may affect their social protection. In order for platform workers, their representatives and relevant public authorities to assess whether this impact

⁷⁶ In contrast, the compromise amendments establish digital labour platforms' potential liability as it regards platform workers hired via subcontracting chains, see EUROPEAN PARLIAMENT: *Compromise Amendments 1–38. Proposal for a Directive on Improving Working Conditions in Platform Work*. 2022. 91–92. Another way of addressing this increasing complexity (albeit outside the scope of the proposed Directive) may be increasing the involvement of the State in the financing of social security, as noted in Iacopo SENATORI: *Conclusion: Protecting Work, Beyond Categories. Defining and Protecting Autonomous Work*, 2022. 258.

⁷⁷ EUROPEAN COMMISSION (2021a) op. cit. 2–3., 9., rec. (41).

⁷⁸ BARRIO op. cit. 209–243.

⁷⁹ Edoardo ALES: *Genuine Autonomous Work: Toward a Tailor-Made Social Protection. Defining and Protecting Autonomous Work*, 2022. 109–120.

⁸⁰ EUROPEAN COMMISSION (2021a) op. cit. Art. 15.

⁸¹ For an analysis on the interconnection between the AI Act and occupational health, see Aude CEFALIELLO – Miriam KULLMANN: *Offering False Security: How the Draft Artificial Intelligence Act Undermines Fundamental Workers Rights. European Labour Law Journal*, Vol. 13, no. 4. (2022) 559–61.

⁸² EUROPEAN COMMISSION (2021a) op. cit. Art. 7(2). This prohibition may have broad implications, depending on how 'system', 'undue pressure' and 'mental health' is defined (as it may be argued that platform work's fragmented and opaque character may put undue pressure or represent a risk to mental health), see Valerio DE STEFANO: *The EU Commission's Proposal for a Directive on Platform Work: An Overview. Italian Labour Law E-Journal*, Vol. 15, no. 1. (2022) 6.

⁸³ EUROPEAN COMMISSION (2021a) op. cit. 2.

is in line with regulations, as well as to limit its risks, the proposed Directive includes a series of provisions requiring digital labour platforms to inform (ex-ante and ex-post⁸⁴) and consult some or all of these actors concerning the use of automated monitoring and decision-making systems⁸⁵. These and other provisions contained in Chapter III of the proposal (such as those prohibiting the processing of certain data⁸⁶ and ensuring human monitoring⁸⁷ and review⁸⁸ of automated systems and the significant decisions taken or supported by them) may facilitate the correct assessment of platform workers' employment status, but also tackle asymmetries of power⁸⁹ and information more generally⁹⁰.

The proposed Directive also promotes transparency, traceability and awareness of developments in platform work⁹¹. It does so by requiring digital labour platforms to report on work performed through them and other relevant data⁹², as well as to provide a copy of the terms and conditions and information on the number of regular workers⁹³. Such regulation may have a significant impact on cross-border situations (where issues of enforcement and implementation may occur), but also on purely internal ones (by improving the enforcement of social protection legislation regarding the determination of contributory obligations and entitlements).

4. Limitations of the proposed Directive's social protection impact and ways forward

As explored above, the proposed Directive tackles some important social protection challenges presented by platform work. The initiative, nevertheless, is also not bereft of limitations as a result of its legal basis, scope and other legislator's choices (some of them questionable, particularly when protection under the proposed Directive seems to be lower or more restricted than in other instances of EU law). This section explores some of these limitations of the proposal on addressing the social protection challenges brought by platform work, as well as how they may be overcome. In order to do so, the section relies on the Parliament's compromise amendments and other preparatory documents (as well as on the wealth of academic analysis available on the proposed Directive).

⁸⁴ Marta OTTO: A Step towards Digital Self- & Co-Determination in the Context of Algorithmic Management Systems. *Italian Labour Law E-Journal*, Vol. 15, no. 1. (2022) 55.

⁸⁵ EUROPEAN COMMISSION (2021a) op. cit. Arts. 6–10.

