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CONFEDERATION SYNDICAT EUROPEAEN TRADE UNION

LEGAL FEASIBILITY OF THE ETUC PROPOSAL

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Legal Feasibility of the ETUC Proposal

1. Introduction

«The abuse of the status of self-employed persons, as defined in national law, either at national level or in cross-border situations, is a form of falsely declared work that is frequently associated with undeclared work» (Recital 8 of Directive (EU) 2019/1152). This remark concerns, among others, platform work.

Effectively, since its inception, **the business model of platform work**, set out by Uber and subsequently taken up by others, **is developed to circumvent labour law and social protection**. The first piece of evidence in this respect is the obligation, without alternative options, for an individual to be registered as an independent worker in accordance with national law. In most cases, the reality is that these workers are in subordination to, and are economically depend on, the platform. This is the reason why High Courts, in several countries, have considered those workers as employees or, more precisely, as bogus self-employed.

Such self-employment is a double-facet phenomenon. **Despite new jobs emerging, there is a high risk of weakening the social and tax systems** if states accept to consider all platforms, even the platform providing and leading work, as mere intermediaries exempted from social contributions. Therefore, regulating work platforms is not only a question of labour law (European Commission 2020). It is more broadly part of the survival of our social protection systems.

Moreover, these **economic models, based on social dumping, provide unfair competition to the traditional undertakings in each sector**. That was very clear since the beginning in relation to taxis[1] and it now has reached many other economic activities. Hence, **binding legislation would protect not only workers, but also the entire social protection systems and guarantee fair competition within the EU's internal market.**

There are two methods to reach this objective. The first option is to adopt a presumption of employment for those workers carrying out a professional activity for platforms, which would allow the application of national labour law. The second option would build on the previous one, and extend the Labour Law guarantees and social protection to "self-employed" workers, creating special provisions for those who were out of its scope. This second option means the adoption of specific, complex and piecemeal legislation in the EU.

Regarding the issue of collective bargaining for platform workers, this will depend on whether workers are employees or self-employed. In case of an assimilation from self-employed to employees, these problems disappear as they are under the coverage of Labour Law. But if they are considered as self-employed, it is necessary to extend the interpretation of the article 101 TFEU in a manner that it is not an obstacle to the

[1] CJEU 20 December 2017, Asociacion profesional Elite Taxi, C-434/15.

guarantee of fundamental social rights. The Commission has already given a favourable opinion in this direction[2].

2. Subjects under protection and presumption of employment status

It is first necessary to analyse the scope of the proposal, as it is not only the key question but it also determines the rest of the analysis. In this respect, the document sets out two main conclusions.

On the one hand, ETUC proposes to extend the coverage of the regulations of certain working conditions (particularly wage, representation and collective bargaining and social protection) to all workers, «including self-employed».

> *The ETUC considers that workers in platform companies are not a new category of workers per se. The progression of platform work can be linked to the development of self-employment and non-standard employment relationships. A European initiative should therefore focus on the protection of all non-standard workers and workers in platform companies (including the self-employed), because a musician, a delivery man, a journalist or a cleaner are in the same situation.*

On the other, it says that it is necessary to avoid the use of a third category and focus on the pairing "employment - self-employment".

> *Regarding the employment status, the ETUC opposes creating a 'third employment status categories' that would fall in between a 'worker' and a 'self-employed'. […]. What matters is not the intention of the company, but the actual design of the employment relationship. A presumption of an employment status should be the starting point. A worker who performs work under the same conditions as "normal" workers should be classified as such according to the definitions used in the respective industrial relation systems.*

There is consensus in the literature that the uncertainty on the employment status is a pressing issue and one of the most important challenges. Nevertheless, this trend is not only specific to platform work. The increase in flexibility and autonomy, made possible through digitalisation, has blurred the boundaries between different employment statuses (Groen et al. 2017) and is shown in many other activities.

Additionally, from a practical perspective, most Member States do not opt for a separate status, but classify platform workers under one of the employment statuses recognised in the respective country. As a consequence, rejecting a third category is aligned with the current developments.

From a general perspective, keeping the debate within the dichotomy of employment and self-employment seems to be a good option, considering that countries, which have chosen this alternative for other activities (TRADEs in Spain, "parasubordinati" in Italy, etc.) have not obtained the expected results (Fulton, L. 2018), but rather introduced more complexity in the regulation and it is not present in all member states.

[2] Cf. https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1237 (press release 30 june 2020)

Finally, the interest in self-employment is also an extremely positive point from both general and particular perspectives. The document shows the greatest interest of unions and the Confederation in providing protection to this category of workers. There is no doubt that self-employment is being used as a means to depart from employment and labour law, and that unions may play a decisive role in limiting and controlling this trend, besides improving the working conditions of self-employed persons.

However, the protection of working conditions of these two categories of platform workers is far from being similar. From a technical point of view, it would be possible to articulate legal answers for both categories. Concretely, analysing the legal "Feasibility of Proposal of Directive on Digital Platform Workers from GUE/NGL Group", we provide an alternative to extend its application scope to both employees and self-employed. Nevertheless, this option is far from being trouble-free. Taking this into consideration, we provide other options for both categories separately.

a) Regulation for workers

The best option to regulate platform workers' working conditions would be a Directive, in accordance to Articles 153, 154 and 155 TFEU. This Directive should have a **subjective scope that is as broad as possible**. The most appropriate and feasible solution would be the one provided by Article 1(2) of **Directive 2019/1152 on transparent and predictable working conditions** (among others[3]) because it includes an explicit mention to the case-law of the Court of Justice (hereinafter "CJEU"): «This Directive lays down minimum rights that apply to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice».

From that point, the ETUC's proposal focuses on including a presumption as the keystone of this forthcoming regulation.

> *The presumption of an employment relationship is closely linked to the definition of worker, which is essential for the application of national labour legislation and for the national social partners to conclude collective agreements on employment and working conditions, while taking into account the general principles of the union legislation and case law established by the Court of Justice of the European Union. Based on this assumption a reversal of burden of proof is needed. Criteria should be based on ECJ decisions, or the California test or ILO conventions[3].*
>
> *[…]*
>
> *To combat bogus self-employment, the assumption that a platform worker is a worker should be the starting point and a reversal of the burden of proof should make it more difficult for platform companies to have workers been classified as self-employed.*

A presumption is usually described as an inference from a known fact to an unknown fact. From the employment relationship perspective this means assuming its existence by the known fact that a relationship between parties exists (or some factual elements

[3] Also Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and careers and repealing Council Directive 2010/18/EU.

taken from it). Most European countries do not have a statutory presumption (Risak, M. et al. 2013), which does not mean that it can be applied by case law.

