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"Employment and Self-Employment in Platform Work"

German National Report

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Contents

I. Introduction - Overview over the economy of digital work platforms and the legal debates

In a world that is increasingly on the path to digitalisation, the labor sector is not unaffected by this development. The influence of digital media in the world of work is becoming greater. One development resulting from this is the emergence of platform work in particular. Here, work assignments are offered digitally, usually via an app, and selected by employees.[1]

The tasks in the area of platform work range from cleaning activities (e.g., helping), delivery and courier driving services, in companies such as Uber, Lieferando or Foodora, to complex work assignments such as software programming or design creation.[2]

Regulations on labor law can be found in many legal sources, including, among others, the basic law for the federal republic of Germany (GG), which ranks first among national legal sources in Germany.[3] This is followed by federal law. According to Section 74 I No.12 GG, labor law is part of concurrent legislation. This means that as far as the Federation has regulated a matter in this area itself, the countries have no longer have their own legislative competence in this area.[4] The federal government has made use of this legislative competence and enacted numerous federal laws in the area of labor law. In particular, the German Civil Code (BGB) should be mentioned, which will also play a central role in this work. Section 611a of the BGB is of great importance. This reads:

(1) By the employment contract, the employee is obliged to perform work in the service of another, such work being tied to instructions and determined by others, and to do so in a relationship of personal dependency. The right to issue instructions may concern the substance, implementation, time and place at which the activities are pursued. Anyone who is not able to essentially determine their

[1] Heckelmann, NZA 2022, 73 (74).
[2] Schubert, Arbeit in der Plattformökonomie, NZA-Beilage 2022, 5 (6).
[3] Preis, in: Müller-Glöge/Preis/Schmidt (Hrsg.), Erfurter Kommentar zum Arbeitsrecht, 23. Aufl., 2023, BGB § 611a Rn. 222.
[4] Spinner, in: Säcker/Rixecker/Oetker/Limperg (Hrsg.), Münchener Kommentar BGB, Bd. 5, 9. Aufl., 2023, BGB § 611a Rn. 248.

activities freely and to determine the times at which they work is tied to instructions. (…)

(2) The employer is obliged to pay the remuneration agreed upon.

This standard came into force on 01.04.2017 and classifies the employment contract as a subcategory of the service contract. It is an exchange contract with primary mutual performance obligations.[5]

In addition to the classification of the legal relationship, the classification of employees also plays an important role. A distinction is made here between salaried employees, self-employed persons and employee-like person. The consequence of this classification is in particular the application of labor law regulations that serve to protect employees (e.g. minimum wage, working hours, vacation regulations, etc.).

Before we dive deeper into the legal matters of platform work in Germany, we would like to present some basic data on how platform work in Germany works. Most platform workers in Germany do this kind of work on a sideline basis,[6] they have a different source of main income. More than 50% of platform workers work around 6 hours per week and earn a salary of 400€ per month.[7] Interestingly, a German study from 2019 found that there is a correlation between the main income of a person and their income by platform work.[8] If you earn a high salary in your main job, you will be more inclined to receive better pay by platform work. People that work with a platform that requires for them to appear to a certain location – so called gig workers – spend statistically less time per week doing platform work, than not location bound workers, so called cloud workers.[9] The average German platform worker is 41 years old, in a relationship and highly educated.[10] And even though in the following we

[5] Spinner, in: Säcker/Rixecker/Oetker/Limperg (Hrsg.), Münchener Kommentar BGB, Bd. 5, 9. Aufl., 2023, BGB § 611a Rn. 1.
[6] Baethge/Boberach/Hoffman/Wintermann, Plattformarbeit in Deutschland, Studie Bertelsmann-Stiftung, 2019, S. 6.
[7] Baethge/Boberach/Hoffman/Wintermann, Plattformarbeit in Deutschland, Studie Bertelsmann-Stiftung, 2019, S. 22.
[8] Baethge/Boberach/Hoffman/Wintermann, Plattformarbeit in Deutschland, Studie Bertelsmann-Stiftung, 2019, S. 24.
[9] Baethge/Boberach/Hoffman/Wintermann, Plattformarbeit in Deutschland, Studie Bertelsmann-Stiftung, 2019, S. 16.
[10] Baethge/Boberach/Hoffman/Wintermann, Plattformarbeit in Deutschland, Studie Bertelsmann-Stiftung, 2019, S. 25.

might uncover some rather critical points on platform work, it should be noted that around 60% of the workers are satisfied with the platform they work for.

