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THE CONCEPT OF WORKER IN THE CONTEXT OF PLATFORM WORK AND THE IMPLICATIONS OF THE PROPOSAL FOR A DIRECTIVE ON IMPROVING THE CONDITIONS OF PLATFORM WORK

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LIST OF ABBREVIATIONS

EU	European Union
CJEU	Court of Justice of the European Union
ILO	International labour organization
TFEU	Treaty on the Functioning of the European Union

ABSTRACT

Developments in technology and changes in organizations have brought up new forms of organizing work. Work performed via a digital platform places the performers of the services in a grey area when it comes to classifying their legal status. This thesis analyses the legal concept of a worker in the context of platform work. The main research questions in focus are: whether the notion of a worker is extended to platform workers and whether the EU law provides a similar level of legal protection to persons working in the platform economy and precarious work as to the traditional workers? To answer these, this thesis examines the interpretations of the concept of a worker by the Court of Justice of the EU and the considerations of the International Labour Organization. Additionally, recent developments in case law on platform workers and in a legislative field are examined. Based on the analysis, this thesis presents proposals for the protection of platform workers that could simplify the classification of the platform workers and therefore enhance cross-border free movement rights of EU citizens and strengthen the fundamental freedoms of all workers equally.

Keywords: platform work, labor law, platform worker, legal status

INTRODUCTION

There are over 28 million platform workers in the European Union.[1] The Commission is expecting this number to grow to 43 million people by 2025.[2] New forms of organizing work have been on the rise even before the Covid-19 pandemic which escalated the growth rapidly. Despite the large number of workers in this sector, the workers are treated differently within the Member States because they do not fit into the traditional concept of the worker. The EU legal concept on the employee has deep roots in the time before the internet and with the fast grown digital era, the existing employment laws are up to a challenge.[3] As the legal status dictates the rights and obligations, it is crucial to be classified correctly. However, the legislation on platform workers drags behind, which has been recognized by scholars, labor organizations and EU institutions, and also through a growing number of court cases. The interpretations vary between the national jurisdictions and often place the persons working the same job in different positions.[4] The central question is whether the platform workers are understood as workers or self-employed persons. To answer this, one must look at the characteristics of a concept of the worker.

The classification of the employment status has enormous implications.[5] By classifying the workers as self-employed, the platforms can disregard, e.g., minimum wages, sector-specific salaries that have been agreed on by collective bargaining, and other social security aspects. The business model that is based on the externalisation of social costs and risks has enabled the platforms to collect huge profits.[6] Lower prices are what attract the customers, and to be able to set such prices, the cost of labor, which usually can account for almost 70% of the total business

[1] European Commission: Commission proposals to improve the working conditions of people working through digital labor platforms (2021). Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605, February 25, 2022.
[2] Ibid.
[3] Todolí-Signes, A. (2017). The 'gig economy': Employee, self-employed or the need for a special employment regulation? *Transfer (Brussels, Belgium), 23*(2), 193-205.
[4] Schoukens, P., Barrio Fernandez, A., & Montebovi, S. (2018). The EU social pillar: An answer to the challenge of the social protection of platform workers. *European Journal of Social Security, 20*(3), 219-241.
[5] Kontouris, N. (2018). The Concept of 'Worker' in European Labor Law: Fragmentation, Autonomy and Scope. *Industrial Law Journal (London), 47*(2), 192-225.
[6] Voet, L. (2022). *In the EU, platform workers scored a victory.* Retrieved from https://www.ips-journal.eu/work-and-digitalisation/platform-workers-in-the-eu-scored-a-victory-5811/, April 5, 2022.

costs[7], is where the businesses usually try to lower their costs. Therefore, it does not come as a surprise that the business model that the platforms use is attractive to different kinds of businesses and thus spreads to new sectors.[8]

Therefore, the European Commission's proposal for a Directive on improving the conditions of platform work (Platform Work Directive) presented on 9 December 2021 is highly topical and the need for regulation in the field of platform work is urgent. The proposed Directive establishes a rebuttable legal presumption of an employment relationship between workers and the platforms. The proposal's main objective is to protect the workers and regulate the business model that has enabled the platforms to evade their obligations. The rebuttable legal presumption shifts the burden of proof from worker to employer. Thus, as long as the platform cannot prove otherwise, it is considered an employer.[9]

This thesis is based on the findings of the European Court of Justice (CJEU) on the notion of worker and scholars who have studied the subject in the context of platform work. The scope of this thesis is narrowed to touch on mainly food couriers and chauffeurs working through digital labor platforms, as different kinds of platform work exist. The key research questions in focus are whether the notion of a worker is extended to platform workers and whether the EU law provides a similar level of legal protection to persons working in the platform economy and precarious work as to the traditional workers? The arguments and research questions of this thesis are constructed as an extension of the findings of scholars that have studied the subject before the newest legislative development on the EU level, and therefore this thesis will consider the implications of the proposed Directive together with the presented research questions.

This thesis is based on an in-depth qualitative analysis of EU law, policy proposals, case laws, and secondary sources. This analysis is supplemented by the jurisprudence from selected EU Member States and international law and policy provisions, particularly from International labour organization. This methodology will allow to build a holistic approach to analyze the current legal rules and policy framework applicable to the platform workers.

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[7] Paycor: *The Biggest Cost of Doing Business: A Closer Looj at Labor Costs*. (2022) Retrieved from https://www.paycor.com/resource-center/articles/closer-look-at-labor-costs/, April 5, 2022.
[8] Voet (2022), *supra nota* 6.
[9] European Union: European Commission, Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, 9 December 2021, COM(2021) 762 final, available at: https://ec.europa.eu/social/BlobServlet?docId=24992&langId=en, January 20, 2022.

This thesis finds that the task of classifying platform workers within the scope of labor laws is not simple and straightforward. Generally, the platforms classify the workers as self-employed, although it is more of an employment relationship when one takes a thorough look at the characteristics of the employment relationship. This thesis concludes that the platform workers that are in the scope of this research are in fact in an employment relationship, especially in the light of the Platform Work Directive.

In Chapter 1 the key characteristics, definitions and terminology of platform work is identified. In Chapter 2, the concept of worker is examined with an emphasis on the case law of the CJEU. In Chapter 3, the concept of self employed under EU law is analyzed, and in the following Chapter 4 the considerations and studies of the International Labour Organization (ILO) on platform work are in the focus. Chapter 5 will present the most recent developments in the field of platform work regarding case law and legislative processes. Finally in Chapter 6 this contribution presents the main findings and proposals

1. PLATFORM WORK

Platform work, gig work, sharing economy, contingent work, non-standard work… The terms that refer to a same phenomenon seem to be limitless whilst reading studies on platform work. Not only does this create general confusion, it also limits the accumulation of knowledge.[10] Therefore, before diving deeper into the topic of this contribution, it is important to clarify the concept of platform work. There isn't one generally accepted definition for platform work[11] and the forms of platform work vary. According to Schmidt, platform economy "consists of online marketplaces that involve at least three parties".[12] One party coordinates the supply and demand and simultaneously shifts the costs and risks to the other parties.[13] Whether the services via the platform are bound to a specific location or a person, dictates the regulatory measures that should be applied.[14]

In addition to the varying terminology, there are also multiple forms of platform work[15] as the field of platform work is not homogeneous, and additionally often it is understood as a newer phenomenon when in fact gig work has existed since before the 1800s.[16] It can be categorized as cloud work if it is not bound to a specific location. Accordingly, if the task isn't bound to a specific person, it is crowd work. If a task is bound to a specific location and has to be done at a specific time by a specific person, it is gig work.[17] Gig workers are also defined as service providers with formal agreements with on-demand companies.[18] Schmidt divides digital labor platform work into six types: freelance marketplaces; micro tasking crowd work; contest-based creative crowd work;