⁸⁶ Ibid. Art. 6(5).

⁸⁷ Ibid. Art. 7.

⁸⁸ Ibid. Art. 8.

⁸⁹ OTTO op. cit. 61.

⁹⁰ ALOISI–POTOCKA–SIONEK op. cit. 33.

⁹¹ EUROPEAN COMMISSION (2021a) op. cit. 3.

⁹² Ibid. Art. 11.

⁹³ Ibid. Art. 12. Such provisions, however, may be seen as less protective than those contained in Arts. 64(2) and 64(3) of the proposed AI Act, as well as in Art. 58 GDPR, as noted in Aida PONCE – Diego NARANJO: Regulating Algorithmic Management: An Assessment Of The EC's Draft Directive On Improving Working Conditions In Platform Work. *ETUI Policy Brief*, 2022. 6.

4.1. Limitations of the provisions on the legal presumption

The proposed Directive's legal basis for regulating social protection is arguably at its weakest in the case of the provisions establishing a legal presumption, as they typically do not relate to Art. 16(2) TFEU [and hence are only able to rely on Art. 153(1)(c) – or an ancillary legal basis –]. Moreover, the applicability of these provisions for social protection purposes (when not foreseen in national legislation) is a contentious issue for at least some Member States, as shown by the abovementioned Council's general approach of 12 June 2023⁹⁴ (as well as the earlier – and rejected – compromise proposal for a Directive on platform work that the Czech Presidency of the Council attempted to approve on 8 December 2022). All this indicates a risk that, in a potential final Directive, these provisions' social protection relevance will be at least as limited as it is in the Commission's proposal (if not more). And yet, misclassification of employment status is a very significant challenge in the field of social protection⁹⁵. Allowing Member States to decide whether the legal presumption is to be applied in social protection instances may arguably risk worsening some of the very challenges that the proposed Directive seeks to address, such as regulatory arbitrage⁹⁶ or regulatory fragmentation⁹⁷.

Besides this, the way the legal presumption is phrased in the proposed Directive has been criticized due to its potentially limited relevance (as it only applies if at least two out of five indicators of control are fulfilled)⁹⁸. This, however, was tackled by the European Parliament's compromise amendments, which include in the rebuttable presumption of employment relationship all persons performing platform work⁹⁹ (and then address the specific features of platform work by requiring the consideration of a series of indicators during the rebuttal procedure¹⁰⁰). The Council's general approach, in contrast, goes in the opposite direction (by, *inter alia*, requiring that 3 out of 7 indicators of control are fulfilled for the legal presumption to be applied, as well as by allowing administrative authorities to not apply said presumption if they are acting on their own initiative and it is manifest that the presumption would be rebutted)¹⁰¹.

⁹⁴ COUNCIL OF THE EUROPEAN UNION (2023) *op. cit.* 43.

⁹⁵ Judicial or administrative decisions with relevance for social protection have been taken in Austria, Belgium, Denmark, France, Italy, Netherlands, Spain and Switzerland, as noted in HIESSL *op. cit.* 4–42. Similarly, the European Commission has noted the existence of judicial decisions related to social protection in Belgium, Spain, Italy and France in EUROPEAN COMMISSION (2021b) *op. cit.* 156–69.

⁹⁶ EUROPEAN COMMISSION (2021a) *op. cit.* 3.

⁹⁷ *Ibid.* 9.

⁹⁸ DE STEFANO (2022) *op. cit.* 2–5.

⁹⁹ EUROPEAN PARLIAMENT (2022) *op. cit.* 61.

¹⁰⁰ *Ibid.* 68–70. It should be noted, however, that while the indicators contained in Art. 5(1b) of the compromise amendments must be used to ascertain whether the legal presumption may be rebutted, whether a person is an employee needs to be assessed based on the facts as regulated under national law (with consideration to the caselaw of the CJEU), as noted in the (revised) version of Article 3(1) contained in the compromise amendments, see European Parliament, 59.