At European level, it is possible to find some relevant examples. Article 6(3) of Directive 2009/52/EC provides for minimum standards on sanctions and measures against employers of illegal third-country nationals sets that, for certain cases, «Member States shall provide that an employment relationship of at least three months duration be presumed unless, among others, the employer or the employee can prove otherwise». Additionally, Article 11 of **Directive 2019/1152 on transparent and predictable working conditions** states that Member States shall take, among others, «a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period».

At the national level, the first country to use this mechanism for platform work has been Spain. According to the Royal-Decree Law 9/2021 « By application of the provisions of article 8.1[4] [of Workers' Statute -the Spanish Employment Law-], it is included in the scope of this law [again, the Workers' Statute] the activity of persons who provide paid services consisting of the delivery or distribution of any consumer product or merchandise for employers who exercise the powers of organization, management and control directly, indirectly or implicitly, through the algorithmic management of the service or working conditions, through a digital platform.» This has been classified as a "strong presumption" (Cruz Villalon, J. 2021) because if the worker provides evidence on the organisation management and control through algorithms, the dependency or subordination is presumed and, as a consequence, the employment relationship admitted. At the end of the day, this particular legal construction makes it very difficult for platform companies to prove the opposite.

Consequently, there are different options at both European and national level to introduce this mechanism in a hypothetical directive regulating platform work.

The presumption must not be confused with the burden of proof. It does not shift the burden of proof *per se*, but it is merely an evidentiary rule whereby the opposing party must go forward with an explanation to rebut the permissive presumption. Actually, different approaches have been used in Europe (Risak, M. et al. 2013). On the one hand, there are models based on a broad presumption that all relationships are employment relationships and a worker making a claim is not required to produce evidence to prove the existence of it (but proofs to the contrary may be admitted). On the other hand, the law may specify one or several indicators and make the claimant seek to prove the existence of an employment relationship. **According to the ETUC position, if presumption was considered, the shift of the burden of proof should be added, making the platform prove that a non-employment relationship exists**.

[4] This article regulates the general presumption for all kinds of activities.

b) Regulation for the self-employed

Even if the scope of a hypothetical Directive on platform work was extended as much as possible, it should be kept in mind that there are going to be persons that are not covered: those who could have been classified as real self-employed. In other words, **neither the broadest definition nor any kind of presumption can impede the classification of certain situations out of that regulation** (Mercader Uguina, J. R. 2017) (Aloisi and De Stefano 2018). The reasons are multiple, such as: the diverse features of this sector; the strategy changes by platforms following courts' resolutions; and the multiple tests used by courts to determine the existence of an employment relationship are flexible and can lead to different solutions.

As a consequence**, it would be indispensable to extend the coverage of EU protection to self-employed, either including them in the aforementioned directive[5] as an alternative to those protected by the presumption; or providing a separate regulation**.

In this case, it is also necessary to provide a definition of self-employed persons with respect to the scope of the directive. It should be kept in mind that, as in the case of the concept of employee, it cannot be imposed on Member States in general terms, but will be connected to the directive and aimed to delimit its application. From this perspective, the easiest solution would be to consider all self-employed persons without employees (so called solo self-employed). This prevents the problem of delimitation between self-employed and employers. They also fulfil the requirement of having a work which is predominantly personal (Countouris, N. & De Stefano, V. 2019). Additionally, it avoids difficulties related to their legal status, as it does not matter if the professional activity is developed under the coverage of a legal person. Furthermore, it seems that it would be in line with the Commission's proposals, opting for the broadest option. From a practical perspective, the result would be relatively considerable, as, according to Eurostat, around 70% of self-employed people in the EU have no employees.

In this respect, the definition made by the CJEU must be highlighted. In the case FNV Kunsten (C-413/13,) the Court addressed the compatibility with competition law of a collective agreement applying to both employees and the self-employed. Focusing on what is interesting now, it sets the type of self-employed person who could be covered by a collective agreement that would not fall under the prohibition of Article 101 TFEU. Hence, the criteria used by the Court are: i) the fact that the self-employed person is (not) determining independently their own conduct on the market; ii) is (not) sharing any financial or commercial risk; iii) is working (or isn't) as an auxiliary within the business' operations; and iv) has (or hasn't) a relation of subordination with the entity they provide their services to.

The EU regulations concerning self-employment are scarce. Nevertheless, **the most common legal bases used to develop it are Articles 114, 115, 202 and 352 TFEU**. From our perspective, the most appropriate would be **article 114, as it refers to the functioning of the internal market but it follows the ordinary legislative procedure**.

[5] Acting on multiple legal bases for indivisible legal acts is possible according to, among others, Huber -C-336/00-.

Although it excludes its application to the rights and interests of employees, it does not include self-employed, as exceptions of the Treaties must be interpreted restrictively (Case 2975, Kaufhof vs. Commission). **The problem of this provision is that it does not necessarily include the intervention of social partners.** Nevertheless, it is partially compensated by the participation of the European Economic and Social Committee.

Besides these legal bases, different articles concerning legal treatment of the self-employed have been also used to set regulations concerning the self-employed, frequently together with those of employees[6]. Particularly, **Directive 2010/41/EU** on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. It is adopted according to article 157 TFEU (equal pay), which **refers to "workers" but extends to "self-employed". It is interesting because it extends the terms "worker" and "work" and, consequently, this particular working condition applies to the self-employed**. Actually, the rule provides that «each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied». This opens the possibility of applying other articles under the same title and referring to "workers", particularly, Article 153 TFEU, to the self-employed.

c) The role of employer

Obviously, any type of regulation for platform work requires to be referred to the platform itself, limiting and delimiting it from a legal perspective. In this respect, ETUC's resolution states:

> *A digital platform is an employer, a (temporary work) agency or an intermediary. Any platform can be assigned to one of these categories. A separate status is unnecessary and undesirable. This should be laid down in a regulation on platform work.*
>
> *[…]*
>
> *An online platform seems to involve (at least) three parties in each transaction: (i) the person/entity who wants work to be done for them, (ii) the worker who provides that work and (iii) the platform that coordinates these two elements. In this framework, triangularity in itself does not exclude the possible existence of an employment relationship between the platform company and the worker,*

[6] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. It guarantees equal treatment in the access to both employment and self-employment according to articles 3 and 13 TECC (equal treatment). Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. It guarantees equal treatment in the access to both employment and self-employment according to articles 3 and 13 TECC (equal treatment). Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. It is applicable to the working population, including the self-employed. Its legal base is the article 141 TEC (equal treatment). Directive 2004/38 EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (for employees: see also Regulation 1612/68). It applies to "all Union citizens" (Article 3), including therefore self-employed persons. Directive 2005/36/EC on the recognition of professional qualifications. It is applicable to either a self-employed or employed basis. Its legal basis are articles 40, 47 and 55 (free movement of persons and services). Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. It is adopted according to article 157 TFEU, which is referred to "workers" but extended to "self-employees".

otherwise "traditional" temporary agency work (TAW) would not exist either. A triangular relationship in which there is in fact an employment relationship between the worker and the platform company can be considered as a bilateral relationship.