II. Classification of platform workers

A central problem that arises in connection with platform work is the classification of workers as employees and self-employed. According to the Council of the European Union, 7% of the workforce are employees and 93%, or over 26 million people, are self-employed. However, according to these statistics, a total of 5 million of this percentage are misclassified.[11] The consequence of this is, in particular, a lack of protection for employees.

In the following, the focus will be on Section 611a of the German Civil Code (BGB), which is significant for the classification as an employment relationship. Furthermore, the main differentiation criteria that distinguish an employee from a self-employed person will be discussed. These problems will be explained with examples from case law.

1. The working relationship

Of important significance is section 611a BGB. According to this, an employee is obliged by the employment contract to perform work in personal dependence, bound by instructions and external determination. A person is bound by instructions if he or she is not essentially free to organise his or her work and to determine his or her working hours. The degree of personal dependence also depends on the nature of the activity.[12]

On the other hand, self-employment is characterized in particular by own entrepreneurial risk, free organization of working time and activity and the possibility of free allocation of one's own labor.[13]

A distinction must be made between the employment relationship according to section 611a BGB and the home work relationship. Home-based work is performed by anyone

[11] https://www.consilium.europa.eu/de/infographics/digital-platform-workers/ (letzter Zugriff: 12.04.23).
[12] Gramano/ Stolzenberg, Lavoro Diritti Eurpoa Numero 3/ 2021, S. 2 ff.
[13] Bundesozialgericht (Federal Social Court, BSG), Urt. v. 18.11.2015 – B 12 KR 16/13 R; LSG Hessen, Urt. v. 14.3.2013 – L 8 KR 102/12.

who works for a client or intermediary foreman, alone or together with family members, at a place of work of their choice and leaves the results of the work performed to the client or intermediary foreman.[14] They do not have a personal dependency on their client, so they are not to be classified as employees.[15]

How the employment relationship in question is to be classified depends on the overall view and

which characteristics dominate.[16] Personal dependence is to be assumed if the worker commits himself by contract to a performance in which the type, volume and place are decisively determined.[17] The extent of these characteristics is determined individually according to the tasks performed and may vary depending on the type of task.

If the personal dependency typical of an employment contract is not achieved and the employee is not subject to instructions, a homeworking relationship within the meaning of section 2 (1) first sentence HAG may exist.[18] However, this is not the subject of this report. The following explanations refer only to the employment relationship.

2. Distinguishing between employees and self-employed persons

Whether an employment relationship within the meaning of Section 611a of the German Civil Code (BGB) exists is determined on the basis of differentiation criteria. Criteria that speak for work as an employee are, in particular, being bound by instructions, organizational integration[19] and personal dependence.[20] In contrast, a self-employed person is free to arrange working hours, place[21] and activity and there is no obligation to accept work orders.

Due to the many variants of platform work, location-bound or location-independent as in delivery services, micro tasks up to complex programming work and the different

[14] Hensen/Gerretz, in: Däubler/Hjort/Schubert/Womerath (Hrsg.), Arbeitsrecht, 2022, § 5 Rn. 19.
[15] Backhaus, in: Linck/Preis/Schmidt (Hrsg.), Kündigungsrecht, 2021, § 14 Rn. 562.
[16] Mengel, Compliance und Arbeitsrecht, § 8 Rn. 7.
[17] Müller, Homeoffice in der arbeitsrechtlichen Praxis, 2022, § 1 Rn. 11.
[18] Müller, Homeoffice in der arbeitsrechtlichen Praxis, 2022, § 1 Rn. 24.
[19] Hermann, in: Grobys/Panzer-Heemeier (Hrsg.), Stichwortkommentar Arbeitsrecht „Arbeitnehmer“, 2023, Rn. 2 f.
[20] Löwisch/ Rieble, Tarifvertragsgesetz, 2017, § 12a Rn. 37.
[21] Bundesgerichtshof (Federal Court of Justice, BGH), Urt. v. 18.7.2019 − 5 StR 649/18.

work models from secondary income to work performances of several hours a week, which are to generate the main income, the demarcation criteria are not uniformly pronounced. Personal dependency and the extent to which the employee is bound by instructions to the employer depend heavily on the work to be performed and the nature of the employment relationship.[22] Examples of this are the delivery services Uber and deliveroo.