¹⁰¹ COUNCIL OF THE EUROPEAN UNION (2023) *op. cit.* 41–43.

4.2. Limitations of the provisions on transparency concerning platform work information

Another notable scope limitation concerns the provision on declaring platform work (i.e. Art. 11), which only applies to situations of platform work performed within an employment relationship¹⁰². This choice by the Commission (which may be due to the limited legal basis of Art. 153(1)(b) and/or traditional notions of employers' declaration responsibilities) seems to ignore both the intermediary role of platforms¹⁰³ (even when they are not employers), as well as the situations of vulnerability experienced by truly self-employed workers (which, at least in cross-border situations, are often similar to those of employees¹⁰⁴ – with issues also existing as it regards intermediate categories¹⁰⁵ –). The compromise amendments address this by extending platforms' obligation to declare platform work to include situations of platform work outside an employment relationship, as well as requiring them to declare employment status as part of the information provided¹⁰⁶. If self-employed persons are introduced into the scope of Art. 11, however, it may be necessary to develop procedures on the exchange of information relevant to voluntary social security schemes (which may exist in some Member States as it regards self-employed workers, and to which the rules on determination of legislation applicable under the Coordination Regulation typically do not apply unless only voluntary insurance exists in that Member State concerning a relevant contingency¹⁰⁷ – something that may be difficult to determine when non-standard workers may access to the employees' compulsory insurance in a voluntary basis¹⁰⁸ –).

Another issue under Article 11 is that it requires digital labour platforms to provide said information on platform work performed in accordance with the laws and procedures laid down in the law under the legislation of the Member State concerned, which may result in platforms opting to be active in Member States with the most favourable legislation on said relevant data¹⁰⁹ (although this risk may be reduced if 'concerned' is interpreted as also relating to those Member States to which the information is relevant for the determination of the legislation applicable – which might be understood from the

¹⁰² EUROPEAN COMMISSION (2021a) op. cit. Art. 11.

¹⁰³ In this regard, it may be noted the recent proposals in the field of EU tax law to consider (some) digital labour platforms to be the provider of short-term accommodation rental or passenger transport services that are performed through the platform by a taxable person if such person fits into a series of categories (e.g. it is a non-established person who is not identified for VAT purposes or a non-taxable person), see EUROPEAN COMMISSION: *Proposal for a Council Directive Amending Directive 2006/112/EC as Regards VAT Rules for the Digital Age*. Brussels, 2022. 39. See also MARTA PAPIŠ-ALMANSA: *The Use of New Technologies in VAT and Taxpayers' Rights*. CJEU: *Recent Developments in Value Added Tax*, no. October 2021.

¹⁰⁴ GREGA STRBAN et al.: *Social Security Coordination and Non-Standard Forms of Employment and Self-Employment: Interrelation, Challenges and Prospects*. Brussels, 2020.

¹⁰⁵ STRBAN et al. op. cit. 32–35.

¹⁰⁶ EUROPEAN PARLIAMENT (2022) op. cit. 87–88.

¹⁰⁷ See Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Art. 14.

¹⁰⁸ STRBAN op. cit. 40–41.

¹⁰⁹ SASKIA MONTEBOVI – MARJON WEEREPAS: *Cross-Border Impact Assessment 2022. Dossier 2: Cross-Border Effects of the EU Proposal for a Directive on platform workers (ex-ante)*. Maastricht, 2022. 19.

administrative cooperation obligations set in the Coordination Regulations¹¹⁰ –). Article 12, regarding access to relevant information on platform work, does apply to self-employed platform workers, but the information required (i.e. terms and conditions and number of persons regularly performing work through the platform) is quite restricted (although it may be complemented by requests of information from labour, social protection and other relevant authorities and representatives of platform workers¹¹¹). This is partly addressed in the compromise amendments, which add a requirement to provide a copy of the employment contract, as well as the average duration of activity, weekly working time and income received among persons performing work through the platform on a regular basis¹¹².