It can be argued that the work done through mediation on digital work platforms could be considered in some cases as a particular form of temporary agency work. Even if the worker is not bound by a standard employment contract, it cannot be denied that, for a certain period of time, the worker provides services for and under the direction of another person in return for remuneration. The platform company and the end user effectively exercise direction and control over the worker because, when accessing the platform, the worker accepts that the platform company exercises general control over the provision of work and dictates the terms and conditions of employment[5]. Therefore, in principal, the relationship between platform company and worker/ customer has to be considered as a standard employment contract. A broader interpretation, in which the reference point is taken to other workers in the sector should be considered.

Concerning platforms, it should be noted that the concept should be used to delimitate the scope of a possible directive. If a platform intervenes, the directive is applied, without considering the role taken up from a labour or social perspective, as employer or simply intermediator. This would be valid for all kinds of regulations. Nevertheless, if the proposal of directive only focuses on regulating the dependent employment work, the role of the employer can be added, despite the most important point is delimiting the kind of platforms concerned.

Regarding this point, an appropriate option to define a platform would be «**an online facility or marketplace operating on digital technologies that are owned by an undertaking, facilitating the matching between the demand for, and supply of, services provided by a platform worker**» (European Parliament 2020)[7]. This definition is narrower than the understanding of online platforms in the Commission's Communication on Online Platforms and the Digital Single Market - which includes e-commerce websites, search engines, social media, advertisement platforms, payment systems and communication services, **but flexible enough to include all types of platform work**. Actually, the term "platform worker" included at the end could be substituted by a "natural person" or both "a worker" or "a self-employed" depending on the chosen legal option.

An alternative inspired by national approaches would be the one that focuses on its role as intermediator (Ratti, L. 2008). Without considering if this feature is enough to classify it as an agency, there is no doubt that it is its main role. As a consequence, introducing it in the previous definition would be also useful, stating that a platform is «**an online facility or marketplace operating through digital technologies that are owned by an undertaking, intermediating between the demand for, and supply of, services provided by a platform worker**».

Related to this, it must be highlighted that, from our perspective, **the resolution is right in rejecting the idea of considering platforms as temporary employment agencies**. As the document underlines, the most common situation is a bilateral relationship, so introducing it into the debate only generates confusion. Even if some cases could be

[7] According to the authors, this definition would be derived from (Eurofound 2018; European Commission 2020)

considered as a particular form of temporary agency work, that simply means that its directive would be applicable, without requiring any important adaptation. In other words, it does not only seem unnecessary to regulate this aspect in a platform work directive, but its introduction can be counterproductive.

Nevertheless, it is true that, in the case of the self-employed, some problems can emerge if the platform's responsibilities are not explicitly included. In contrast to workers, for whom the role of employer derives from its own status, this is not the case for the self-employed. **As a consequence, a directive covering self-employment should comprehend the concrete responsibilities of platforms regarding the self-employed working for them**. The options range from the declaration of the duties and responsibilities "as if the platform was the employer" to a concrete list of different areas including remuneration, working time, health and safety and termination.

3. Working conditions

a) Minimum salaries

Concerning **salaries**, ETUC's resolution focuses on the two main areas. On the one hand, **within the employment relationship's limits, the most important actions must be developed at national level** by **guaranteeing an appropriate coverage of collective bargaining** (considering the exception of Article 153(5) TFEU) and, as the text highlights, **ensuring that exemptions from the application of statutory minimum wages are not allowed,** and **using tender procurements as an incentive to achieve this objective**. On the other hand, the problem of applying **minimum wages (or wage regulation) to the self-employed** needs to be addressed. This again shows the **importance of setting regulations for all types of platform workers**.

> *The Confederation wants to extend the coverage of the applicable wage to all the workers (here non-standard workers and workers in platform companies – including the self-employed), either statutory or to be negotiated by social partners.*
>
> *[…]*
>
> *The presumption of an employee relationship is not sufficient if there is no level playing field preventing the employer from using a self-employed person cheaper than an employee. This is the only way to ensure that the choice to be self-employed is that of the worker and not the employer in order to save on labour costs*. This implies taking action in relation to minimum wages and minimum tariffs. It should not be possible to pay a self-employed person less than an employee's wage under existing minimum wages or sectoral collective agreements, including the cost of social protection, taxes and other costs (such as holidays and professional costs) that the self-employed person will have to finance him/herself. In those cases, the self-employed cannot be regarded as economically independent. For those cases in which a platform is covering more than one economic sector, the collective agreement to be used will be the most favourable one for the worker[4]. Equally, Tax incentives to promote bogus self-employment should be prevented.*
>
> *With regard to the coverage of statutory minimum wages or agreed in collective agreements, where they exist, social partners and/or national and/or European action in this area is necessary to ensure that exemptions from application of statutory minimum wages for certain categories of workers such as non-standard workers and workers in platform companies (including the self-employed) should not be allowed. In tender procurement clear rules should be established for*

bidding labour platform companies concerning the payment conditions of tender procedures and non-reuse of unsuccessful bids.

Hence, **the first legal tool to guarantee the application of minimum tariffs to self-employed is, without a doubt collective bargaining**[8], as in the case of the classical employment relationship. Please refer to the correspondent section below (see point 4). Nevertheless, we must highlight here that **assuring collective bargaining for the self-employed, which would be a tremendous advance for this type of worker, does not mean having the same levels of remuneration as employees**.

In order to avoid this problem, (Risak, M. 2017) **suggested the introduction of an article concerning the principle of equal treatment as other directives do and, particularly, Directive 2008/104/EC on temporary agency work (TWA)**. It should be noted that equal treatment requires specific grounds to be applied, but that they can be created by rules such as: temporary agency workers must be treated as user's company workers; and, temporary workers like those with an indefinite contract or part-time workers like full-time workers.

The idea of applying this legal tool to platform workers would be based on establishing that working conditions of platform workers - particularly, remuneration - are to be at least those that would apply if they had been recruited directly by the user, to occupy the same job for the duration of their work on tasks or their active search for such. According to the author, this would also establish equal treatment of temporary agency workers and platform workers, and thus avoid circumventing the laws protecting them by switching over to platform work.