The drivers of deliveroo are not bound by instructions, because they can reject an incoming order without any consequences. In contrast, the drivers of Uber are penalized for rejecting orders or not following detailed guidelines provided by complex feedback and rating systems, so that they are qualified as employees.[23] Both companies are delivery services that provide the same work service to an outside third party. But it is these different forms of work that lead to different classifications. Another difference is that Deliveroo riders are allowed to work for other companies. This, in turn, speaks against a personal and economic dependence on the employer, which is also significant for an employment relationship. The consequence is that, unlike Uber drivers, they are self-employed.[24]

The consequence of this classification is different working conditions. Foodora's drivers are also classified as employees, which means that they earned €9 in 2018, a little bit more than the minimum wage at this time. In the same period, Deliveroo paid its drivers only 5€ per delivery. While drivers from Foodora also have to bring their own bike and cell phone, the company provides them with work clothes and delivery bags. In contrast, drivers from Deliveroo pay a deposit for using the working equipment and in addition, a small monthly fee for the use of the Rider App.[25] Further details on this issue and the consequences of the classification follow in the rest of the report.

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[22] Gramano/ Stolzenberg, Platform work and the notion of ‘employee ’under the German legal System - possible consequences at a systematic level, in : Lavoro Diritti Eurpoa Numero 3/ 2021, S. 2 ff..
[23] Ivanova/ Bronowicka/ Degner, Foodora and Deliveroo: The app as a boss? Control an Autonomy in App-Bases management- the case of food delivery riders, Working Paper Forschungsförderung, number 107, 2018, S. 37 ff.
[24] Ivanova/ Bronowicka/ Degner, Foodora and Deliveroo: The app as a boss? Control an Autonomy in App-Bases management- the case of food delivery riders, Working Paper Forschungsförderung, number 107, 2018, S. 37 ff.
[25] Ivanova/ Bronowicka/ Degner, Foodora and Deliveroo: The app as a boss? Control an Autonomy in App-Bases management- the case of food delivery riders, Working Paper Forschungsförderung, number 107, 2018 S. 20 f.

Personal dependence is also characterized by the existence of the employee's obligation to give instructions to the company. This right to issue instructions may include not only the time and place of performance, also the content and nature of the performance. In this context, it is not a matter of a detailed specification, but rather the decisive factor is that the work is carried out under the control of others. In which form this exists in each case, is, as otherwise, strongly dependent on the work to be performed.[26] Thus, a supplier can also be an employee if he chooses his routes independently on the basis of the orders, but is dependent on instructions in his choice of orders or scope of working time. Platform work also exercises its control via through incentives, through feedback systems. The problem is that these methods cannot be classified into the typical categories "instructions" and "directions".[27]

In addition, the right to issue instructions can also be found in the work of a self-employed person.[28] A freelancer can also be given prescribed deadlines for the completion of work, without this resulting in an employee-specific time obligation to follow instructions.[29] In 2016, the Federal Labor Court ruled that personal dependency does not arise from the fact that the service must be performed within the given organizational structures of the company, which relates to when and to what extent it is performed. Thus, information or accountability obligations that relate to the status of the activity do not lead to the compulsory classification as an employment relationship. The decisive factor is whether the employee was free to determine his or her working routine.[30]

It is therefore important to distinguish between the right to issue instructions under labor law and the right to issue instructions for contractual relationships with self-employed persons.