4.3. Limitations of the provisions on transparency in algorithmic management

The provisions on transparency in algorithmic management have also been criticised due to their limited scope. In this regard, and while they arguably have the broadest material and personal scope as it regards social protection and platform work of all of the main provisions of the Directive (due to their legal basis – Art. 16(2) TFEU – and relevance for situations of platform work outside of an employment relationship¹¹³), some commentators and policy-makers (including Rapporteur Elisabetta Gualmini in her original proposal for amendments¹¹⁴) have noted the need to extend the personal scope of such provisions to all workers subject to automated or semi-automated monitoring and decision-making systems in relation to their working conditions or the organisation of their work. This was not reflected in the final compromise amendments agreed upon by the European Parliament. What the compromise amendments do, however, is to develop said rules (although conserving the same scope) by, inter alia, adding new categories of information to be provided¹¹⁵, stating some more grounds that should be protected from the use of monitoring and automated decision-making systems¹¹⁶, and overall facilitating the information, consultation and involvement of platform workers and their representatives¹¹⁷. These may be seen as positive additions, given how the rights contained in these

¹¹⁰ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Art. 76; Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, Art. 2.

¹¹¹ EUROPEAN COMMISSION (2021a) op. cit. Art. 12(2).

¹¹² EUROPEAN PARLIAMENT (2022) op. cit. 89.

¹¹³ EUROPEAN COMMISSION (2021a) op. cit. Art. 10.

¹¹⁴ Elisabetta GUALMINI: *Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*. Brussels, 2022. 59., 104.

¹¹⁵ EUROPEAN PARLIAMENT op. cit. 72–73.

¹¹⁶ Ibid. 73., 81.

¹¹⁷ Ibid. 82–86.

rules (e.g. as it regards data explainability and meaningful human intervention) are typically difficult to implement¹¹⁸.

The Commission's proposal, moreover, may allow digital labour platforms to refuse to disclose the detailed functioning of their automated monitoring and decision-making systems, including algorithms, or other detailed data that contains commercial secrets or is protected by intellectual property rights, as long as that does not stop them from providing the information required under the proposed Directive¹¹⁹. In the words of Otto, the proposed Directive “focuses on the ‘transparency’ of the main features of the algorithmic management systems without ‘opening the hood’, i.e. without any knowledge of its system design, test data, source codes”¹²⁰. The Parliament's compromise amendments address this by establishing a new provision on confidential information seeking to protect such information provided by digital labour platforms to workers' representatives and the technical experts that support them¹²¹ (hence allowing for this kind of information to reach these key actors).

Finally, the proposed Directive does not regulate issues of transparency as it regards the functioning of social protection systems¹²² (an issue that is partially addressed in the Council Recommendation on access to social protection¹²³). Platforms' reporting obligations under the Directive, in fact, may make the regulation of this aspect in situations of platform work even more urgent.

4.4. Other limitations

Some of the other issues that might not have been sufficiently addressed by the proposed Directive concern its scope and enforcement mechanisms.

In this regard, it should be noted that the proposed Directive may not cover situations in which the digital labour platform resorts to subcontracting chains, as well as certain situations of marginal and/or ancillary work¹²⁴. The former, however, was regulated by the Parliament's compromise amendments (which establish the subsidiary liability of digital labour platforms concerning infringements of any of the rights contained in the proposed Directive regarding platform workers they subcontract via subcontracting chains¹²⁵). This is one of the rare instances in which the amendments proposed by the

¹¹⁸ PONCE-NARANJO op. cit. 3.

¹¹⁹ EUROPEAN COMMISSION (2021a) op. cit. rec. (33).

¹²⁰ OTTO op. cit. 56.

¹²¹ EUROPEAN PARLIAMENT (2022) op. cit. 78–79.

¹²² See SPASOVA et al. op. cit.

¹²³ Council Recommendation 2019/C 387/01 of 8 November 2019 on access to social protection for workers and the self-employed, recommendations 15–16.