Nevertheless, the author recognises that «It should be noted, however, that this equal-treatment approach will very likely only work in cases where platform workers are actually working for a business that would otherwise employ an employee and that instead opts to crowdsource labour. In cases **where the user is a consumer and the alternative is contracting directly with a self-employed person** (e. g. with a cleaner), avoiding the intermediary (the platform), **the equal-treatment principle cannot apply**. In these cases, employment contracts are not crowdsourced and a host of other issues arise, not least as regards the application of minimum wages to those platform workers» (Risak, M. et al. 2013, 4). Anyway, **despite this limited effect, it could be considered as a useful tool for certain types of platforms**.

b) Working time and work duration

Concerning working time and work duration, ETUC's proposal highlights the concern about this particular issue when it mentions the effect of Directive 2019/1152 on

the right to knowing a reasonable period in advance when work is taking place, for workers whose working schedules are very unpredictable, such as in the case of on-demand work; the right to anti-abuse legislation for zero hour contract work;

[8] It should be noted that CJEU has already admitted this, as the fees included in a collective agreement, in case of self-employed in a comparable situation of that of employees, fall outside the scope of article. 101 TFEU (FNV Kunsten -C-413/13-)

> […]
> Since the moment the worker is available for a task on the platform, the worker should be considered at its workplace with all the obligations it means for platform companies. Work duration should be considered as the period spent by a worker in connection with a platform from which s/he has been receiving assignments or searching for jobs.

Nevertheless, despite the importance of this Directive concerning this particular and other working conditions, it should be kept in mind that its regulation primarily depends on the Working Time Directive. The application of this Directive to platform work bring about two main challenges.

On the one hand, it is not applicable to self-employed people (Commission v France – C-255/04-), despite this issue showing a great potential to be extended to this type of work (Rodríguez Fernández, M. L. 2019) (Langstaff 2016). Even though the respect of these kinds of limitations would be difficult from a theoretical perspective, since a self-employed person controls the development of his own work, they would be very useful in a situation of dependency, such as in the case of platforms, as they can be opposed to their requirements. As a consequence, it would be possible to extend the application of some of the most important rules included in this Directive such as:

- The concept of working time, defined as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with the national laws and/or practice (Article 2(1)), but with the adaptations or warnings referred below;
- A minimum daily rest period of 11 consecutive hours per 24-hour period (Article 3)
- A minimum of uninterrupted rest period of 24 hours per each seven-day period on top of the 11 hours' daily rest per 24-hour period (Article 5)
- A rest break in cases of working days that are longer than six hours, the duration and terms on which it is granted being established by collective agreements or in national legislation (Article 4)
- A maximum of weekly working time as established by national collective agreements, administrative provision or legislation, where the average working time for each seven-day period, including overtime, may not exceed 48 hours (Article 6)
- The right to paid annual leave of at least four weeks in accordance with national legislation and the prohibition to replace the paid annual leave by another allowance unless when the employment relationship is terminated (Article 7)
- Limitation of normal hours of night work to an average of eight hours in any 24-hour period (Article 8).

On the other hand, concerning employees, despite the sole application of the Directive would be beneficial, there are some areas which would need to be adapted (European Commission 2020):

- Derogations: Member States can derogate (Article 17(1)) from some of the provisions of the Working Time Directive, because of the specific characteristics

of the activity concerned, when the duration of working time is not measured and/or predetermined, or when the working time can be determined by the workers themselves. This is the case for most platform work practices. However, as affirmed by the European Commission in its Interpretative Communication[9], «there is no case-law yet on how the "autonomous worker" derogation could apply to workers in new forms of employment such as the digital platform economy […]». In order to avoid any kind of uncertainty, a platform work directive should indicate that no derogation is permitted.

- Working time, rest and waiting periods: Although the position of the CJEU's case law is relatively flexible, setting that, even staying at home, the stand-by time of a worker at home who is obliged to respond to calls must be considered as working time if the required availability reduced the opportunities for the workers to perform other activities (C-518/15, Ville de Nivelles v. Rudy Matzak); it is not enough to cover all situations related to platform work. Consequently, the directive should clarify it by regulating, for example, working time is the time of connection. Additionally, platform workers who are on standby at home cannot be in such a situation for more than 48 hours a week, or more than 13 hours in a 24-hour period, when the provisions of the Working Time Directive have to be respected (provided that the nuances brought by the recent judgment of the CJEU are represented).
- Registration: Even though the CJEU's judgement CCOO v. Deutsche Bank (C-55/18) would justify a reform of the Working Time Directive in order to introduce the obligation of registering working time, taking into consideration the importance that this matter has in platform work, it would be indispensable to regulate it in a directive on this sector. Additionally, there are also some peculiarities that should be considered. Particularly, the digital app used to connect (and stay connected) with the platform would be potentially an adequate instrument to register working time, this point should be included, besides the use and access to this data.

c) Health and safety

These risks would make the enforcement of OSH regulations for work carried out through online platform companies of the highest importance. The application of OSH rules and labour law in general is contested by the platform companies, as the involvement of online platforms in work organisation tends to complicate the classification and regulation of responsibilities for the work in question. Rules and practices of the host country where the platform work is performed should apply. National labour inspectorates shall develop tools and strategies to effectively enforce existing OHS rules and labour law at the place of work. In connection to this the cross-border cooperation between the labour inspectorates will be of utmost importance.

Workers in platform companies are also vulnerable in terms of civil liability and insurance. For example, in the specific case of platform companies in the transport and delivery sectors, platform companies should be liable in the event of accidents involving their workers. There is no legal ground to make any difference between these platform companies and other companies in their respective sectors.

[…]

[9] Interpretative Communication on Directive 2003/88 of the European Parliament and of the Council of 24 May 2017, concerning certain aspects of the organisation of working time.

It is the obligation of online platform companies to ensure the safety and health of workers in every aspect related to work and they should not impose financial costs to the workers to achieve this aim. Otherwise this would be in contradiction with the provisions of the European Directive 89/391 (OSH Framework Directive) which applies to all companies, also online platform companies.

In clarifying the liability of online platform companies, it should be recognised that platform companies exercising significant control and influence over users in their capacity as individual providers of labour should in fact be held liable not only as sellers of services, but also as employers in relation to platform workers performing the physical services. This is in particular the case when the information society service provided by the platform is inherently linked to the provision of a physical service, as held by the CJEU in C-434/15 Uber. The duty to initiate negotiations in order to conclude a collective agreement should be included among the obligations of employers.

Occupational health and safety (OHS), is the most overarching topic in labour[10]. It is inherent to human dignity. For this reason, all the international organisations recognise it as a based or fundamental right[11]. The ILO has adopted numerous conventions to be in accordance with its Constitution and the Philadelphia Declaration[12]; specific reference is done in the Universal Declaration of Human Rights[13], in the Convention on Economic, Social and Cultural Rights[14]; and of course, in a lot of European provisions (Ales 2013). We will get back to this later.

Since more than a century, **employers have been responsible for OHS of their workers in view of their direction and control power**. They are presumed to be able to prevent accidents or occupational diseases. A platform could pretend that it is not responsible for a traffic accident, or any other accident, in which it cannot control the way of driving or the work of the self-employed. But it is easy to note that, nowadays, a lot of employees have a great autonomy concerning the way they carry out their work. In this case, nevertheless, the employers remain responsible in case of an accident, because of their obligation under the Employment Law. This responsibility could lie with any person directing and controlling work, as platforms do.