[10] Watson, G. P., Kistler, L. D., Graham, B. A., & Sinclair, R. R. (2021) Looking at the gig picture: defining gig work and explaining profile differences in gig workers' job demands and resources. *Group & Organization Management, 46(2),* 327-361.
[11] Arasanz, J., Bazzani, T., Sanz de Miguel, P. (2021). The definition of worker in the platform economy: Exploring workers' risks and regulatory solutions. Study for *The European Economic and Social Committee*. 107.
[12] Schmidt, A. (2017). Digital Labor Markets in the Platform Economy – Mapping the Political Challenges of Crowd Work and Gig Work. 5 et seqq.; see also Forde, C., Suart, M., Joyce, S., Valizade, D., Alberti, G., Hardy, K., Trappmann, V., Umney, C., & Carson, C. (2017). The Social Protection of Workers in the Platform Economy. Centre for Employment Relations Innovations and Change. University of Leeds, United Kingdom. 5.
[13] Ibid., 5.
[14] Ibid., 5.
[15] Ibid., 28 et seqq.
[16] Watson, Kistler, Graham, Sinclair (2021), *supra nota* 10.
[17] Ibid., 5.
[18] Donovan, S., Bradley, D. and Shimabukuru, J. O. (2016) *What does the gig economy mean for workers? Congessional Research Service*.

accommodation; transportation and delivery services (gig work); and household services and personal services (gig work).[19] This contribution focuses on what Schmidt has categorized as transportation and delivery services.

Why platform work has grown so significantly cannot be answered exhaustively but there are a few upsides that are worth mentioning. One attribute is the flexibility that allows the workers to decide when and where to work, making it easier to combine work with other duties like childcare.[20] Additionally, the threshold to engage in economic activities is lower and the work itself does not require a high level of education making it easier for an unemployed person to find a job. Also, the nature of platform work enables one to work multiple jobs at the same time.[21]

An obvious downside to platform work is the poor working conditions due to lack of unions, and legal and economic uncertainty, which result in the platforms exercising dominance over the workers by setting the conditions.[22] Another downside is the issue of personal data protection: the workers are tracked via their smartphones which hinders their right to privacy.[23] Another concern is insurance: Karoliina Kiuru who is the Director at Finnish Centre for Pensions points out that employees are insured by their employer while the self-employed are left to handle it by themselves.[24] In the following chapter, this contribution focuses on the concept of a worker in EU law.

[19] Watson, Kistler, Graham, Sinclair (2021), *supra nota* 10, 5.
[20] Risak, M. (2017). Fair working conditions for platform workers. *Possible regulatory approaches at the eu level. Friedrich Ebert Stiftung.* 4.
[21] Ibid., 4.
[22] De Grown, W., & Maselli. "The impact of the collaborative economy on the labor market." (2016). 9-11
[23] Watson, Kistler, Graham, Sinclair (2021), *supra nota* 10, 8.
[24] Finnish Centre for Pensions: *Self-employed or employee – platform workers' status unclear*. (2021). Retrieved from https://www.julkari.fi/bitstream/handle/10024/143458/Tyoelake-4-2021.pdf?sequence=1&isAllowed=y, April 5, 2022. 3. See also International Labour Organization: *Non-standard employment around the world: Understanding challenges, shaping prospects.* (2016). Retrieved from https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_534326.pdf; See also Rani, U., Kumar Dhir, R., Furrer, M., Göbel, N., Moraiti, A., & Cooney, S. (2021) World employment and social outlook: the role of digital laour platforms in transforming the world of work. International Labor Office – Geneva: ILO, 2021. 5 May 2022.

2. CONCEPT OF WORKER IN EU LAW

First it should be established that the TFEU provides for the fundamental right to work.[25] As Sacha Garben points out, the legal status of platform workers is key to their socio-economic protection.[26] EU law does not consist of one comprehensive body of labor law, and most of the legislation regulate social policy aspects of employment relationships.[27] EU primary law lays down the right to equal pay and freedom of movement. Subject to the principles of subsidiarity and proportionality, employment policies are within the Member States' competence but the EU has taken action in this field in respect of equal treatment.[28] There is no uniform definition of a worker at the European level.

Usually, the right enshrined in Article 45 TFEU has been the centerpiece for the development of the concept of a worker in case law. In its case law, the CJEU has insisted to give a worker a broad Community meaning.[29] Sagan explains that the EU law distinguishes between an autonomous concept of a worker, and references in EU law that refer the term back to national laws in which case the personal scope of the legislative act depends on the national laws.[30] Sagan concludes by stating that "whenever the term 'worker' is used in EU law, a distinction must be made as to whether it is either an autonomous term or a reference to national laws."[31]

The distinction between an employee and a self-employed has been an issue in civil law and common law jurisdictions and neither has a clear approach to answering whether a platform worker

[25] O'Connor, N. (2020). Whose Autonomy is it Anyway? Freedom of Contract, the Right to Work and the General Principles of EU Law. *Industrial Law Journal (London)*, *49*(3), 285-317.
[26] Garben, S. (2021). "Old" Rules and Protections for the "New" World of Work' (*Social Europe*). https://socialeurope.eu/old-rules-and-protections-for-the-new-world-of-work.
[27] Risak, M., & Dullinger, T. (2018). The concept of 'worker' in EU law: Status quo and potential for change. *ETUI Research Paper-Report, 140.* Pg., 17
[28] International Labor Office: *Employment policy implementation mechanisms in the European Union*. (2017). Retrieved from https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_613368.pdf, April 5, 2022, 5. And Hauben, H., Lenaerts, K., & Wayaert, W. (2020). The platform economy and precarious work. Publication for the committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament. 52.
[29] Barnard, C. (2006). *EC Employment Law.* (3rd ed.). New York, USA: Oxford University Press Inc. 172.
[30] Sagan, A. (2019). The classification as 'worker' under EU law. *European Labor Law Journal,* 10(4), 356-361.
[31] Ibid., 356-361.

is in a subordinate relationship or not.[32] The protection that the EU labor laws offer applies mainly to employees, leaving most of the platform workers in a grey area.

The concept of a worker was first seen as a prerogative of the Member States and therefore the Community law focused on economic aspects.[33] Because of these economic aspects (such as building the internal market) the concept of the worker received attention. The Court started to develop its community-wide concept of a worker starting from the *Lawrie-Blum* case in the area of free movement of workers. The contributions of the Court are now included in the personal scope of the most recent Directives. In addition to the case law of the CJEU, the preliminary reference procedure has also played a part in regard to dilemmas about non-standard and precarious work.[34]

This chapter focuses on the concept of a worker in the context of EU law, its development, and how the Court has interpreted the conditions. It is important to study the concept of worker, especially in the context of this contribution, since the platform workers are often and in many jurisdictions ruled as self-employed[35] and as the EU labor legislation concerns predominantly employees, the self-employed are left out from the scope of the protection it offers.