¹²⁴ See EUROPEAN COMMISSION (2021a) op. cit. Arts. 1 and 2(2).

¹²⁵ EUROPEAN PARLIAMENT (2022) op. cit. 91.

Parliament and those included in the Council's general approach coincide, as the latter also establishes a similar liability¹²⁶.

A final limitation of the proposed Directive that should not be ignored regards its enforcement. While the Commission's proposal required Member States to lay down rules on penalties for infringements of the Directive's provisions, it did not provide indications on what these penalties may consist of (besides the fact that they must be effective, proportionate and dissuasive¹²⁷). The Parliament's compromise amendments fill partly this gap by clarifying in some ways this aspect¹²⁸. Nevertheless, the complex framework for monitoring compliance (with competencies distributed among different enforcement authorities) might still be problematic¹²⁹.

4.5. Ways forward

After the approval of the European Parliament's compromise amendments and the (very recent – at the time of this writing –) adoption of the Council's general approach¹³⁰, the proposed Directive is finally heading for trialogue negotiations. And yet, the Commission's proposal, the Parliament's and (especially) the Council's show both concerns (for example as it regards the application of the legal presumption for social security – as well as tax and criminal – proceedings¹³¹) and dissent among Member States¹³². This, together with the potentially controversial character of relying on an ancillary legal basis, may indicate a risk that a potential final version of the Directive will have an uncertain and/or limited relevance for social protection. This risk, nevertheless, might be significantly reduced with further clarifications (via modifications of the Directive's text, or through the Commission's guidance on implementation), as well as via potential additional EU initiatives that might rely on a clearer legal basis (such as Article 153(1)(c) TFEU).

5. Conclusions

Platform work's specific combination of technical features, economic strategies, market position and narrative presents challenges to key social protection aspects. While the Commission's proposal for

¹²⁶ COUNCIL OF THE EUROPEAN UNION (2023) op. cit. 40.

¹²⁷ EUROPEAN COMMISSION (2021a) op. cit. Art. 19.

¹²⁸ EUROPEAN PARLIAMENT (2022) op. cit. 97–98.

¹²⁹ PONCE–NARANJO op. cit. 6–7.

¹³⁰ COUNCIL OF THE EUROPEAN UNION (2023) op. cit.

¹³¹ Ibid. 32–33.

¹³² See Joint Statement by Belgium, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia and Spain (10107/23 ADD 2).

a Directive on improving working conditions in platform work address some of these challenges (particularly as it regards autonomy, access to social protection and transparency), its social protection impact may be limited.

One reason for this limitation may be the unclear legal basis for social protection regulation. While the proposal's direct legal basis allows for some social protection relevance, a more comprehensive application of its provisions may require resorting to an ancillary legal basis.

However, it could be argued that the proposal's limited impact on social protection is due more to its focus than just its scope. The proposal, while relevant for social protection, is primarily designed around the notion of working conditions. As a result, some challenges to social protection systems presented by platform work have not been fully addressed (including as it regards data gathering and processing on the functioning of social protection systems, as well as concerning the protection of marginal or subcontracted platform workers).

To prevent a recurrence of the limitations discussed, future regulatory attempts should prioritize addressing instances of vulnerability in platform work that extend beyond the boundaries of the employment relationship. By taking a more comprehensive approach to regulation, future efforts can ensure that social protection measures remain effective and relevant in the rapidly-evolving landscape of platform work.