An economic reason also pleads for the employer's responsibility (here, the platform organising the work). **In an organisation where one person takes advantage of the work of another, the first must be responsible for the health and security of the**

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[10] Here OHS are examined in the narrow sense of this expression. Work time is a great matter for worker's health, but it has been taken above.

[11] See Health and safety at work, a basic human right https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_151827.pdf All the international standards are cited in this document.

[12] 1944 *The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: (g) adequate protection for the life and health of workers in all occupations.*

[13] Article 22 and 25.

[14] Art. 9, 11, 12 : Right of every one to an adequate standard of living for themselves and their families, including adequate food, clothing, and housing and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

second[15]. This is applicable to all persons, regardless of their status, if they are dependent on the one who provides the work and who takes all the benefits. This happens when the employer (or the platform) sets the salary, among other things, because in this case the worker never profits from the benefits; he is in the position of an employee. Within the ETUC's Resolution this concerns all the non-standard workers and workers in platform companies, (including the self-employed).

In addition, **there is a problem of unfair competition**. The platform model providing services is built on a fraudulent system. Compelling the workers to have a self-employed status to access the application of **the platform, transferring the social charges and economic risk on the workers**[16]**. This system is unfair to competitors** (European Commission 2020). It puts into question the national social systems. The Commission cannot promote this new form of social dumping.

This essential right must be understood from a broad scope, it cannot be restricted and reserved to a category of workers (Aloisi y De Stefano 2018). **This first step requires the extension of the OHS rights to all precarious workers, especially for non-standard workers and workers in platform companies**, (including the self-employed as is the case of the majority of platform workers). This broad meaning is, moreover, necessary to combat the avoidance of OSH legislation by platforms. This solution could cover self-employed people working within an organisation with other workers. Some European legal regulations include both dependent and self-employed workers in the application of OHS rules (Dir. 92/57/EEC).

It must be stressed that **OHS concerns physical and psychological matters**. In fact, platform workers are highly exposed to physical accidents, but also to illnesses related to screens or working positions. They are also subject to permanent stress linked to their precarious situation (European Commission 2020). The **purpose here is** neither to detail the physical or psychological risks, nor the solutions to prevent or cure them, but **to explore the legal bases for the platforms' responsibility for health and safety towards workers.**

First, we will take a look at some general fundamental standards that could be useful for our topic. At a second stage, we will examine the actual OHS Directives in order to analyse their possible application to platform workers.

i. OSH as a fundamental right in international standards

In the international legal order, there are numerous standards concerning OHS, especially in the scope of the ILO. We will not list here all those conventions or recommendations, but it is important to recall that all the Member States are members of the ILO and have ratified a lot of conventions. Often, the scope of these conventions is wide enough to be applied to formal and informal work (De Stefano 2016). However,

[15] About the need of making responsible the platform companies, cf. the critical analysis of J.Y. Frouin Report delivered by (Daugareilh, I. y Pasquier, T. 2014, 14).

[16] The obligation to register as an auto-entrepreneur in order to have access to the Uber platform was a decisive element in the requalification of the contract as an employment contract, pronounced by the judges of the French Court of Cassation on 4 March 2020 (n°19-13.316) .

here we will focus on the primary European Law. Additionally, we will take a look at the European Pillar of Social Rights, that drives current social legislative policy, even though it is not a binding standard.

Concretely, the second Chapter of **the European Pillar of Social Rights** is dedicated to «fair working conditions». The fifth principle concerns «**secure and adaptable employment**». All workers are involved in this matter, «**regardless of the type and duration of the employment relationship**». The point *c* states that «entrepreneurship and self-employment shall be encouraged». At this stage, the action plan of the Commission sets the «initiative to improve the working conditions in platform work». So, **the need for protection of the workers is independent of their status** and the responsibility of the platform is based on the benefit derived from the work of the workers.

Regarding the primary European Law, **since the beginning, the Commission has undertaken the task of promoting close cooperation between Member States in the social field, particularly relating to the prevention of occupational accidents and diseases** (Art. 118, Treaty of Rome). Afterwards, the reforms of the Treaty have reinforced its competence and the legal tools in this field.

Article 3 of the TEU declares that the **EU «shall combat social exclusion and discrimination, and shall promote social justice and protection**» and by Article 6 recognises that the rights, freedoms and principles set out in the **Charter of Fundamental Rights of the European Union** shall have the same legal value as the Treaties. Therefore, **Article 31** of the Charter is relevant for our purposes as it recognises that «**every worker has the right to working conditions which respect his or her health, safety and dignity**»[17]. Here, the notion of worker can be understood in the wide definition of the CJEU[18]. **It includes bogus self-employed, and, in some particular situations, it could involve the self-employed**, when the work is organised by the platform (employer). Article 31 as a legal base is essential in the way of its direct application in a trial.

Of course, **Article 153 of the TFEU is the cornerstone of our topic** (Risak, M. 2017). It states that the Union shall support and complement the activities of the Member States in certain fields and, fundamentally, «**the working environment to protect workers' health and safety**». This article is the legal base for the adoption of directives in the social field. It must be highlighted that European interventions under Article 153 target partial harmonisations of national legislation. They set the minimum requirements. It would be an excellent basis to grant platform workers a minimum of social protection (Ales et al. 2018). Nevertheless, it must be remembered that these legal bases come in addition to the standards analysed above (See. 2.b)).

[17] This sentence recalls point 19 of the Community Social Charter (1989), which states «every worker must enjoy satisfactory health and safety conditions in his working environment». This text has not the same legal effect as the CFRUE.

[18] CJEC Lawrie Blum, C-66/85.

As several Directives have been adopted under Article 153 and some of them concern OHS, it is useful to compare them to the situation of platform workers.

ii. The effectiveness of this essential right

Regarding secondary European law, the matter of the application to non-standard workers and workers in platform companies, (including the self-employed) is complex. It refers to the notion of worker (Kountouris 2018). Although the CJEU ruled that «the concept of worker (within the meaning of the Social Security Regulation) is not a matter of national law but of Community law»[19], after that it has developed its own definition which is primarily depending on the European directives. Very few are directly relevant to self-employed workers. Some of them are applicable to workers, without reference to national law (Directive 98/58/EC, collective redundancies), and allow the CJEU to interpret it broadly[20]. However, most of them refer to the definition in national law. This would limit an autonomous interpretation by the CJEU. Nonetheless, as it's well known, the Court no longer hesitates to extend its comprehensive definition to situations that should be regulated by national law[21]. Directive (UE) 2019/1152 endorses this development by referring «to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State **with consideration to the case-law of the Court of Justice**» (Laulom, S. 2019). However, this extension has its limits and there is a fear that few directives can be immediately interpreted as applicable to non-standard workers and workers in platform companies, (including the self-employed).