2.1. Lawrie-Blum as the departing point

As explained, most of the case law in the field of workers has taken place in the context of freedom of movement. The Court has held that the term worker has an autonomous meaning because it is a fundamental freedom that is binding to the Member States which should not be entitled to determine the personal scope on their own.[36]

[32] Blainpain, R., and J. Baker. (2014). *Comparative Labor Law and Industrial Relations in Industrialized Market Economies.* (11th and rev. ed.) The Hague: Kluwer Law International. 361.
[33] Février, V. (2021). The Concept of 'Worker' in the Free Movement of Workers and the Social Policy Directives: Perspectives from the Case Law of the Court of Justice. *European Labor Law Journal 12(2),* 177-192. 2.
[34] Menegatti, E. (2019). The Evolving Concept of "worker" in EU law. *Italian Labor Law e-Journal,* 12(1), 71-83. 72.
[35] Kerikmäe, T. Employment status of gig companies working force in EU/EEA member states. (2019). Accessible at https://haldus.taltech.ee/sites/default/files/2021-10/Employment%20status%20of%20gig%20companies%20working%20force%20in%20EUEEA%20member%20states.pdf?_ga=2.31651966.1155068199.1634382905-1384769620.1633335591.
[36] Sagan, A. (2019), *supra nota* 30. 353-361.

In 1986, the Court interpreted the concept of a worker in the *Lawrie-Blum* case and developed a formula that is still in use. There must exist "a relationship of subordination vis-á-vis the employer, irrespective of the nature of that relationship, the actual provision of services and the payment of remuneration."[37] In an earlier case *Levin* that dealt with a part-time worker, the Court found that the activity of employment must be effective and genuine to be considered work within the free movement in Article 45.[38] The terms of the contract aren't as much in the focus as the actual nature of the relationship so in *Levin*, the Court held that part-time workers are considered to be workers within the context of Article 45.[39]

The Court has interpreted the elements from the *Lawrie-Blum* formula on a case-by-case basis to be inclusive, instead of restrictive, and to confront the status quo of the emergence of working relationships that do not fit into the framework of traditional understanding of a worker. Irregular income, on-call schedules, fragmented working hours and casual nature of work challenge the concepts of subordination and continuity.[40]

2.1.1. Economic activity

In respect of both employee relationships and self-employed persons, the Court requires that the work activity constitutes an economic activity.[41] The work must then be genuine and effective, thus activity that is seen as purely marginal and ancillary does not constitute work within the scope of free movement of workers.[42]

In the context of platform work, it is difficult to determine whether the work constitutes economic activity that is more than marginal and ancillary as the considerations differ across nations and are often based on aspects of working time and wage, which in turn do not support the fragmented

[37] Judgment of the CJEU, Case C-66/85 *Deborah Lawrie-Blum v Land Baden- Württemberg* (3 July 1986). Paragraph 15.
[38] Judgment of the CJEU, Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie* (23 March 1982). Paragraph 21.
[39] Case C-53/81 *Levin*. Paragraph 15 & 17.
[40] Ludera-Ruszel, A. (2020). The Concept of "Worker" under the Principle of Free Movement of Workers and Its Implications for the Protection of Workers in the Euroepan Union. *Studia z Zakresu Prawa Pracy I Polityki Spolecznej*, 27(3), 167-174. Pg., 169-170.
[41] Judgment of the CJEU, Case C-36/74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unien and Federación Española Ciclismo (12 December 1974). Paragraph 4.
[42] Case C-53/81 *Levin*, paragraph 17.

structure of the platform.[43] Therefore, when attempting to distinguish between an employee and a self-employed relationship, economic activity isn't a suitable feature.[44]

2.1.2. Subordination

The Court has interpreted the concept of a worker to refer to a situation where there exists direction of the employer over the worker.[45] The Court has also approached this from a more flexible perspective in respect of the organization of work and the way that the tasks are performed.[46]

In the *Asscher* case, the Court had to consider if a person who under national laws was seen as self-employed, could have been qualified as a worker under Union law. The Court ruled that there was no subordination present as Mr. Asscher was the director of a company of which he was the only shareholder.[47] In a case regarding a pregnant worker, who was an only member of the Board of Directors employed under an agency contract and was removed by a decision taken by a general meeting of shareholders, the Court had to consider whether she was a worker under the Pregnant Workers' Directive. The outcome differed from the *Asscher* case. Although Ms. Danosa was the only member of the Board, the Court considered her as an employee. This ruling was motivated by the circumstances in which Ms. Danosa was recruited, the nature of her duties, the context in which the duties were performed, the scope of her powers and the extent to which she was supervised within the company, as well as the circumstances under which she was removed.[48]

The factual circumstances of Mr.Asscher's intentions of tax avoidance, and the questionable motives behind Ms.Danosa's removal explain the different outcomes: the Court is very cautious to protect and enhance equality so it did not hesitate to stretch the concept of subordination in Ms. Danosa's case.

[43] Hauben, Lenaerts, & Wayaert (2020), *supra nota* 28. 26.
[44] Risak, M., & Dullinger, T. (2018), *supra nota* 27, 30.
[45] Case C-66/85 *Lawrie Blum*, paragraph 17 & 18; Judgment of the CJEU, Case C-256/01 *Debra Allonby v Accrington & Rossendale College* (13 January 2004). Paragraph 72. Judgment of the CJEU, Case C-232/09 *Dita Danosa v LKB Līzings SIA* (11 November 2010). Paragraph 39.
[46] Judgment of the CJEU, Case C-393/10 *Dermod Patrick O'Brien v Ministry of Justice* (1 March 2012). Paragraph 34, 35, 38 & 51; Judgment of the CJEU, Case C-216/15 *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbh* (17 November 2016).
[47] Judgment of the CJEU, Case C-107/94 *P.H. Asscher v Staatssecretaris van Financiën* (27 June 1996). Paragraph 26.
[48] Case C-232/09 *Danosa*, paragraph 47.

Subordination is perhaps the most relevant criterion when an employment relationship has to be differentiated from other forms of work relationships.[49] Hauben, Lenaerts and Wavaert observed that national definitions of 'worker' often refer to this criterion.[50] Based on the analysis of the case law, the Court has focused on the criterion of subordination, and it appears that in cases where the Court deals with people needing protection in the sense that they are considered to be economically dependant, the Court is willing to stretch the concept of subordination.

Subordination in the context of platform workers is difficult to establish as the economic activity must be more than purely marginal and ancillary, and generally, allocation and organisation of work are very different from traditional concepts of work as technology plays a huge role and therefore there is less human involved decisions.[51] Some Member States use the concept of economic dependency when establishing the sort of employment relationship in question.[52]

2.1.3. Remuneration

Remuneration is one of the elements essential to an employment relationship. Speaking of the quality of the payment of a worker, the Court appears to accept various scenarios to avoid creating obstacles to the principle of free movement and to ensure the smooth functioning of the Single Market. [53]

The Court has stated that a part-time worker who earns less than a full-time worker is not relevant.[54] As well as it isn't relevant if a person earns below the minimum wage.[55] In *Agegate* the Court ruled that a person cannot be deprived of the status of a worker based solely on the fact that he is paid a 'share' and that the remuneration may be calculated on a collective basis.[56] In *Trojani* the Court concluded that the remuneration could also consist of benefits and some pocket money as longs as they constitute as a consideration for the performed services.[57] In the *Bettray* case, the Court considered it to be irrelevant if the remuneration is provided by subsidies from public funds

[49] Février (2021), *supra nota* 33, 6.
[50] Hauben, Lenaerts, & Wayaert (2020), *supra nota* 28, 23.
[51] Hauben, Lenaerts, & Wayaert (2020), *supra nota* 28, 23.
[52] Ibid.., 23.
[53] Menegatti (2019), *supra nota* 34.
[54]Case C-66/85 *Lawrie-Blum*. Paragraph 21.
[55] Judgment of the CJEU, Case C-316/13 Gérard Fenoll v Centre d'aide par le travail 'La Jouvene' and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon (26 March 2015). Paragraph 33.
[56] Judgment of the CJEU, Case C-03/87 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd (14 December 1987). Paragraph 36.
[57] Judgment of the CJEU (Grand Chamber), Case C-456/02 Michael Trojani v Centre public d'aide sociale de Bruxelles (7 September 2004). Paragraph 22.