Annex 1. References to social protection or social security (in bold) in the European Commission's proposal for a Directive on improving working conditions in platform work (classified by location in the text and theme)

1. In the Explanatory Memorandum – context of the proposal

1.1. Previous initiatives

- “The European Pillar of Social Rights states that “regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions and access to **social protection**.”¹³³
- “In addition, regulations on the coordination of national **social security** systems apply to both employed and self-employed people working through platforms in a cross-border situation. Finally, the Council Recommendation on access to **social protection** for workers and the self-employed²⁴ recommends Member States to ensure that both workers and the self-employed have access to effective and adequate **social protection**. The Recommendation covers unemployment, sickness and health care, maternity and paternity, invalidity, old-age and survivors' benefits and benefits in respect of accidents at work and occupational diseases.”¹³⁴

1.2. Risks related to platform work

- “Still, as digital labour platforms introduce new forms of work organisation, they challenge existing rights and obligations related to labour law and **social protection**.”¹³⁵
- “According to one estimate, up to five and a half million people working through digital labour platforms could be at risk of employment status misclassification. Those people are especially likely to experience poor working conditions and inadequate access to **social protection**. As a result of the misclassification, they cannot enjoy the rights and protections to which they are entitled as workers. These rights include the right to a minimum wage, working time regulations, occupational safety and health protection, equal pay between men and women and the right to paid leave, as well as improved access to **social protection** against work accidents, unemployment, sickness and old age.”¹³⁶

¹³³ EUROPEAN COMMISSION (2021a) op. cit. 2.

¹³⁴ Ibid. 6.

¹³⁵ Ibid. 2.

¹³⁶ Ibid. 2.

- “Difficulties in enforcement and lack of traceability and transparency, including in cross-border situations, are also thought to exacerbate some instances of poor working conditions or inadequate access to **social protection**.”¹³⁷
- “This, in turn, makes it difficult for national authorities to enforce existing obligations, including in terms of **social security** contributions.”¹³⁸

1.3. Aims and intended impact

1.3.1. Concerning misclassification of employment status

- “The specific objectives through which the general objective will be addressed are:
 - (1) to ensure that people working through platforms have – or can obtain – the correct employment status in light of their actual relationship with the digital labour platform and gain access to the applicable labour and **social protection** rights,”¹³⁹
- “This legal presumption would apply in all legal and administrative proceedings, including those launched by national authorities competent for enforcing labour and **social protection** rules, and can be rebutted by proving that there is no employment relationship by reference to national definitions.”¹⁴⁰
- “Those who, as a result of correct determination of their employment status, will be recognised as workers will enjoy improved working conditions – including health and safety, employment protection, statutory or collectively bargained minimum wages and access to training opportunities – and gain access to **social protection** according to national rules.”¹⁴¹
- “Other businesses that compete with digital labour platforms by operating in the same sector will benefit from a level playing field as regards the cost of **social protection** contributions. Member States will enjoy increased revenues in the form of additional tax and **social protection** contributions.”¹⁴²

1.3.2. Concerning transparency

- “Finally, concrete measures are proposed to achieve the third objective of enhancing transparency and traceability of platform work with a view to supporting competent authorities in enforcing existing rights and obligations in relation to working conditions and **social protection**. This includes clarifying the obligation for digital labour platforms which are employers to declare

¹³⁷ Ibid. 2–3.

¹³⁸ Ibid. 3.

¹³⁹ Ibid. 3.

¹⁴⁰ Ibid. 3.

¹⁴¹ Ibid. 3.

¹⁴² Ibid. 3.

platform work to the competent authorities of the Member State where it is performed. The proposed Directive will also improve labour and **social protection** authorities' knowledge of which digital labour platforms are active in their Member State by giving those authorities access to relevant basic information on the number of people working through digital labour platforms, their employment status and their standard terms and conditions. These measures will help those authorities in ensuring compliance with labour rights and in collecting **social security** contributions, and thus improve working conditions of people performing platform work.”¹⁴³

2. In the Explanatory Memorandum – legal basis, subsidiarity and proportionality

2.1. Risks related to platform work

- “The working conditions and **social protection** coverage of people performing cross-border platform work is equally uncertain and depends strongly on their employment status. National authorities (such as labour inspectorates, **social protection** institutions and tax authorities) are often not aware of which digital labour platforms are active in their country, how many people are working through them and under what employment status the work is performed.”¹⁴⁴

3. In the Explanatory Memorandum – impact assessment

3.1. Aims and intended impact

3.1.1. General

- “The quantitative and qualitative analysis of the preferred combination of measures shows that a substantial improvement in the working conditions and access to **social protection** for people working through platforms is expected.”¹⁴⁵

¹⁴³ Ibid. 4.