With reference to the harmonisation of occupational health and safety, the greatest reference is the framework **Directive 89/391/EEC** on the introduction of measures to encourage improvements in the safety and health of workers at work, which is **«still the major instrument within EU OHS Law and has deeply influenced OHS legislations of Member States»** (Ales et al. 2018). As a framework, it provides a comprehensive regulation, leaving to the Member States the task to identify the nature of employer's liability and to define sanctions to be applied in case of violation. This Directive could be an excellent legal base to require prevention and protection from the platform and to engage their responsibility towards their providers of services. **But is it applicable to all kinds of workers providing services for a platform?**

Article 3 of the directive gives the definitions of worker and employer. **Worker is «any person employed by an employer,** including trainees and apprentices but excluding domestic servants" and the **employer is "any natural or legal person who has an employment relationship** with the worker and has the responsibility for the undertaking and/or establishment». Therefore, **if the providers are workers** (in the meaning of employees), or presumed to be so, the platform is the employer and the national regulation adopted on the base of **Directive 89/391/EEC is applicable.** But, **if they are considered as genuine self-employed, the platform cannot be considered the**

[19] CJEC Unger, C-75/63.

[20] CJEC Balkaya, C-229/14.

[21] CJEU, Danosa, C-232/09.

employer and the legislation will not be applicable[22]. A solution could be to extend the scope of this directive to non-standard workers and workers in platform companies, (including the self-employed), by translating and adapting its contents to a specific directive on platform work which includes all of them regardless their status[23].

One of the implementing directives, taken on the basis of the 1989 framework directive, is the **Directive 391/383/EEC** concerning the **health and safety of workers on fixed-term contracts or in temporary work**. It enhances the protection of these non-standard workers in terms of information, training, protection and access to medical services. The recommendations contained in this directive **could inspire the implementation of health protection measures for platform workers** in a dedicated directive for all platform workers regardless of their status.

Another directive could be inspiring too: **Directive 92/57/EEC** on the implementation of minimum safety and health requirements at temporary or mobile constructions sites. It was taken on the basis of the meaning of Article 16 (1) of Directive 89/391/EEC. This Directive **concerns both workers, employers and self-employed** workers working on the same site. The self-employed are defined here by default, as opposed to the definition of workers contained in Directive 89/391/EEC : «**self-employed person means any person other than those referred to in Article 3 (a) and (b) of Directive 89/391/EEC, whose professional activity contributes to the completion of a project»** (Article 2 (d)). A priori, the comparison cannot go very far. The Directive mainly concerns the coordination of work to ensure the protection of all workers and compliance with safety instructions by all those involved. However, **it can also be considered that the person organising the work is responsible for the health and safety of those working under his direction, whatever their status**. This remark is transposable to the platforms organising the work of service providers, regardless of their status.

At the least, it can be observed that **the directives relating to non-standard workers[24] are not very interesting for our subject.** Indeed, they insist above all on the principle of equality between workers. From the point of view of the OHS, part-time, fixed-term and temporary workers must be covered by the same rules of prevention, information and protection as the permanent employees of the undertaking. But, in order to make a comparison it needs comparable elements. **In the case of platform workers, as already seen, most of the time, there is a lack of comparable situations.**

To conclude on the matter of OHS, it is necessary to recall the central place of health and safety issues in labour relations. **Platforms cannot be exempted from their responsibility to those who make them flourish, whatever the status of those workers**. **A directive dedicated to non-standard workers and workers in platform companies, (including the self-employed) could take into account the need to protect the health**

[22] This binary view is confirmed by the Directive 92/57/EEC, like we will see below.

[23] On this expression, see above, and the Employment Relationship Recommendation, 2006 (n°198).

[24] Directive 97/81/EC concerning the Framework agreement on part-time work; Directive 1999/70/EC concerning the Framework agreement on fixed-term work; Directive 2008/104/EC on temporary agency work.

and safety of these people, at the responsibility of the organisation (the platform) that provides the work, controls it and benefits from it.

d) Other working conditions

Another area which is particularly important for platform work is the **management of algorithms**. Concerning this issue, ETUC's resolution calls for:

> *The democratic control and transparency of the operation of the algorithm of intermediate work applications (including rating of workers) and platforms, the right to disconnect, and the protection of the data of workers must be at the heart of the public debate on digitalisation as well as being discussed through information, consultation and participation of workers[12] in full compliance with principles of non-discrimination. The European Commission and the Member States should promote the creation of a public register that displays a complete list of online platforms companies. The general employers' obligations of a company should be a requisite for their operation in an EU member state.*

We find this strategy as the most appropriate one from a technical point of view because it does not require the creation of new legal tools, but the adaptation of the classical ones. Concerning information, **both the collective and individual perspectives - including self-employed people depending on the personal scope of the proposal-, is without a doubt (despite the collective dimension) the one which needs more attention, as individual consultation has at least some legal instruments already in force** (Directive 2019/1152 and GDPR), **and workers' representation can have a clear impact on platforms' resistances to provide information about algorithms.**

Particularly, Article 4 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community sets out a list of topics for which information and consultation should be provided. This list should be completed, among other issues, by the inclusion of algorithm management according to the specifications covered below. This can be done by reforming the directive or setting an especial rule in a potential Platform Work Directive. Nevertheless, as this issue is referred to other sectors, the first option seems the most appropriate one. Additionally, it must be considered that Articles 1 and 2 do not cover the self-employed. Its inclusion would be only applicable to platform work.

From a formal point of view, the right to information should distinguish between the access to the information and the way in which the information should be provided. Concerning the first one, the proposal of Directive of the GUE/NGL group provides a rather complete set of items referred to the functioning of the algorithm:

a) the parameters «which, either individually or collectively - this incise is very relevant -, are the most important for determining» the following working conditions:

   i. allocation of teams,
   ii. the distribution of job offers and places of work,
   iii. the assessment of work carried out,

iv. the arrangements for waiting time and
v. for determining remuneration,

b) the importance of these main parameters. This can be interpreted as the way in which the parameters are assessed and their impact on the above-mentioned working conditions.

Nevertheless, **another alternative is a more general approach, updating the list of areas covered (Article 4(2)) by adding a wording such as «information and consultation on the general functioning of algorithms and their effects on working conditions»**.

On the other hand, it is also important to regulate the way in which the information should be provided. Again, the GUE/NGL proposal provides some interesting ideas about: «easily and publicly accessible and set out in clear and comprehensible language». Moreover, «platforms shall keep this description up to date». However, there are other alternative or complementary options, such as the ones given by Article 5 (3) Directive 2019/1152 («a clear, transparent, comprehensive and easily accessible way») and Article 12 GDPR («concise, transparent, intelligible and easily accessible form»).