[26] Herrmann, in: Grobys/Panzer-Heemeier (Hrsg, Stichwortkommentar Arbeitsrecht „Arbeitnehmer“, 2023, Rn. 17.
[27] Ivanova/Bronowicka/Degner, Foodora and Deliveroo: The app as a boss? Control an Autonomy in App-Bases management- the case of food delivery riders, Working Paper Forschungsförderung, number 107, 2018, S. 37 ff.
[28] Kocher, in: Hensel/Schönefeld/Kocher/Schwarz/Koch (Hrsg.), Selbstständige Unselbstständigkeit - Crowdworking zwischen Autonomie und Kontrolle, 2019, S. 174 ff.
[29] Bundesarbeitsgericht (Federal Labour Court, BAG), Urt. v. 1.12.2020 - 9 AZR 102/20.
[30] Kocher, in: Hensel/Schönefeld/Kocher/Schwarz/Koch (Hrsg.), Selbstständige Unselbstständigkeit - Crowdworking zwischen Autonomie und Kontrolle, 2019, S. 174 ff.

Thus, the instructions given to self-employed persons are result-oriented and those given to employees are person-, process and procedure-oriented. They are therefore not "essentially free" in the execution of their activities within the meaning of section 611 (1) third sentence BGB.[31]

The Labor Court in Munich also dealt with this criterion. The subject of this legal dispute was the legal relationship of a crowdworker with the platform Roamler. His employment relationship lasted for more than 2 years, during which he earned his income exclusively through this platform, until his access to it was terminated. He assumed that he was an employee and considered the termination without notice to be invalid. However, the labor court saw this differently and denied the crowdworker's dependence on the platform due to the fact that he was not obliged to accept the orders placed with him.[32]

3. The approach to a solution

In order to counteract the problem of the classification of employees, the European Commission presented a "proposal for a directive on improving working conditions in platform work " on December 9, 2021. The goal is, to create more transparency, to clearly define the status of employees and to ensure more fairness (Art. 1 (1)).[33]

Article 4 contains a presumption of employment, according to which an employment relationship exists between the work platform and the employee if the platform controls the work performed by the employee. When this is the case is determined by 5 criteria, of which at least 2 must be met. These include, among others, that the amount of remuneration is determined or upper limits are set, the work performance or its results are monitored and the employee's independent freedom of organization is restricted.[34]

[31] BAG, Urt. v. 1.12.2020 - 9 AZR 102/20.
[32] Krzywdzinski/Gerber, Varieties of platform work - Platforms and social inequality in Germany and the United States, Weizenbaum Series, No. 7, 2020, S. 24 f.
[33] Fuhlrott, ArbRAktuell 2022, 191 (192).
[34] Fuhlrott, ArbRAktuell 2022, 191 (192).

III. Working conditions of platform workers – independence as a curse or blessing?

The unclear status of platform workers, which is difficult to determine, exposes many different problems in everyday working life. In particular regarding working conditions, various follow-up questions arise. These are primarily issues of working hours, occupational safety and health, social security, and liability issues. What protective duties are incumbent on the employer in a conventional labour contract and which other problems arise, especially for platform workers, will be explained in the following.

1. Working Time

A majority of workers name flexible working hours as one of the greatest benefits of platform work.[35] The digital world of labour offers space for activities that don't depend on place and time. This however does not apply universally. Especially for Gig-workers, namely workers that do have location-bound work, it is very important where and when they can work. In order to prevent exploitation of workers and to ensure a humane working life, the legislator has laid down concrete guidelines on working hours in the "Arbeitszeitgesetz" (Working Hours Act), ArbZG. Furthermore, it stipulates that working time is the period of time during which the employee is available to the employer. Thus, it does not depend on pure productivity, which transposes the EU Directive 2003/88/EG on working time.