¹⁴⁴ Ibid. 9.

¹⁴⁵ Ibid. 12.

3.1.2. Concerning misclassification of employment status

- “In-work poverty and precariousness would thus decrease as a result of reclassification and the resulting improved access to **social protection**. Hence, income stability and predictability would improve.”¹⁴⁶
- “For some people working through digital labour platforms currently earning above the minimum wage, reclassification might lead to lower wages, as some digital labour platforms might offset higher **social protection** costs by reducing salaries.”¹⁴⁷

3.1.3. Concerning transparency

- “The initiative would also improve transparency and traceability of platform work, including in cross-border situations, with positive effects for national authorities in terms of better enforcement of existing labour and fiscal rules, as well as improved collection of tax and **social protection** contributions. To this end, Member States could benefit from up to EUR 4 billion in increased tax and social protection contributions per year.”¹⁴⁸

4. In the Explanatory Memorandum – detailed explanation of the specific provisions of the proposal

4.1. *Aims and intended impact*

4.1.1. Concerning misclassification of employment status

- “Article 4 – Legal presumption [...]

Member States are required to establish a framework to ensure that the legal presumption applies in all relevant administrative and legal proceedings and that enforcement authorities, such as labour inspectorates or **social protection** bodies, can also rely on that presumption.”¹⁴⁹

4.1.2. Concerning transparency

- “Article 11 – Declaration of platform work

This provision clarifies that digital labour platforms which are employers have to declare work performed by platform workers to the competent labour and **social protection** authorities

¹⁴⁶ Ibid. 12.

¹⁴⁷ Ibid. 13.

¹⁴⁸ Ibid. 13.

¹⁴⁹ Ibid. 15.

of the Member State in which the work is performed and to share relevant data with those authorities, in accordance with national rules and procedures.”¹⁵⁰

- “Article 12 – Access to relevant information on platform work

This provision requires digital labour platforms to make certain information accessible to labour, **social protection** and other relevant authorities ensuring compliance with legal obligations and the representatives of persons performing platform work.”¹⁵¹

- “Article 19 – Supervision and penalties

The provision requires labour and **social protection** authorities and data protection supervisory authorities to cooperate, including by exchanging relevant information.”¹⁵²

5. In the proposal for a Directive

5.1. Previous initiatives

- “(3) Principle No 5 of the European Pillar of Social Rights, proclaimed at Gothenburg on 17 November 2017, provides that, regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to **social protection** and training;”¹⁵³
- “(11) Council Recommendation 2019/C 387/01 on access to social protection for workers and the self-employed recommends Member States to take measures ensuring formal and effective coverage, adequacy and transparency of **social protection** schemes for all workers and self-employed. Member States currently have varying degrees of providing social protection to the self-employed.”¹⁵⁴

5.2. Risks related to platform work

- “(6) [Misclassification] also leads to an uneven playing field with respect to businesses that classify their workers correctly, and it has implications for Member States’ industrial relations systems, their tax base and the coverage and sustainability of their **social protection** systems.”¹⁵⁵

¹⁵⁰ Ibid. 17.

¹⁵¹ Ibid. 17.

¹⁵² Ibid. 19.

¹⁵³ Ibid. 20.

¹⁵⁴ Ibid. 22.

¹⁵⁵ Ibid. 21.