because the person's productivity was low.[58] In the *Steymann* case, the Court stated that a person who worked in a religious community as a plumber and was paid some pocket money was a worker. The nature and the extent of the activities did not matter when the work constituted as an essential part of participation in the community and could be regarded as being an indirect quid pro quo.[59] In the case *Mattern Cikotic* the Court concluded the both: the origin of the remuneration nor the limited amount of it can have any consequence in regard to whether the person is a worker or not.[60] Accordingly, in a research executed by V. Fevrier, it is concluded that no cases where the question of existence of remuneration was under scrutiny, were found.[61]

In the context of platform work, the Commission found that the financial transactions between the platforms, platform workers and clients indicate that the payment seems to be carried out by the client even though the platform sets the prices. This is important in the sense that it is often under scrutiny to figure out who is the force that sets the price of the service when deciding on the nature of the employment relationship.[62]

After presenting the characteristics of the concept of worker deriving from the Lawrie-Blum formula, what should be kept in mind is that the concept of an employee is developed for each EU legal act separately despite the extensive and regular usage of the formula, and Kullman points out that it should be done so "accordingly for the acts on which the CJEU has not yet ruled and where a legal act does not explicitly state that national definitions of 'worker' provide the scope of applicability."[63]

2.2. Secondary law

In the previous chapter, the characteristics of traditional concept of worker were introduced to provide an understanding of how a worker is to be understood based on the CJEU case law which has shown the way for the interpretation of the definition of worker. This section considers the secondary laws and how a worker is defined in them.

[58] Judgment of the CJEU C-344/87 Bettray v Staatssecretaris van Justitie (31 May 1989). Paragraph 15.
[59] Judgment of the CJEU, Case C-196/87 *Udo Steymann v Staatssecretaris van Justitie* (5 October 1988). Paragraph 4, 11 & 12.
[60] Judgment of the CJEU, Case C-10/05 *Cynthia Mattern and Hajrudin Cikotic v Ministre du Travail et de l'Emploi* (30 March 2006). Paragraph 22.
[61] Février (2021), *supra nota* 33, 6.
[62] Hauben, Lenaerts, & Wayaert (2020), *supra nota* 28, 26.
[63] Kullman, M. (2021). Platformisation of Work: An EU Perspective on Introducing a Legal Presumption. *European Labor Law Journal*.

2.2.1. Concept of a worker in secondary law

Most Directives refer the definition of worker back to national legislation. EU Transfer Directive[64], Temporary Agency work Directive[65], and the Pregnancy Directive[66], all leave it to the national legislation to specify the definition of a worker. The scope, therefore, depends on the definition of national legislation. However, worker is defined (very broadly) in the Occupational Safety and Health Framework Directive as 'any person employed by an employer, including trainees and apprentices but excluding domestic servants.'[67] Thus, M. Risak and T. Dullinger point out that the terminology is inconsistent as there are varying situations where a certain Directive refers to a 'Community concept' and on the other hand situations where the definition is referred back to national legislation.[68]

The case *Ruhrlandklinik* is a good example of a situation when the Court has moved towards a community-wide concept of a worker in secondary law. The case concerned the Directive 2008/104 on Temporary Agency Work that applies to situations where an employment contract of the employment relationship is defined by national law and refers the definition of a worker back to the Member States.[69] Under German laws, the claimant was not considered a worker. However, the Court stated that: "the provision cannot be interpreted as a waiver on the part of the EU legislature of its power itself to determine the scope for the purposes of Directive 2008/104, and accordingly the scope rationae personae of that directive."[70]

When a Directive has referred the definition of worker back to the national laws, the Court has restrained from establishing a European concept of the worker.[71] It seems that in these cases, a Community concept was not possible to introduce because a Directive was intended for only a partial harmonisation. However, according to V. Février the Court has chosen to develop an

[64] Council Directive 2001/23/EC, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of undertakings or businesses, 12 Mar. 2001, OJ L82, 22 Mar. 2001.
[65] Council Directive 2008/104/EC of the European Parliament and the Council, on temporary agency work, 19 Nov. 2008, OJ L327, 5 Dec. 2008, 9
[66] Council Directive 92/85/EEC, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC, 19 Oct. 1992, OJL 348, 28 Nov. 1992, 1.
[67] Occupational Health and Safety Directive, Art. 3 (a)
[68] Risak, Dullinger (2018), *supra nota* 27, 20.
[69] The Part Time Work Directive clause 1 (a), 2 (1).
[70] Case C-216/15 *Betriebsrat der Ruhrlandklinik,* paragraph 32.
[71] Judgment of the CJEU, Case C-105/84 *Foreningen af Arbejdsledere I Danmark v A/S Danmols Inventar, in liquidation* (11 July 1985)

autonomous concept.[72] When secondary law does not refer the definition of a worker back to the Member States, the Court uses the Lawrie-Blum criteria and the findings of free movement case law and emphasizes the link of subordination and stretches it especially in respect of economically dependent workers.

2.2.2. Secondary law relevant to platform work

The Directive on transparent and predictable working conditions (TPWC) that replaces the Written Statement Directive is one of the most recent EU legal instruments that is relevant to platform work. The TPWC Directive only applies to employment relationships and thus does not cover the workers that are classified as self-employed. The Council Directive 91/533/EEC addresses the workers' right to be informed on their working conditions but as it does not cover all the workers in the Union, the TPWC addresses for an extended written information obligation on the part of employers which includes all the essential aspects of the employment relationship.[73]

Another relevant instrument to the platform industry is the Platform to Business Regulation ("P2B Regulation"). The P2B Regulation which regulates, amongst others, on transparency and on the duty to notify of written general terms of conditions. The Regulation applies on online intermediation services that businesses use to sell goods or services to consumers in the EU.[74] Therefore, online intermediation services with underlying services are outside the scope of the Regulation and most platform workers enjoy very limited protection in respect of contractual conditions, administrative or legal redress or other dispute resolution mechanisms as the Regulation mainly makes sure that the aspects between a platform and a business are transparent, fair and redress is applicable.[75] Despite of the relevancy of these two legal instruments, they still do not offer protection to the platform workers as the workers cannot rely on either of them.

There are many other initiatives that have been launched during the recent years that apply in the field of platform ecnomy in general such as the European Digital Strategy that includes the EU Data Strategy, White paper on Artificial Intelligence and the Digital Services Act. Additionally in

[72] Blainpain, Baker (2014), *supra nota* 32.
[73] Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (OJ L 186/105 11.07.2019). Article 4.
[74] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186/57 11.07.2019). Article 1.
[75] Ibid.

2017 the European Pillar of Social rights was launched that aims at strengthening the rights of EU citizens.[76]

The EU concept of a worker is wide and can include forms of employment that would not be considered so under national laws as the case-law of the CJEU proves.[77] This raises the question that if the Court has interpreted e.g., intermittent work, part-time work, etc. to fall under the concept of a worker, why not platform work. The situation of different legal acts alternately referring the definition of worker to national legislation should not be a barrier for platform workers to benefit from being classified as a worker. The Member States should ensure them the same rights as to the persons with traditional employment contracts.[78] The secondary law that is relevant to platform work in general is neither comprehensive nor does it take into account the employment status of the workers. The existing gap of regulation in such a huge and rapidly growing field of platform work should be assessed.

