

Position Paper

European Parliament - EMPL Committee report regarding the proposal for a Directive on improving working conditions in platform work

16 January 2023

On 12 December 2022 the European Parliament's Committee Employment and Social Affairs adopted its report on the proposal for a Directive on improving working conditions in platform work ahead of voting in plenary and triilogue negotiations in 2023.

Overall, Bitkom believes that the Platform Work Directive will become a success when it leads to an effective level playing field amongst digital labour platforms that operate within the internal market. The Directive must be clear, precise, and easily enforceable, especially regarding the determination of the employment status of workers. It is important for companies in the sector that the Directive establishes the necessary legal certainty. Legal certainty is a key precondition for companies when considering expansion and investments.

By this we mean that those working as genuine self-employed can continue to work that way under this new Directive. Unfortunately, the changes introduced to Articles 3-5 fail to provide the necessary legal certainty for self-employed persons performing platform work and platforms in the EU. A rebuttable presumption of employment should be linked to the fulfilment of clear criteria and in any case should not be triggered quasi-automatically.

More in detail Bitkom would like to draw attention to the followings:

Disclosure of algorithms should under no circumstances be required (Recital 33)

The EMPL-Committee turned Recital 33 into its opposite, which now reads:

Digital labour platforms should be required to disclose the detailed functioning of their automated monitoring and decision-making systems, including algorithms, which may affect the rights covered by this Directive.

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Bitkom fully supports the objective of ensuring transparency on the use of automated monitoring and decision-making systems. The disclosure of the detailed functioning of such systems and the algorithms themselves is, however neither appropriate, nor proportionate to achieve this objective. Firstly, according to Article 6 paragraph 3 of the draft Directive information provided to platform workers, their representatives and national labour authorities must be intelligible and use clear and plain language. An algorithmic code evidently does not fulfill these requirements. Secondly, the protection of commercial secrets and intellectual property rights must be ensured under the Directive since the transparency objective can be attained by less burdensome measures.

Focused definitions (Article 2)

Harmonised and clear definitions in the context of platform work could improve legal certainty throughout EU Member States. Bitkom welcomes that the EMPL-Committee report no longer foresees a boundless definition for “*digital labour platform*” that would have included even the simple use of digital tools in the modern world of work. The EMPL Committee, yet unnecessarily broadened the original definitions of the Commission.

Article 2 – paragraph 1 – point 1 – point b now reads:

*it is provided at the request of a recipient of the service **or it involves the allocation of work through an open call;***

Article 2 – paragraph 1 – point 2 now reads:

*‘platform work’ means any work organised through a digital labour platform and performed in the Union by an individual **on the basis of a contractual relationship between the digital labour platform and the individual,** irrespective of whether a contractual relationship exists between the individual and the recipient of the service;*

The definition of a “*digital labour platform*” needs to be narrowed down to focus on the organisation of service work in the platform economy and should not include online tender procedures. Furthermore, the definition of “*platform work*” should entail the requirement of a contractual relationship between the digital labour platform and the person performing platform work. The contractual relationship should reflect the status of the person performing platform work as worker or self-employed.

Clear criteria for the rebuttable presumption (Articles 4 and 5)

Bitkom believes that changes introduced by the EMPL Committee fail to deliver legal certainty for self-employed persons performing platform work as well as platforms. According to the current text the hurdle to trigger the presumption of employment is very low, the hurdle to rebut it is very high.

In Bitkom's view the presumption of employment should only be triggered if clear criteria for an employment relationship are fulfilled.

While the new article 4 states, that the application of the legal presumption shall not lead to an automatic reclassification of all persons performing platform work as platform workers, the hurdle for triggering the presumption is still set very low. The mere existence of a contractual relationship between a digital labour platform and a person performing platform work could lead to the application of the presumption of employment.

Article 4 – paragraph 1 – introductory part reads:

*A person performing platform work shall be either a platform worker or a genuinely self-employed person. **The contractual relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship and therefore digital labour platforms shall be presumed to be employers.** [...]*

For the sake of legal certainty and to ensure that genuinely self-employed are not affected by the presumption, the sentence above should be deleted, and a set of clear criteria should be enshrined in article 4 focussing unambiguously on potential bogus self-employment being backed by European case law.¹ At the same time the extremely narrow criteria to determine self-employed status regarding the rebuttal process in article 5 of the EMPL Committee Report should be deleted.

The Directive should keep focusing on its original aim to combat false self-employment in platform work and to facilitate the correct determination of the employment status. The Directive must ensure that self-employed persons performing platform work, the vast majority of whom wish to remain self-employed, are not affected by the presumption without them opting-in to a challenge of their status. The freedom of entrepreneurship should be respected.

The current wording would result in massive disadvantages for solo self-employed persons. Having less flexibility regarding the choice of clients and projects, would make it harder for them to reconcile private and professional life. Moreover, their earning opportunities would be noticeably reduced. Self-employed platform work that provides an income above the minimum wage can lead to higher additional earnings than would be the case in an employment relationship.

¹ For more details on the criteria please consult the Bitkom Position paper on the European Parliament - EMPL Committee draft report concerning the proposal for a directive on improving working conditions in platform work
[03.06.22 Bitkom-Position paper EP-EMPL-Draft Report.pdf](#)

Suspensive effect on the application of the legal presumption (Articles 4 and 5)

The adopted text does not foresee a suspensive effect in case the presumption of employment is challenged in a rebuttal process.

Article 4 – paragraph 1 – subparagraph 1 states:

*The application of the legal presumption shall not lead to an automatic reclassification of all persons performing platform work as platform workers. Digital labour platforms shall have the possibility to rebut the presumption of employment before a decision for reclassification is taken in administrative or legal proceedings. The rebuttable presumption of employment shall apply in all relevant administrative procedures and administrative and legal proceedings. Competent authorities and bodies, including those responsible for registering administrative procedures, verifying compliance with or enforcing relevant legislation, including collective agreements, **shall effectively apply that presumption.***

Furthermore, once an administrative or judicial decision on the status is taken the legal challenge of such decision shall not have suspensive effect:

Article 5 – paragraph 1 c (new):

Where a digital labour platform challenges an administrative or judicial decision determining the employment status of a person performing platform work, such a proceeding shall not have a suspensive effect on that decision.

In Bitkom's view the presumption should clearly be suspended during the process of rebutting it. Otherwise in case of a successful rebuttal, reversals of contractual relationships between platforms and persons performing platform work would lead to significant administrative and financial burden for companies, member states and persons performing platform work themselves. In addition, the (provisional) change of status of persons performing platform work would also deprive them to work under flexible terms during the rebuttal process.

Bitkom represents more than 2,000 companies of the digital economy. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.