- “(48) Automated monitoring and decision-making systems used in the context of platform work involve the processing of personal data and affect the working conditions and rights of persons performing platform work. They therefore raise issues of data protection law as well as labour and **social protection** law.”¹⁵⁶

5.3. *Aims and intended impact*

5.3.1. General

- “Article 19 - Supervision and penalties

The authorities referred to in paragraph 1 and national labour and **social protection** authorities shall, where relevant, cooperate in the enforcement of this Directive, within the remit of their respective competences, in particular where questions on the impact of automated monitoring and decision-making systems on working conditions or on rights of persons performing platform work arise.”¹⁵⁷

5.3.2. Concerning misclassification of employment status

- “(9) When platforms operate in several Member States or across borders, it is often unclear where the platform work is performed and by whom. Also, national authorities do not have easy access to data on digital labour platforms, including the number of persons performing platform work, their employment status, and their working conditions. This complicates the enforcement of applicable rules, including in respect of labour law and **social protection**.”¹⁵⁸
- “(19) [...] The aim of those procedures should be to ascertain the existence of an employment relationship [...] and, where such employment relationship exists, to ensure full compliance with Union law applicable to workers as well as national labour law, collective agreements and **social protection** rules.”¹⁵⁹
- “(23) [...] Where a digital labour platform decides – on a purely voluntary basis or in agreement with the persons concerned – to pay for **social protection**, accident insurance or other forms of insurance, training measures or similar benefits to self-employed persons working through that platform, those benefits as such should not be regarded as determining elements indicating the existence of an employment relationship.”¹⁶⁰

¹⁵⁶ Ibid. 31.

¹⁵⁷ Ibid. 41.

¹⁵⁸ Ibid. 22.

¹⁵⁹ Ibid. 24.

¹⁶⁰ Ibid. 25.

- “(24) [...] Authorities in charge of verifying the compliance with or enforcing relevant legislation, such as labour inspectorates, **social protection** bodies or tax authorities, should also be able to rely on that presumption.”¹⁶¹

5.3.3. Concerning transparency

- “(41) In order to ensure that digital labour platforms comply with labour legislation and regulations, social security contribution obligations, social security coordination and other relevant rules, in particular if they are established in another country than the Member State in which the platform worker is performing work, digital labour platforms should declare work performed by platform workers to the competent labour and **social protection** authorities of the Member State in which the work is performed, in accordance with the rules and procedures laid down in the law of the Member States concerned.”¹⁶²
- “(42) Information on the number of persons performing platform work through digital labour platforms on a regular basis, their contractual or employment status and the general terms and conditions applicable to those contractual relationships is essential to support labour inspectorates, **social protection** bodies and other relevant authorities in correctly determining the employment status of persons performing platform work and in ensuring compliance with legal obligations as well as representatives of persons performing platform work in the exercise of their representative functions and should therefore be made accessible to them.”¹⁶³
- “(48) [...] Data protection supervisory authorities and relevant labour and **social protection** authorities should therefore cooperate in the enforcement of this Directive, including by exchanging relevant information with each other, without prejudice to the independence of data protection supervisory authorities.”¹⁶⁴
- “Article 11 – Declaration of platform work
Without prejudice to Regulations (EC) No 883/2004 and 987/2009 of the European Parliament and of the Council, Member States shall require digital labour platforms which are employers to declare work performed by platform workers to the competent labour and **social protection** authorities of the Member State in which the work is performed and to share relevant data with those authorities, in accordance with the rules and procedures laid down in the law of the Member States concerned.”¹⁶⁵

¹⁶¹ Ibid. 25.

¹⁶² Ibid. 29.

¹⁶³ Ibid. 30.

¹⁶⁴ Ibid. 31.

¹⁶⁵ Ibid. 39.

- “Article 12 – Access to relevant information on platform work
 1. Where labour, **social protection** and other relevant authorities exercise their functions in ensuring compliance with legal obligations applicable to the employment status of persons performing platform work and where the representatives of persons performing platform work exercise their representative functions, Member States shall ensure that digital labour platforms make the following information available to them.”¹⁶⁶
- “Article 12 – Access to relevant information on platform work [...]
 3. Labour, **social protection** and other relevant authorities and representatives of persons performing platform work shall have the right to ask digital labour platforms for additional clarifications and details regarding any of the data provided.”¹⁶⁷

¹⁶⁶ Ibid. 39.

¹⁶⁷ Ibid. 39.