Position Paper

Hearing of the Federal Ministry of Labour and Social Affairs concerning the proposal for a Directive on improving working conditions in platform work

16 March 2022

1 General Comments

With view to the hearing of the Federal Ministry of Labour and Social Affairs on 23 March 2022 Bitkom would like to comment on the European Commission proposal for a Directive on improving working conditions in platform work as follows:

Bitkom generally endorses a coherent European approach, which helps to avoid fragmentation of the single market by diverging national legislation, administrative or judicial decisions. It also supports initiatives ensuring legal certainty and the establishment of a level playing field for platform mediated services.

However, Bitkom is very concerned about a core element of the proposed Directive, notably the introduction of a rebuttable presumption of employment, which would apply to a large number of self-employed persons performing platform work in Europe. Our association fears that this provision would have unintended negative consequences for persons performing platform work and platforms alike, and drastically increase legal uncertainty. Furthermore, Bitkom believes that several additional provisions of the proposed Directive require further clarification in the legislative text to ensure a harmonised approach throughout the EU.

2 Specific comments

2.1 Critical issues

Article 4 and Article 5: Bitkom strongly opposes the introduction of a rebuttable presumption of employment, which would not fix the issues related to the misclassification in employment status. This approach is not in line with the needs and wishes of persons working through platforms and could ultimately lead to considerable legal uncertainty. Parties would still need to litigate before a court, which implies lengthy procedures and substantial costs. Bureaucracy and legal costs would not only burden undertakings but also Member States.

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In Bitkom's view Article 4 must ensure that **self-employed persons performing platform work, the vast majority of whom wish to remain self-employed, cannot automatically face reclassification without them opting-in to a challenge of their status.**

The proposed criteria to trigger the presumption are very broad in the current text, do not capture the diversity of business models in the platform economy and could be interpreted very differently in Member States. Many of these criteria are inherent to the way platforms function. Regulation should strike the right balance between an appropriate level of protection of persons working through platforms and the efficient supply of platform-based services. Member States may also add further criteria to the list while transposing the Directive into national law, which would lead to diverging national approaches and legal uncertainty for platforms operating in multiple Member States as well as for cross-border platform work. So while the initial intent of the Directive was to bring the single market closer together, we might see the opposite effect. As the hurdle to trigger the presumption according to the current text is very low and is not clearly limited to bogus self-employment, Bitkom is very concerned that this could lead to a massive application of the presumption in cases where it is clearly not justified. This could lead to a wave of legal and/or administrative procedures. **Therefore, the criteria should clearly focus on potential bogus self-employment (being backed by European case law) and be limited to one distinct factor in each criterion listed in Article 4 (2). In addition, we suggest foreseeing the fulfilment of at least half of the criteria for the legal presumption of an employment relationship to apply.**

With regard to the criteria for the presumption of employment listed in Article 4 (2) we would like to add following specific comments:

Determining the level of remuneration

In Bitkom's view this criterion fails to capture the diversity of business models in the platform economy. By determining the level of remuneration platforms in many cases protect persons working through them by preventing a „race to the bottom" pricing.[1] In addition, there are already sector specific rules for certain platform services in place that protect a certain level of remuneration.[2]

[1] Platform trials have shown that persons performing platform work tend to set the lowest price when choosing between a range of prices to get the request.
[2] For example, minimum fares for taxi and PHV ride-hailing in national transport laws.

Moreover, this criterion cancels out the added value that platforms bring to the ecosystem with their ability to determine the best price to adjust supply and demand, in the interest of both service providers and consumers. A highly standardised service like ride-hailing or delivery would not justify pricing differentiation among the service providers. On top of this, it is difficult to imagine how a service that happens real time and at a large scale could work, without resulting in customers negotiating the price of the service with each person performing platform work, for every single service offering, and ultimately, driving away consumers.