[76] Hauben, Lenaerts, & Wayaert (2020), *supra nota* 28, 51-52.
[77] Arasanz, Bazzani, Sanz de Miguel (2021), *supra nota* 11, 61.
[78] Kullman (2021), *supra nota* 63.

3. THE SELF-EMPLOYED UNDER EU LAW

The number of self-employed workers has grown and diversified which has been a challenge for the policymakers.[79] One reason for this is the growth in services and public sector but also that being self-employed is a "suitable opportunity".[80] Amongst other reasons are the continuation of the family business, the usual practice in the field, flexible work hours, inability to find a job as an employee, and being requested by a former employer.[81] However, the number of self-employed persons that has grown mainly involves self-employed persons without employees and not so much with self-employed with employees.[82]

To provide an understanding of the importance of the correct labor status classification, this chapter presents a short overview of the concept of self-employed persons in EU law and on the nature of self-employment. The aim is to establish the rights, obligations and implications on social security aspects in comparison to being classified as an employee.

3.1. The self-employed under EU law

The freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 55 TFEU) support the free movement of self-employed workers in the EU. These freedoms are relevant in cross-border activity and therefore a stronger legislative action is needed as the element of crossborder movement might not always be present for all the self-employed persons.[83]

[79] Biletta, I. Fromm, A. Vermeylen, G. Wilkens, M. (2017). Eurofound: Exploring self-employment in the European Union. Publiations Office of the European Union, Luxembourg. Retrieved from https://www.european-microfinance.org/sites/default/files/document/file/exploring-self-employment-in-the-european-union.pdf. 1.
[80] Eurostat. Self-employment statistics. (2018). Retrieved from https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Self-employment_statistics#in_2_self-employed_persons_highly_satisfied_with_their_current_job.
[81] Ibid.
[82] Biletta, I. Fromm, A. Vermeylen, G. Wilkens, M. (2017), s*upra nota* 79. 13.
[83] Nato, A. (2021). The Self-employed and the EU Court of Justice: towards new social protection of vulnerable EU citizens? *European Labor Law Journal*.

A Council Recommendation on access to social protection for workers and self-employed is intended to support the self-employed persons especially the one's who because of the employment status are in a grey area and therefore not covered by social security aspects.[84]

The definition of a worker given by the CJEU has a wide scope and also applies to the self-employed as the definition goes: any person engaged in economic activity. The Article 53 of the TFEU provides for the free movement of the self-employed persons. There are also directives that apply on the self-employed persons such as the Directive on application of the principle of equal treatment between women and men engaged in an activity in a self-employed capacity, and on the protection of self-employed women during pregnancy and maternity.[85] Thus, legislation on self-employed on an EU level exists, the issue is correct classification, not so much the inexistance of such.

3.2. Wolt study

A study was conducted on behalf of Wolt, a food delivery company, which allows to present the view of a company applying a business model that allows for employing workers in a relationship of self-employed and which has surveyed its employees. The study considers attitudes and feelings of the couriers, and presents that 43,3% of the couriers are happy with Wolt, while only 2,3% are unhappy.[86] The study mentions that there is room for improvement when it comes to social security in cases where a courier is left unemployed. However, in Wolt's opinion the difficulty lies with the actual social security system instead of their business model.[87]

The study considered the basis why Wolt classifies their couriers as employees. Amongst the reasons were many and they all have in common the flexibility that the business model offers for the couriers (right to choose the working hours, no non-compete obligation etc.). 84% of the couriers is said to be happy with being their own boss. For Wolt as the "employee", flexibility that comes with being able to employ couriers in a self-employed relationship is the key to being able

[84]Eurofound. Self-employed person. (2019). Retrieved from https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/self-employed-person. 1 May 2022. And see Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed 2019/C 387/01, ST/12753/2019/INIT, OJ C 387, 15.11.2019.
[85] Eurofound. Self-employed person. (2019), *supra nota* 84.
[86]Mykkänen, J. (2019, 1 November). Wolt: 27 kysymystä ja vastausta Woltista ja läheteistä (Blog post). Retrieved from https://blog.wolt.com/fin/2019/11/01/27-kysymysta-ja-vastausta-woltista-ja-laheteista/ , 2 May 2022.
[87] Ibid.

to offer jobs for a wide range of people with no actual work background, and therefore Wolt thinks that this is why their business model also contributes to the society.

The study considered both the upsides and downsides of the employment status from both points of view (the company's and the courier's). However, the study does not tell whether the couriers are genuinely aware of the implications of their employment status in comparison to being classified as workers during the recruitment stage. This makes it hard to form a genuine and unbias opinion when a person has performed work with flexible hours before presenting the question of whether one prefers the status of being self-employed over an employee.

3.3. Nature of self-employed work

As established previously, the definition given by the Court of Justice includes the self-employed in its scope. However, only the persons working for and under the supervision of an employer are considered employees (the aspect of subordination). Economically active persons in the context of self-employed are the persons providing their services to another beneficiary, for the benefit of the client. Even though the attribute of subordination is the distinguishing factor between a worker and a self-employed, defining what in practice is subordinated work can be quite complex. Therefore, the concepts of dependent self-employment and bogus self-employment[88] have emerged.

A number of self-employed persons have become such because of necessity instead of opportunity and they acknowledge the fact that they are in a vulnerable position in case they face long-term sickness.[89] It seems that the attractiveness of being self-employed might stem from the nature of the work: self-employment promotes innovation and easier access to economic activity alongside to the autonomy that comes with being one's own boss. A key question, however, is whether it is a genuine choice to become a self-employed person. The self-employed persons are considered as entrepreneurs meanwhile they aren't always meeting the definition of self-employed person and

[88] Williams, C.C., Horodnic, I.A. (2017). Tackling Bogus Self- Employment: Some Lessons From Romania. *Journal of Developmental Entrepreneurship.* 1-3.
[89] Biletta, I. Fromm, A. Vermeylen, G. Wilkens, M. (2017), *supra nota* 79. 13.

are very dependent.[90] It is confusing why the self-employed are seen differently from workers in respect of social protection.

[90] Conen, W., Schippers, J. (2019). *Self-employment as precarious work: A European perspective*. Edward Elgar Publishing.

4. INTERNATIONAL LABOUR ORGANIZATION CONSIDERATIONS ON PLATFORM WORK

This chapter intends to provide perspective from the point of view of a large international organization that specializes in employment issues. The International Labour Organization ("ILO") is a specialized agency of the United Nations which was created in 1919 after World War I. ILO's aims are to promote social justice and internationally recognized human and labor rights including equal opportunities for women and men in obtaining decent and productive working conditions.