According to Sec. 3 (2) ArbZG, an employee may work a maximum of 8h on a business day. An extension to 10h per day is permissible, if the average work day is no longer than 8h during a period of 6 months. According to Sec. 5 (1) ArbZG, there have to be at least 11 hours of rest between work phases. From 6h working time onwards, a break must be granted. Such legal occupational health and safety regulations do not apply to self-employment. This is, logically, not necessary, because a self-employed person is not personally dependent and therefore does not require the protection of the labour law. There is no imbalance of power. In relation to platform work, several problems arise: the control of working hours cannot be guaranteed. In

[35] Baethge/Boberach/Hoffman/Wintermann, Plattformarbeit in Deutschland, Studie Bertelsmann-Stiftung, 2019, S.21.

particular, it is not possible to check whether platform workers work overtime or take their mandatory rest breaks. Considering the fact, that the majority of platform workers perform this activity on a sideline basis,[36] it cannot be guaranteed that the legally prescribed 11-hour rest period will be observed. However, it should be noted here again that these circumstances are only a problem if the platform workers who appear to be self-employed are in fact „bogus“ self-employed persons who are actually in a personal dependency relationship with the platform and are thus actually in an employment relationship. A self-employed activity is generally carried out under one's own direction, which brings the advantage of being able to arrange one's own working hours. However, flexible working hours are not not incompatible with employment relationships. In the end, it is a question of a question of legal application: there are certainly platforms that only act as an an intermediator to a solo self-employed person.

It becomes problematic if, due to the circumstances of the work, they are „bogus“-self-employed and actually require the protection of labor law. Here, the aforementioned problems become relevant.

It is also worth mentioning that many platforms pay their workers per completed task and not per hour. This can hardly do justice to the classic concept of "salary for being - available“. Some are therefore calling for a complete reform of labor law and it’s adaptation to the digital age.[37] However, this would go beyond the scope of this article. In summary, it can be said that working time is a follow-up problem of the classification question discussed at the beginning, which can only be answered individually.

2. Health and Safety

With regard to occupational safety, various problems are conceivable in relation to platform work. Occupational health and safety find their basis specifically in Sec. 618 of the German civil Code. This stipulates that the employer is obligated to prevent dangers to the life and health of the employee. In the event of a breach by the employer against these protective obligations, the employee has a right to refuse performance in

[36] Baethge/Boberach/Hoffman/Wintermann, Plattformarbeit in Deutschland, Studie Bertelsmann-Stiftung, 2019, S.6.
[37] Schneider-Dörr, „Erwerbsarbeit in der Plattformökonomie“, Working Paper Nr. 116, 2019.

accordance with Sec. 273 I BGB. At the same time, the employee's right to payment of his salary remains, according to Sec. 615 BGB.[38]

The implementation of the European Directive 89/391/EEC resulted in the "Arbeitsschutzgesetz" (Occupational Health and Safety Act), which establishes the protective duties of the employer, as well as his rights in case of a violation by the employee.[39] It can therefore be stated that in an employment contract, the employer has a special responsibility to guarantee the necessary safety at work. In contrast, in case of a simple „service-contract", according to §611 BGB, the partner of contract only has to guarantee the basic duties of care and protection that are applicable to any contract under the law of obligations. If we transfer these legal requirements to practice, it is noticeable that there are also major differences between location-independent and and location-bound activities. It is almost obvious that work performed from home is associated with relatively low risks. However, if one thinks of delivery services, Uber, or other activities that require participation in road traffic, the workers are exposed to considerably greater risks to life and health. Bicycle couriers in particular seem to be at risk because they form the weaker part of the traffic, which can be extremely dangerous, especially in large cities. If one considers that there is an increased risk of distraction through the use of the mobile device, that leads to conclude that the danger, some platform workers are exposed to is quite significant. Similarly, when working in microtasking, there is an increased potential for distraction. If platform workers were employees, they would be insured against work accidents by law, according to Sec. 2 (1) Nr. 1 SBG VII. Accident-insurance pays a large part of the accident-related costs that arise in connection with the accident. However, if the workers are self-employed, they would have to contract additional, voluntary accident insurance, Sec. 6 (1) Nr.1 SGB VII. If they do not, they have little to no coverage in case of an injurious event.