Furthermore, the proposed criterion makes very little sense regarding platform models in which, based on a business-to-business (B2B) service, the only contracting party for the person performing platform work is the platform. In this model it is unclear how the platform could enter into service agreements without "effectively determining or setting upper limits for the level of remuneration" given that the platform is the contracting partner of the person performing platform work. There are no B2B contracts in any other parts of the economy where the procurer of services could not set the level at which it is ready to purchase services.

Requirement to respect specific binding rules

It is in every industry standard practice for suppliers to conclude a framework agreement with their customers at the beginning of a business relationship, with a detailed performance specification, timetable and service-level agreement as parts of the contract. These usually contain clear details of what exactly constitutes the contractual service and by when and in what quality it must be rendered. These arrangements are accepted as binding by the parties to the contract. In fact, the precise definition of such arrangements in the contract in advance should be seen as a strong indication of self-employment of the person performing platform work and not as an indication for his employment status.

In addition, certain industries, but also individual companies often set up voluntary "Codes of Conduct", e.g. measures to prevent corruption, forced labour, child labour or discrimination as well as guidelines for ensuring sustainable management or promoting diversity. Persons working through platforms are also called upon to observe these rules. It is nowadays standard practice in every

industry that companies not only impose their code of conduct on themselves, but also stipulate it as binding on all those in their supply chain.

Finally, persons performing platform work also need to comply with statutory obligations, e.g. with respect to data protection, consumer protection or provisions on health and safety protection.

Against this background the Directive should explicitly refer to exceptions in Article 4 that allow digital labour platforms to require persons working through their platform to comply with certain binding rules.

Supervising the performance of work and quality control

Supervising the performance of work can also be necessary due to statutory obligations, e.g. in the field of data protection or consumer protection. This, however, is only recognised in Recital 25 of the proposed Directive and not in Article 4 itself.

Similarly, in case industry or company codes of conduct are in place, platforms would also need to regularly check the implementation thereof.

Furthermore, not being able to verify the quality of the results of the work would impose disproportionate risks on digital labour platforms and even more importantly, have an adverse impact on end-users of the services. Businesses will rightly want to maintain and improve the quality of their service, which would be impossible to do under the proposed criterion. In other legislation, the EU has been keen to ensure that platforms take appropriate measures to ensure safety for their users and the quality of products.

Similarly to the remuneration criterion, this criterion does not consider the variety of business models in the platform economy either. While it could be argued that in a model, in which the platform intermediates a service between a person performing platform work and a customer, the platform's ability to verify the service quality could limit the former's entrepreneurial freedom, this does not apply for models where the platform buys a B2B service from a person performing platform work. There is no single other area of the economy where a company purchasing services from another company is not allowed to verify the quality of the results of the work of the company it is purchasing services from

without a fear of that supplier being considered to be an employee of the company.

As the presumption, once triggered, could not be suspended during the process of rebutting it (according to the current text in Article 5), platforms would have to temporarily comply with it and significantly adapt their systems in this process, requiring vast resources. In practice the (provisional) change of status of persons performing platform work means, that platforms may temporarily shut down their business while they are rebutting the presumption, which could take months or even years. In case of a successful rebuttal, authorities would have to reimburse the costs to platforms, incurred in relation to the presumed employment status, which would lead to a significant administrative burden on both sides. Let alone the administrative and fiscal burden on persons performing platform work, who would also be deprived to work under flexible terms during the rebuttal process. Someone who used to be self-employed might see his status changed to employee only to be re-re-classified at the end of the rebuttal process as independent contractor. **Against this background, any potential presumption should be suspended during the process of rebutting it.**

Moreover, Bitkom would like to stress that the proposed regulatory concept does not reflect market realities in the platform economy and disregards the desire of persons working through platforms for more flexibility, while improving their social security. People working through platforms often do so on a short term (for a few months or even less), have a primary occupation or are self-employed and many work through multiple platforms at the same time. Studies show that for the overwhelming majority earnings through digital labour platforms represent a supplementary source of income. Due to the rebuttable presumption platform work will for these persons no longer be a convenient and flexible way to earn additional income.