Why ILO's input in respect of this thesis is important is that ILO has a strong foothold to advance the creation of decent working conditions that ultimately affect the workers and businesses. ILO has a tripartite structure that allows for the workers, employers, and governments to raise their voices equally and therefore makes ILO's considerations and reports on the platform work very relevant in terms of providing an objective perspective on this matter.[91] In addition to this, ILO and the European Commission have been committed to cooperation since 1958 and signed a renewed letter indicating the continuity of such cooperation on February 4th, 2021 during which the Commissioner Nicolar Schmit acknowledged how the world of work is changing because of digitalization inter alia.[92]

The International labour organization has studied digital labor platforms since 2015 to understand the implications that this new form of organizing work has on the workers.[93] The Director-General of ILO, Guy Ryder, recognizes the opportunities on display in regard to digital labor platforms. Amongst these are the opportunities for women, young people, persons with disabilities, and

[91] ILO: International labour organization. United Nations. Retrieved from https://www.un.org/youthenvoy/2013/08/ilo-international-labor-organization/, 5 May 2022.
[92] EU and ILO reinforce cooperation to shape just recovery from crisis and promote decent work. European Commission. Retrieved from https://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&langId=en&newsId=9910, 5 May 2022. See also Schmit, N., Ryder, G. (2021). Exchange of letters EU-ILO Renewal of the 2001 exchange of letters (2021). European Commission and International labour organization. 6 April 2022.
[93] Digital labor platforms. International labour organization. Retrieved from https://www.ilo.org/global/topics/non-standard-employment/crowd-work/lang--en/index.htm, 20 April 2022.

marginalized groups.[94] The challenges that this thesis has already presented can be tackled through global social dialogues so the hoped outcome of equal access to fundamental rights at work could be reached.[95]

4.1. ILO's World Employment and Social Outlook 2021 report

The ILO's report, World Employment and Social Outlook 2021 addresses all the issues in respect of platform work: working conditions, hours, income, lack of access to social protection, freedom of association and collective bargaining rights.[96] The report attempts to collect the experiences of different parties (workers and businesses) in the digital labor sector and is based on surveys and interviews in 100 countries. In the scope of this thesis is especially ILO's considerations on the classification of a platform worker's labor status.

The report highlights the employment status as one of the aspects that is important in regard to labor and social protections. Countries having various approaches to this include classifying platform workers as employees based on the amount of control by the platform, others have introduced a new intermediary category to extend the protections of labor laws, while others have created de facto intermediate category that ensures the workers their rightful benefits. Additionally, others have classified the workers as independent contractors because of the flexibility and autonomy that comes with the nature of the job.

Although platform workers could be ruled as self-employed as most of the platform's terms state, fundamental principles should nevertheless be applied. ILO stresses that some aspects of pay and working time could even be intervened to reach a coherent and equal treatment of the workers in a grey area.[97] In the case of platform work and their remuneration, inadequate pay could lead to ineffective payment systems which ultimately cost money to the society as the workers that are left without adequate pay could at some point become very much dependent on social security.[98]

[94] ILO urges better policies to protect workers, businesses, as digital platforms proliferate. United Nations. Retrieved from https://news.un.org/en/story/2021/02/1085462, 5 May 2022.
[95] Ibid.
[96]Rani, U., Kumar Dhir, R., Furrer, M., Göbel, N., Moraiti, A., & Cooney, S. (2021) World employment and social outlook: the role of digital laour platforms in transforming the world of work. International Labor Office – Geneva: ILO, 2021. 5 May 2022.
[97]Ibid. 210.
[98] Ibid. 210.

In an earlier report from 2018, the ILO acknowledged that if the platform workers truly would be self-employed as the platforms claim, the workers should be able to choose their tasks in any fashion and using whatever tools they want, they should not either be punished for not taking tasks because they should enjoy the freedom to choose their working hours and tasks.[99]

The 2021 report lists different objectives to be reached through social dialogue and one of these is the correct employment status of the platform workers.

Despite the size of ILO, questions are raised on the effectiveness of its role as the power of the traditional nation state governance through agreed international conventions has been brushed slightly aside due to global supply chains.[100]

[99] Berg, J., Furrer, M., Harmon, E., Rani, U., & Silberman, M. S. (2018) Digital labor platforms and the future of work: Towards decent work in the online world. International Labor Office, Geneva. 104. 5 May 2022.
[100] Thomas, H., & Turnbull, P. (2018). From horizontal to vertical labor governance: The International labour organization (ILO) and decent work in global supply chains. *Human Relations (New York)*, 71(4), 536-559.

5. RECENT DEVELOPMENTS

5.1. Case law on the classification of platform workers

The amount of case law speaks volumes about how much confusion there exists in the field of classification of platform workers. According to a report prepared for the Commission, there had been 175 judgments and administrative decisions up until September 2021.[101] In the following section, this contribution takes a look at a few of the most recent cases. The following cases show the need for EU action on a legislative level.

5.1.1. Belgium

Belgium's administrative committee on work relations decided in October 2020 that the Uber drivers were in an employment relationship because they fulfilled the criteria listed in Article 337/2, Section 1 of the Loi-programme which has a legal presumption of an employment relationship if the criteria is fulfilled.[102] Later in 2021 the same committee decided that an Uber driver's working conditions were incompatible with the self-employed status of the driver.[103]

5.1.2. France

In France, the law dictates that natural persons whom are registered in the Trade and Companies Register, are presumed to be non-employees but this presumption can be bypassed if the self-employed worker can show that one is in a subordinated relationship with the platform, demonstrate that one receives instructions from the platform and the work is monitored.[104]

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[101] Hießl, C. (2021) Case law on the classification of platform workers: Cross-European comparative analysis and tentative conclusions. Forthcoming, Comparative Labor Law & Policy Journal. 4.
[102] Ibid., 6.
[103] European Trade Union Confederation: *National rulings on platform work show need for EU action.* (2021). Retrieved from https://www.etuc.org/en/pressrelease/national-rulings-platform-work-show-need-eu-action. See also Decision by the Committee, 187-FR-20200707. Service public federal Sécurité sociale. Accessible at: https://www.ilawnetwork.com/wp-content/uploads/2021/03/dossier-187-nacebel-fr-en.pdf. 20 March 2022.
[104]Jaurett, A. Grosjean, C. (2022). Platform workers: The European Commission proposes a presumption of employment. *White* & Case. Accessible at: https://www.whitecase.com/publications/alert/platform-workers-european-commission-proposes-presumption-employment. Accessed on: 28 March 2022.

In 2020 the Supreme Court recharacterised Uber drivers in the aforementioned way from self-employed to employees. In the Court's opinion a driver was in a relationship of subordination because, inter alia, the driver was not informed about a customer's destination when accepting the ride, the platform imposed the rates, the platform was in a position that allowed it to impose penalties on the drivers, and finally the driver is restricted from building up his/her own clientele.[105]

Before this judgment, the status of an employee was negated from by other courts. Their arguments included the following: the freedom to decide when to work indicated of self-employment; the instructions given by the platform were only general in nature (instead of precise) which would be normal in relations between two independent businesses; the disciplinary regime was generally disregarded (until Supreme Court); and in respect of whether the platform is preventing competition by the driver the Supreme Court and Appeals Court saw a limitation in the prohibition to take up other passengers while connected via the Uber application alongside the high costs of driving for Uber which essentially forced the drivers to work through the app and furthermore prevent from building up their own clientele.[106]

However, it is pointed out that newer judgments do not follow the Supreme Court's approach and in January 2021 the Lyon Appeals Court found Uber drivers to be self-employed due to lack of obligation to work and freedom to determine their schedules.[107]

5.1.3. Spain

In a case regarding Deliveroo, the company was ordered to pay 1.3 million euros in social contributions because the Court found that 748 riders were falsely regarded as self-employed.[108]

In another case from September 2020, a rider working for the company Glovo was deemed to be an employee due to working under the Glovo's trademark, the digital platform itself was the essential mean of production in the activity, the platform's rating mechanism was a form of surveillance and control and limited the freedom to choose when to work, the company did not act as a intermediary but was primarily a delivery company, Glovo did all the commercial decisions,

[105] Jaurett, Grosjean (2022), *supra nota 104*.
[106] Hießl (2021), *supra nota* 101, 13-14.
[107] Ibid., 14.
[108] European Trade Union Confederation: *National rulings on platform work show need for EU action.* (2021). Retrieved from https://www.etuc.org/en/pressrelease/national-rulings-platform-work-show-need-eu-action

the price and method for payment was fixed by Glovo, and the worker did not have any part in the negotiations between Glovo and the companies that products were intended to be delivered.[109]

Spain has also ratified a "Riders' Law" that aims to provide legal presumption of an employment relationship for the platform workers and is in fact the first Member State in the EU to recognize the platform workers as employees.[110] However, the law falls short in respect of its scope: it only applies to the delivery sector.