3. Social Security

Following on from the previous topic, we will now take a closer look at the social security of platform workers. According to research by the Bertelsmann Foundation,

[38] Preis/Temming, Arbeitsrecht, § 37 Rn. 1786.
[39] Preis/Temming, Arbeitsrecht, § 37 Rn. 1792 ff.

the fear of a lack of social security is the biggest concern workers have about their kind of work.[40] If you work in an employment relationship in Germany, the majority of the employees gets mandatory social security service, according to Sec.1 Nr.1 SGB IV. In particular, the compulsory insurances are health-insurance, unemployment-insurance and pension-insurance. If you work as a self-employed person, you do not have this right. If you want social security you must inscure yourself. This problem is particularly evident for platform workers, who are more likely to work in „bogus“ self-employment rather than actually working as self-employed persons. In Germany, people have become aware of this problem, which is why various solutions have been presented over the years. On political scale, the following demands are heard again and again, especially the demand to do more for the social protection of platform workers. For example, the parliamentary group of the "Green party" in the german parliament demanded in a motion dated 3.3.2021 an improvement in the social protection and working conditions of platform workers.[41]

In a "key issues paper,"[42] the new German government also establishes its intention to improve the social protection of platform workers, including those who are actually self-employed. It is therefore evident that political awareness of this specific problem existed even before the EU directive was issued. In legal literature, approaches to solving this problem have been published as well. For example, the idea of a "social insurance fund for service providers" has been established.[43] This was inspired by the model of the "social insurance fund for artists“, according to which professional artists pay contributions into an insurance-like pot, with the "entrepreneur" paying the other share of contributions. Historically, the motivation for this fund was the socially insecure situation of artists and publicists, due to low wages and irregular payments. It is argued, that the former situation of artists is comparable to that of many platform workers nowadays. If the model of the „social insurance fund for artists“ would be applied to platform workers, both the worker and the platform would have to pay a contribution. Platforms would therefore not be able to escape their social responsibility

[40] Baethge/Boberach/Hoffman/Wintermann, Plattformarbeit in Deutschland, Studie Bertelsmann-Stiftung, 2019, S. 25.
[41] BT-Drs. 19/27212.
[42] Bundesministerium für Arbeit und Soziales, „Eckpunkte des BMAS- Faire Arbeit in der Plattformökonomie“, S. 3.
[43] Hartung/Klaiber, ZRP 2021, 78 (80).

and platform workers would continue to be self-employed. In legal discourse, there was the proposition to adapt this kind of social-security system to on demand workers. Beyond political demands and theoretical legal constructs however, nothing further has been done to provide platform workers with better social security. How this problem will be solved in the future remains open.

4. Liability of platform workers

Another interesting question is the role of the platform, if the platform worker makes a mistake.. In short: who is liable? As already mentioned before, employees enjoy certain privileges when it comes to such issues. For example, there is a limitation of liability for an employee, in case he performs poorly. If the employee disturbs the legal interests of a third party, this third party is initially entitled to make claims against the employee. However, the employee is then entitled to an „exemption claim“, according to which he is only liable to the extent that he would be liable if he had violated the legal the legal interests of his employer.[44] The employee therefore benefits from the liability privileges existing in the internal relationship. The decisive factor for the extent to which the employee is liable, is the degree of his or her fault.[45] Depending on the level of negilegence or even intent, the employer is liable proportionally.[46] In cases of minor negligence the employer is usually fully liable for the damage. Once again, this raises the question of how the law is applied. If a worker is classified as an employee, he or she also benefits from this liability privilege. If the platform were the employer, it would have to assume liability under certain circumstances. If, however, the worker is self-employed, he has to take complete responsibility for his actions. Intrestingly, some platforms have already started to approach this problem. For example, the platform "Helping", which offers household help, takes out professional liability insurance for its workers, which takes effect in the event of damage or loss in private households. Sadly it only takes effect, if the value of the damage is above 350€.[47]

[44] Temming/Preis, Arbeistrecht, § 52 Rn. 2402.
[45] Temming/Preis, Arbeitsrecht, § 52 Rn. 2387.
[46] Temming/Preis, Arbeitsrecht, § 52 Rn. 2389 ff.
[47] Schneider-Dörr, Erwerbsarbeit in der Plattformökonomie, Working Paper Nr. 116, 2019, S. 35.