Within this issue, one must consider that the obligation imposed on the platform does not mean a risk for its business model due to a number of reasons. Firstly, because it is not necessary to provide the whole information, but how the algorithm works concerning working conditions. This can be provided, for instance, by a decision tree or pseudocode. Secondly, because labour law has traditionally included some tools concerning the information that is given to representatives, such as the good faith in the use of the information provided. Finally, when the information is confidential (what it is not necessarily the case), some extra guarantees are added (Article 6 Directive 2002/14/EC)[25].

4. Social Protection

Platform companies transfer the costs of the social protection that they are not granting to their workers to society as a whole.

[…]

As regards to the scope of social protection for non-standard workers and workers in platform companies (including the self-employed), a comprehensive approach should be taken in which non-standard workers enjoy the same protection as ordinary workers. An "à la carte solution" would ultimately lead to discriminatory practices against specific groups in society. Non-standard workers should have access to the following social

[25] By the way, it must be reminded that the acquisition of a trade secret shall be considered lawful when is obtained by the exercise of the right of workers or workers' representatives to information and consultation in accordance with Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

protection benefits: unemployment; sickness; accidents at work and occupational diseases; pensions and assistance related to old-age; maternity and paternity; bankruptcy and company closure protection; vocational guidance, counselling and placement; training and updating of knowledge; and measures for rehabilitation and reintegration into the labour market[8]. In March 2018, the European Commission published a proposal for a Council Recommendation on access to social protection for employed and self-employed workers. The recommendation aims to support all persons who, because of their status or the duration of their employment, are not sufficiently covered by social security schemes. ETUC welcomed the Council Recommendation. However, ETUC regrets that it is not very ambitious as regards the principles of upward convergence set out in the European Pillar of Social Rights. This is why ETUC, in coordination with its member organisations, is monitoring the implementation of the European Pillar of Social Rights closely. ETUC is developing a project to follow up from a trade union perspective the implementation at national level of this Council Recommendation[9].*

ETUC has tirelessly underlined both the need and the lack of adequate social protection for non-standard workers, pointing out the variety of social security systems in the different Member States. In many cases, the self-employed as independent workers have no access to adequate social protection and/or solely carry the financial burden of the contributions without any share of digital labour platforms. ETUC warns about the risks that companies using ordinary employment relationships are subsidising the digital labour platforms companies; in the long term, this could put enormous pressure on the sustainability of the redistributive institutions that characterise the welfare state. ETUC calls for a comprehensive approach in which non-standard workers, including platform-workers and self-employed, enjoy the same social protection as ordinary workers so as to prevent discriminatory practices.[26]

From a legal point of view, social protection has different dimensions that come along with different competences at EU or national level. Before studying the access to social protection with a focus on social security systems and the need to adapt the EU regulations concerning the coordination of social security, it is appropriate to take some general considerations on equal treatment and non-discrimination as a starting point. An important part of social protection against current social risks, especially the loss of income due, is granted via social insurance in social security systems in many Member States. This applies, for example, in particular to illness and incapacity for work, unemployment, accidents at work and occupational diseases and pensions in old age. This poses particular challenges in the area of access to social security systems (see below, section a) and the coordination of these systems (see below, section b).

Other aspects of social protection are already regulated by European Directives that are directly applicable to platform workers. As regards the wide scope of Council Directive

[26] See also ETUC Position on a Second stage consultation of the social partners on possible action addressing the challenges of access to social protection for people in all forms of employment (in the framework of the European Social Pillar Rights). December 2017.

92/85/EEC on maternity leave[27], it will apply to platform workers in most cases[28]. This is also true for the different directives on equal treatment[29]. However, to prevent discrimination, it is recommended that a Directive indicates that Member States should take appropriate measures to ensure not only the effective application of the respective Directives, but also that platform workers are informed about their rights. For other Directives with a narrower scope, such as Directive 2008/94 EC, the application should be extended to all platform workers. This seems necessary to meet the protection needs of platform workers, which in this respect are no different from those of workers with a traditional employment contract and, therefore, would not justify a difference in treatment.

a) Access to social protection for platform-workers.

The need for social protection for all non-standard workers is obvious. Undertaking legislative measures may be quite easy for the national legislators of the Member States. The EU may use a variety of legal options to promote social protection for platform workers. Considering the provision in Article 153(4) TFEU the EU should reinforce initiatives in the framework of the Open Method of Coordination and options of "soft law" when it comes to the access to social security systems and other means of social protection. The Council Recommendation on access to social protection for workers and the self-employed, adopted on the legal bases of Articles 153 and 292 TFEU, is a first step in this direction. Further actions may be taken by the European Parliament and the Council on the legal basis of Article 153 TFEU. Also, the European Commission can act on the legal basis of Article 156 TFEU in order to promote cooperation and to facilitate the exchange of ideas and strategies, i.e. in the field of social security. So, they are able to initiate procedures for information and discussions about good practices on how to open national social security systems for platform workers (e.g. redefining the personal scope in order to broaden the access to social insurance schemes either voluntary or mandatory; how to technically assure the financial contributions of the platforms). They should take measures to promote cooperation and the exchange of good practices concerning social protection for platform workers. The EU should promote the principle of non-discrimination concerning the access to social protection. Finally, action should be taken to promote the inclusion of platform workers in collectively bargained social security or social protection along with the national tradition, for example in the field of pensions schemes.

[27] Council Directive 92/85/EEC of 19 October 1992 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).

[28] This can hardly be contested in view of the Court's ruling in CJEU, 11 November 2010, C-232/09 (Danosa), ECLI:EU:C:2010:674.

[29] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; and COUNCIL DIRECTIVE 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (in the limits drawn in the 15th recital in the preamble to that directive); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (see in particular its article 6 to 8 defining the personal and material scope).

b) Coordination of social security systems

Furthermore, the cross-border aspects of work via platforms need to be considered with regard to social security (European Parliament 2021) (European Commission 2021), independently of the legal status of the platform workers (employees or self-employed). The coordination of social security systems of the Member States, in order to guarantee the freedom of movement such as provided in Article 48 TFEU, is governed by Regulation 883/2004 and Regulation 987/2009.

On-location platform determined work that is (physically) performed off-line is less likely to produce cross-border situations. **However, if it were the case, the workers (employees or self-employed) may be qualified as frontier workers** under Article 1(f) of the regulation 883/2004 (living in one Member State – which is the Member State of residence – and working in another Member State which is the member State where the activity is pursued). **In this case, they fall under the scope of Regulation 883/2004**. According to its Article 11(3)(a), the legislation of the Member State where the activity is pursued, will apply.