5.1.4. Finland

In October 2020 the Finnish Labor Council found that the delivery riders and drivers were employees because they performed work for remuneration; the work was done personally; the platform could give precise instructions and controlled the performance e.g., via GPS.[111]

Contrarily to this, a recent judgment by the Helsinki Administrative Court has caused irritation. The case concerned a Wolt food courier who had not paid the VAT because he considered himself to be an employee instead of an independent worker. The tax officials filed a complaint and the court concluded that based on the fact that the courier has borne the financial risks of the activities and has been able to choose the working hours and methods the courier was an independent worker and therefore liable to pay the VAT.[112]

However, the Occupational Safety and Health Authority sees otherwise and issued a decision in November 2021 according to which the couriers are employees. The decision was based on an overall assesment of the employment relationship and the officials found that the couriers are in a subordinate relationship: Wolt defines how the work is conducted, directs and supervises the work and exercises control over the workers and the couriers have no influence on the level of fees and the amount of compensation.[113]

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[109] Waeyaert, W., Lenaerts, K., & Gillis, D. (2022). Spain: The 'Riders' Law', new regulation on digital platform work. *Policy case study*.
[110] Ibid., 4.
[111] Työneuvoston lausunto TN 1482-20 (ään. 6-3). Työneuvoston lausunto TN 1481-20 (ään. 6-3).
[112] Helsingin HAO 13.8.2021. See also Aaltonen., J. Hallinto-oikeus piti ratkaisussaan ruokalähettiä yrittäjänä työntekijän sijaan – Millainen vaikutus päätöksellä on? Helsingin Sanomat (2021). Retrieved from https://www.hs.fi/talous/art-2000008190602.html, 20 March 2021.
[113] Työsuojeluviranomainen: työsuojeluviranomainen katsoo että Woltin ruokalähetit ovat työsuhteessa. (2021). Retrieved from https://www.tyosuojelu.fi/-/tyosuojeluviranomainen-katsoo-etta-woltin-ruokalahetit-ovat-tyosuhteessa. 5 April 2022.

Hießl acknowledges that because of the heterogeneity of platforms, reforms in the platforms' structures and work patterns, the scarcity of case law on some platform types and the incoherence of judicial approaches makes it hard to draw overall conclusions on dominant patterns in national case law.[114] An important fact to keep in mind: there are platforms that actually have classified their workers as employees correctly.[115]

5.2. Proposal for a Directive on improving working conditions in platform work

In December 2021 the Commission introduced measures to improve the working conditions of platform workers in the EU with the mindset of balancing and ensuring the labor rights and social benefits of the people working through digital labor platforms.[116] One of these measures is a proposal for a Directive on improving working conditions in platform work to be adopted on the legal basis of Art. 153 TFEU.

The personal scope of the Directive is broad as can be seen from Article 1 of the Directive as it applies to every person that performs platform work in the Union who has, or who based on assessment of facts may be deemed to have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in the Member States with consideration to the case-law of the Court of Justice.[117] The substansive scope is limited to digital labor platforms.[118] The proposed directive includes a criteria according to which it is established whether a platform is an employer or not. If this criteria is met, the platform is legally presumed to be an employer which it can contest on the basis of Art. 5 of the proposed Directive.

[114] Hießl (2021), *supra nota* 101, 59.
[115] De Stefano, V. (2016). The Rise of the "Just-In-Time Workforce": On-Demand Work, Crowdwork and Labor Protection in the "Gig-Economy". *Comparative Labor Law & Policy Journal*. 471, 500.
[116] European Commission: *Commission proposals to improve the working conditions of people working through digital labor platforms.* (2021). Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605. April 5, 2022.
[117] Article 1 (2) Proposal for a Directive on improving the working conditions in platform work
[118] Article 1 (3) Proposal for a Directive on improving the working conditions in platform work

5.2.1. Legal presumption

The Commission has considered adopting a legal presumption for some time: e.g., in 2006 it acknowledged the issues of false classification of employment.[119] Kontouris and De Stefano perceived that it could be useful to introduce a legal presumption of employer status of an entity that substantially determines the terms of the work relationship.[120] This could help in determining the individual and shared obligations and liabilities, which in turn could help in answering who is the employer.[121]

According to the Commission, a legal presumption provides clarity and strengthens "the work of labor authorities or social security institutions to reclassify them as workers."[122] The legal presumption could offer legal certainty. Even if a Court can reclassify a work status, the legal presumption allows for more protection as the burden of proof is with the online platform.[123] Additionally, suing one's employer might appear as too risky in terms of the possibility to lose one's job. After all, the platforms are about making profit and the decisions are always motivated by economical aspects: classifying the workers as self-employed is one way of avoiding financial obligations that could arise under labor laws.[124] By clarifying the relationship through a legal presumption, trade unions can also build a stronger platform to offer assistance to the platform workers. Another benefit has to do with monitoring the compliance with labor laws as due to the legal presumption the platform workers are within the scope of labor laws, legally.[125]

Speaking of the rebuttable legal presumption, M. Risak emphasizes that "it is only the platform in its capacity as contractual partner of both the user and the platform worker which organizes the service and where all the strings come together that will be in the position to actually provide evidence revealing the exact web of contracts as well as actual practice."[126] Having a legal

[119] European Union: European Commission, *Commission Green Paper on Modernising labor law to meet the challenges of the 21st century*, 22 November 2006, COM(2006) 708 final, retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ac10312, 11.
[120] De Stefano, V. M., & Kontouris N. (2019). New trade union strategies for new forms of employment. *New trade union strategies for new forms of employment.* ETUC. 17.
[121] Ibid.
[122] European Union: European Commission, Consultation document, Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work, 15 June 2021, C(2021) 4230 final, 21-22.
[123] Kullman (2021), *supra nota* 63.
[124] Ibid.
[125] Kullman (2021), *supra nota* 63.
[126] Risak (2017), *supra nota* 20, 14.

presumption has been seen as means to actually enforce their rights by the platform workers[127] and it could also provide a way "to tackle the issue of having multiple employing entities."[128]

5.2.2. Support and critique

Support for the legal presumption can be found in the ILO Recommendation. In the recommendation No 198 it acknowledged that States should consider adopting a legal presumption.[129] Legal presumption seems to be a multifunctional method to simultaneously relate to notions of different aspects of employment but also encapsulate features of procedural measures. Thus, it could help the platform workers to access their rights deriving from EU and national labor laws.[130]

Regarding cross-border situations, a rebuttable legal presumption could be seen as an obstacle to the free movement of services.[131] Which, however, would seem odd as the intention of introducing a rebuttable legal presumption is to provide the platform workers the means to establish an employment status and therefore broaden the employment rights deriving from EU law to platform workers. Still, as Kullman notes, a legal presumption could possibly reduce the attractiveness of the cross-border movement.[132]

We should be asking whether these new provisions are de facto able to protect the workers against misclassification, as dead-letter provisions won't do anything.[133] The fact that the Directive applies to persons in the EU means that the workers performing services outside the EU cannot rely on the presumption.