Instead of a rebuttable presumption a better approach to improve working conditions in platform work would be to strengthen the position of self-employed performing platform work e.g. by allowing platforms to support them with voluntary benefits (see section 2.3). Also, Member States should ensure access and effective coverage of social protection schemes in all branches of the Council Recommendation (2019/C 387/01) to all workers and self-employed.

Finally, examples in Nordic countries or in France show, that social dialogue may also strengthen the position of self-employed persons performing platform work. The European Commission Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons also put forward proposals in this respect.

2.2 Issues for further clarification

Article 2: Bitkom agrees that the introduction of harmonised and clear definitions would improve legal certainty throughout EU Member States. Nevertheless, Bitkom also believes that the proposed definitions, notably the definition of a "digital labour platform" would require further specification.

Article 6: Regarding the transparency obligation on the use and key features of automated monitoring and decision-making systems, it would be helpful to further clarify by way of examples, how detailed the information to persons performing platform work should be. Article 6(5) significantly narrows down the legal basis of data processing provided for by the GDPR. The current formulation would exclude the legal bases of legitimate interest and consent for processing personal data. Platforms have an interest to work with the self-employed and authorities. The current wording "intrinsically connected to and strictly necessary for the performance of the contract" rules out, for example, soliciting feedback from the partners (consent legal basis) or sharing data with authorities (legal obligation legal basis).

Furthermore, exceptions from the transparency obligation should also explicitly be specified in the article, particularly regarding features that constitute trade secrets or where the implementation of certain aspects of the obligation would disproportionately burden platforms. Concerning the latter, interests of micro, small or medium-sized enterprises should duly be considered.

Article 6 and Article 8: Regarding the transparency obligation and the requirement to provide for the possibility of human review of significant decisions, further clarification is needed to define what effects on working conditions of platform workers are deemed as "significant". Such clarification should go beyond the specifications described in Article 6(1) b and in Recital 32.

Article 10: This Article limits the scope of Chapter III protections from algorithmic management for the self-employed by excluding Article 7(2) and Article 9. This would contribute to widening the gap between employment and self-employment when it comes to protections, which should not be the aim of the Directive.

Article 15: It would be useful to indicate concrete examples of communication channels for persons performing platform work that are considered appropriate to fulfil the requirement of Article 15. Would, for example an internal mailing system, a chat feature, or the possibility to place posts in an internal social media wall be appropriate means to implement this obligation? In this context liability issues should also be addressed. Without access to communication channels, digital labour platforms cannot take appropriate actions against mobbing, harassment, hate speech or other illegal content.

2.3 Positive issues

Article 1: Bitkom welcomes that the objectives and scope of the proposed Directive are clearly defined and that the territorial applicability is defined by the place, where platform work is performed, i.e. in the EU. This ensures a level playing field for digital labour platforms operating in the Union.

Article 4(4): We also endorse, that the legal presumption should not have retroactive effects and Article 4 should not apply to factual situations before the transposition deadline of the Directive. The approach ensures legal certainty and provides time for digital labour platforms to adapt their business practices.

Recital 23: We positively acknowledge the clarification in Recital 23 according to which voluntary benefits provided by digital labour platforms to self-employed persons performing platform work through their platforms should explicitly not be regarded as determining elements indicating the existence of an employment relationship. Indeed, digital labour platforms have a strong interest and willingness to offer voluntary benefits to their self-employed platform workforce, yet they are currently hesitant to do so, because such benefits might be deemed by authorities and courts as an indication for the contractor being an employee of the platform. Recital 23 is therefore a first step to enable governments and platforms to adopt concrete measures to improve the working conditions of self-employed persons performing platform work. As a consequence, we advocate that Recital 23 becomes a stand alone article in the Directive.

Bitkom represents more than 2,700 companies of the digital economy, including 2,000 direct members. 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.