For online platform work, the place, where the activity is pursued, may be far more difficult to determine. In fact, the platform workers' mobility and the flexibility of the work concerning the place where it is performed is one of the characteristics of this type of platform work. In social security law there would be different connecting factors to define the competent Member State in the light of the Regulation 883/2004. Possible locations would be the place where the work is performed, the place of residence of the worker, the place of stay of the worker or the place of business of the platform.

The place where the activity is pursued or the place of stay of the platform worker do not seem appropriate to designate the competent Member State because they may vary and change constantly during the contractual relationship. Usually, the law applicable on the contract (either a labour contract or a contract of services in case of self-employed persons) is not decisive for social security law. One can ask whether it should be considered in the special case of platform work, because it is more stable than the place where the work is performed. However, it does not seem appropriate, as it depends on the choice of the parties according to the Regulation Rome I. It seems inappropriate to meet the need for social protection of platform workers. This is all the truer as the choice is practically made by the platforms setting the terms of contract.

The place of business of the platform is not an appropriate connecting point either. Of course, the application of social security law of the place of business of the platform would be the less complicated option from the platform's point of view, because they would deal only with one national social security system. This would not grant the platform workers the social protection they need. They need access to social protection where they live and (usually) work. Furthermore, this option will cause additional problems in case international platforms do not have an establishment in the EU territory.

That is why the Member State of residence of the platform worker should be the designated location. This is the best option to guarantee appropriate access to social

protection and open the rights foreseen by the social security system of the Member States they are living in. **To prevent legal insecurity on these questions, corresponding provisions should be included either in Regulation 883/2004 or in Regulation 987/2009**.

5. Conclusions

T**his report shows that it is both necessary and possible to set a European legal framework for platform work in order to guarantee fair working conditions for platform workers, fair competition for the platforms, and to prevent social dumping of working conditions that could affect more sectors in the European Single Market.** As it was shown above, **this important task can be mainly addressed by using a Directive focused on platform work**. Nevertheless, depending on the ambition in developing this regulation, **additional reforms of other European tools** (such as Directive 2002/14/EC, Directive 2003/88/EC or Regulations 883/2004 and 987/2009, among others) **will be needed**.

Finally, it must be kept in mind that, despite these new legal tools are, without a doubt, necessary, there are already others that can be useful in solving daily problems of platform workers, particularly when they are reclassified as employees, and, even, without any adaptation. This is the case of the GDPR and, with less intensity, the directives on working conditions. If the proposal for a Directive on platform work failed, the main efforts should be put in adaptation of the regulation already in force. Furthermore, in the case of social protection, the development of the content of the Council Recommendation on access to social protection for workers and the self-employed should also be a priority.

6. References

Ales, A. 2013. *Health and Safety at Work. European and Comparative Perspective*. Alphen aan den Rijn, The Netherlands.

Aloisi, A. 2021. *Platform Work in the EU: Lessons learned, legal developments and challenges ahead*. Brussels: European Commission, Directorate-General for Employment, Social Affairs and Inclusion.

Boitos A., Kellerbauer M. 2020. "Le droit des prestataires de services économiquement dépendants de conclure des conventions collectives de travail au regard du droit de l'Union Européenne » in *Le droit de négociation collective des travailleurs indépendants – cadrages théoriques et études de cas*, dir. D. Dumont, A. Lamine, J.-B. Maisin, Larcier, p. 87

Contouris N., De Stefano V. 2021. "The labour Law Framework : Self-Employed and Their Right to Bargain Collectively", in "Collective Bargaining for Self-Employed Workers in Europe", *Bulletin of Comparative Labour Relations*, 2021, n° 109.

Daskalova V. 2021. "The Competition Law Framework and Collective Bargaining Agreements for Self-Employed: Analysing Restrictions and Mapping Exemption Opportunities" in "Collective Bargaining for Self-Employed Workers in Europe", *Bulletin of Comparative Labour Relations*, n° 109.

Daugareilh, I. and Pasquier, T. 2014. "La situation des travailleurs des plateformes : l'obligation de recourir à un tiers employeur doit-elle être encouragée ?» *Revue de Droit du Travail* 2014: 14-24.

European Commission. 2020. *Study to Gather Evidence on the Working Conditions of Platform Workers: Final Report.* Luxembourg: European Commission, Directorate-General for Employment, Social Affairs and Inclusion. https://op.europa.eu/publication/manifestation_identifier/PUB_KE0120054ENN.

European Commission. 2021. *Consultation Document. First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work*. Brussels: European Commission.

European Parliament. 2020. *The platform economy and precarious work*. Publication for the committee on Employment and Social Affairs. Luxembourg: European Parliament.

Eurofound. 2018. *Employment and working conditions of selected types of platform work*. Research report / Eurofound. Luxembourg: Publications Office of the European Union.

European Parliament. 2021. *Draft Report on fair working conditions, rights and social protection for platform workers - new forms of employment linked to digital development (2019/2186(INI))*. European Parliament, Committee on Employment and Social Affairs.

ETUC. 2017. *Position on a Second stage consultation of the social partners on possible action addressing the challenges of access to social protection for people in all forms of employment (in the framework of the European Social Pillar Rights)*. https://www.etuc.org/en/document/etuc-position-second-stage-consultation-social-partners-possible-action-addressing.

Fulton, L. 2018. *Trade unions protecting self-employed workers*. Brussels: ETUC.

Lianos, I., Countouris, N. & De Stefano, V. 2019. "Re-Thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market". *European Labour Law Journal* 10 (3): 291-333. https://doi.org/10.1177/2031952519872322.

Maisin J.-B. 202. "Sonate en trois mouvements sur le droit de négociation collective des travailleurs indépendants et l'interdiction des accords sur les prix », in *Le droit de négociation collective des travailleurs indépendants – cadrages théoriques et études de cas*, dir. D. Dumont, A. Lamine, J.-B. Maisin, Larcier, p. 291.

Ratti, L. 2008. "Agency Work and the Idea of Dual Employership: A Comparative Perspective". *Comparative Labor Law & Policy Journal* 30: 835.

Risak, M., Rauws, W., Sredkova, K. & Portmann, W. 2013. *Regulating the Employment Relationship in Europe: A Guide to Recommendation No. 198*. http://www.ilo.org/global/publications/books/WCMS_209280/lang--en/index.htm.

Rodríguez Fernández, M. L., ed. 2019. *Plataformas digitales y mercado de trabajo*. Informes y estudios. Empleo 56. Madrid: Ministerio del Trabajo, Migraciones y Seguridad Social, Subdirección General de Información Administrativa y Publicaciones.

Servais, Jean-Michel. 2018. "Travailleurs des plateformes numériques de services : quelles garanties sociales ?", *Revue Interventions économiques. Papers in Political Economy*, n.º 60 (décembre). https://doi.org/10.4000/interventionseconomiques.4785.