[127] Risak (2017), *supra nota* 20, 14.
[128] De Stefano, Kontouris (2019), *supra nota* 120, 17.
[129] International labour organization: *No Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects*. (2016). Retrieved from https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf. 330.
[130] Kullman (2021), *supra nota* 63.
[131] Judgment of the CJEU, Case C-255/04 *Commission v French Republic* (15 June 2006). Paragraph 40. In which the Court ruled that the presumption of a salaried status placed a restriction on rights deriving from Community law and thus was in contrary to Article 56 of the TFEU.
[132] Kullman (2021), *supra nota* 63.
[133] *Ibid.*

6. FINDINGS AND PROPOSED SOLUTIONS

6.1. Main Findings

To fight the misclassification of platform workers and to clarify their employment relationship, the proposed directive seems to be the wisest approach. The directive's legal presumption of an employment relationship appears to be the safest bet to ensure the platform workers' correct classification and entitlement to the rights deriving from EU and national labor laws. The platform workers are currently not in a balanced relationship and their socio-economic rights vary on a case-by-case basis throughout the Member States. While the majority of platform workers would receive the protection of labor laws, the proposed directive would still leave room for the genuinely self-employed working via platforms. The directive sends a clear message and not only does it strengthen the platform workers' position in regard to their employment status it also takes into account the aspect of algorithmic management which is another issue in respect of the platform work.

6.2. Proposals

Based on the traditional framework of workers and the ambiguity of their legal status, I would have considered adding a third category in between the notion of worker and self-employed. However, as having read academic contributions, adding a third category would most likely only cause more confusion, and thus having studied the nature of platform work, I would propose to include a rebuttable legal presumption as the Commission has already drafted.

There is evidence of including a rebuttable legal presumption in law[134] which frightens me. I am afraid that the outcome could possibly be contrary to what the Commission aims at by introducing the Directive. California included a presumption that addresses online and offline economies. According to the AB5 presumption platform workers are employees and the burden of proof of showing otherwise is with the employer. To demonstrate otherwise, the employer must show that

[134] California Legislative Information. Assembly Bill No. 5. Accessible at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5, April 5, 2022.

the workers "are free from control and direction by the hiring company; perform work outside the usual course of business of the hiring entity; and are independently established in that trade".[135]

But because of the deep pockets of companies like Uber and Lyft, they succeeded to be exempted from the AB5 in a result of a ballot initiative costing the companies 200 million dollars.[136] This raises the questions whether the companies could do the same in Europe since after all, big companies like Uber have a strong foothold in the EU as well. The goal is to protect the employees as they are in a weaker position. However, the companies' interests should be considered as well. Thus, the legal presumption should be rebuttable. An aspect to consider when talking about creating new rules is whether these new problems emerging from new models of work could be addressed by the existing labor laws if established a coherent approach and an interpretation that all the parties could accept.[137]

The establishment of a European-wide legal presumption will not wipe out all the issues surrounding classification in platform work. One argument is that the courts will still need to approach situations on a case-by-case basis.[138] However, the classification has always required this kind of assessment. The difference with the proposed directive is that the worker his-/herself does not sue his/her employer as the burden of proof is with the platform.[139] Another limitation of the proposed directive is of course the fact that the platforms can always drawback and figure out a new way of organizing the work to circumvent labor law obligations. To this end, efficient enforcement is needed.

An interesting point that the Commission acknowledged in its communication is the consideration that the directive only extends to platform workers. Sectors beyond this scope do not fall under it which brings us to consider the status that the traditional workers have when their employer uses e.g., algorithmic management. Aislinn and Adams-Prassl point out that the traditional factory floor provided more opportunities to stand up and bargain collectively but because of the rapid

[135] California Legislative Information. Assembly Bill No. 5, *supra nota* 132.
[136] Rhinehart, L. McNicholas, C. Poydock, M. Mangundayao, I. (2021). Misclassification, the ABC test, and employee status. *Economic Policy Institute*. Accessible at: https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/. Accessed on 28 March 2022. See also: Everee. (2020). AB5's ABC test explained. Accessible at: https://www.everee.com/blog/ab5-abc-test/. Accessed on 28 March 2022.
[137] Davidov, G. (2017). 'The Status of Uber Drivers: A Purposive Approach'. *Spanish Labor Law and Employment Relations Journal* 6. 9.
[138] EU-OSHA, Protecting Workers in the Online Platform Economy: An Overview of Regulatory and Policy Developments in the EU (2017), 4-5.
[139] Kullman (2021), *supra nota* 63.

expansion of hybrid working models during the last two years, the traditional workers are more spread out.[140] Thus, the question is that whether the Directive should be extended to all workers as wouldn't the same rights be as valuable to the traditional workers as to the platform workers. My proposal would thus be to extend the substantive scope of the proposed directive to tackle issues arising from algorithmic management in the context of traditional work.

Since the directive is still in its early stages, amendments can be made. The Member States should then be alert and take a thorough reading before accepting to implement the directive as it has been drafted. In Spain, the rules on algorithmic management cover all employees and this is an aspect that the Commission should have considered.

[140] Aislinn, K-L. Adams-Prassl, J. (2021). The EU's Proposed Platform Work Directive: A Promising Step. *Verfblog*. Accessible at: https://verfassungsblog.de/work-directive/. Accessed on 28 March 2022.

CONCLUSION

This thesis aimed to examine the legal concept of worker in the context of work provided through a digital platform, such as the couriers and riders of companies like Uber and Wolt and to provide considerations on the implications of a recently proposed directive on behalf of the Commission. The CJEU has interpreted the concept of a worker via an extensive amount of case law that dates back many years. The key starting point has been the case of Lawrie Blum in which the Court established characteristics that should serve as a blueprint in respect of what is a worker. The key characteristics deriving from the Lawrie Blum formula are economic activity, subordination and remuneration.

The interpretations of the concept on worker have taken place during a time in which digital economy had not yet risen. Today, with the digital development and further development in forms of organizing work, the ordinary and traditional concepts of a worker do not seem to allow space for workers such as the platform workers. 28 million workers in the platform economy are without a clear consensus of their legal status which is in an important role as the legal status dictates their socio-economic rights. It does not help that the Member States of the EU have varying interpretations on the legal status of a platform worker.

As long as the labor laws differentiate people based on the nature of work there will be debate on the legal classification of their relationship. If all economically active persons were to be included in the scope of labor laws without further specifying on their legal classification more people could enjoy the rights and protections that they in theory rightfully should. However, in the meantime the codification of a rebuttable legal presumption seems to be a legit way to confront the prevalent issues regarding the platform workers' legal classification. This of course serves the interests of the workers more than the economic interests of employers, but after all, the laws are aimed at protecting the persons in a weaker position.

The opportunities of platform work are limitless which explains the growing numbers of employment in such a sector. However, when there are benefits there are also downsides. A

challenge that the whole platform work community is facing is the nature of precariousness. However, as this contribution focused on the legal classification of platform workers, the main findings support the assumption that the issues in this field are dependent on the workers' labor status and thus need to be examined. The topicality of this subject is proven by the numerous claims that have been filed by the platform workers hoping that their work could be recognized as subordinate work.

The Commission might be trying to squeeze new forms of organizing work into the old molds with the proposal, however, it is a long-waited first response that the platform workers desperately need. After all, it is up to the Member States to implement the possible directive, and therefore there is still room for making stricter rules. To conclude, the notion of worker is not yet, but will be extended to platform workers in the light of the new legislative proposal and will provide for similar level of legal protection to persons working in the platform economy as to the traditional workers. However, as the directive only regulates on platform work, the scope does not extend to other areas of work and therefore persons that are actively performing in return for economic gain are still not provided similar level of protection.

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