3. Concluding thoughts

In summary, it can be said that the working conditions in case of bogus self-employment are significantly more precarious than those that exist for employees. There are many other problems that depend on the classification as an employee. Because platform workers are usually paid per order, payment of the statutory minimum wage can often neither be guaranteed nor monitored. Supplements for night work do not apply, at least not by law. An interesting discussion also revolves around whether workers should be provided with their necessary working tools by the platform. In principle, it is the employer's duty to provide the employee with the tools necessary to do the job.[48] Thus, as mentioned above, workers at Deliveroo only receive their work equipment if they pay a deposit. In contrast, the Labour Court of Hessen ruled in 2021, that the food delivery app „Lieferando“ has to provide its workers not only with bikes, but even mobile devices, including a data usage contract.[49] It should however be noted here, that the workers of the platform Lieferando are employees and have employment contracts.[50] This claim therefore arose out of an employment relationship. A self-employed person would not be entitled to such a claim to this extent.

The question of whether someone is an employee or self-employed can therefore be of existential importance. Certainly, there is no such thing as "the" platform worker. For some, a classification as an employee makes less sense than for others. Of course, it should also be be possible to provide services via the Internet independently and autonomously. The protection of the labor law does not have to be inflationarily applicable to every platform worker. However, the question of the employee status should not be answered negative lightly.

[48] Landesarbeitsgericht Hessen (Regional Labour Court Hesse, LAG Hessen), Urt. v. 12.03.2021 – 14 Sa 1158/20, Rn. 20.
[49] LAG Hessen, Urt. v. 12.03.2021 – 14 Sa 1158/20, Rn. 19ff.
[50] https://www.lieferando.de/fahrer (letzter Zugriff: 28.04.2023).

IV. Collective action in the platform sector

1. Platform work and its legal status in Germany

Just as in many countries Platform Work has gained popularity in Germany as well and it has been increasing from year to year, besides its increasing popularity, a *legal definition* or even specific regulation of platform work has not yet come about in Germany and the concept of the platform economy is to be understood as any form of organisation of work in which the supply and demand for paid work are matched via an internet platform or a smartphone app, so that its operator, at least at first glance, only assumes the role of an intermediary. From a phenomenological point of view, work-related platforms in the German discussion, not unlike in the international debate, are regularly distinguished in principle according to whether they involve a location-based 'offline' activity or a location-independent 'online' activity. This distinction is a main point of difference according to Eurofound.[51]

At an international level also in Germany, the legal status of platform workers is most questioned because exactly the legal status leads to social protection under labour law. German labour law basically follows the 'all-or-nothing' approach. According to this approach, the applicability of labour law protection depends initially on whether a worker can be considered an employee. This applies, for example, to the statutory minimum wage, continued payment of wages in the event of illness, protection against fixed-term employment relationships and protection against dismissal.[52]

a) Employee in German Law

German law does not offer a statutory definition of an employee, but it is to identify from case to case according to certain characteristics such as integration in the organisation, degree of personal dependency, and subordinate - similar approach that the European Court of Justice (ECJ) has in the context of Article 45 TFEU.[53]

[51] Eurofound, Employment and working conditions of selected types of platform work, 2018.
[52] Krause, in: Carinci/Dorssemont (Hrsg.), Platform Work in Europe: Towards Harmonisation?, 2021, 29 (37).
[53] Klebe/Heuschmid, in: Ales/Deinert/Kenner (Hrsg.), Core and Contingent Work in the European Union: A Comparative Analysis, 2017, 185 (198).

b) Employee-like person in German law

Besides employee, there is a legal concept of employee-like person in German law, this can be considered as an intermediate status between employee and self-employment and therefore has significantly less social protection than employees. Likely to employee's status, there is no legal definition for an employee-like person either and it is mostly by case law to define that is mostly based on two criteria: economic dependency and a need for protection similar to that of an ordinary employee. Employee-like status is often paralleled with "homework" (Heimarbeit) that is regulated by the Homeworking Act (Heimarbeitsgesetz), in the literature there exists an opinion that the rules governing homework should be possible to apply to many crowdworkers by the principle of analogy.[54]

2. Main Actors of the Labour Market

There are three main actors of the labour market, that have taken various relevant activities in the context of platform work: firstly the *platform operators* themselves or the German Crowdsourcing Association acting on their behalf; secondly, the established *trade unions;* thirdly, those who are directly affected, that is, the *platform workers*, insofar as they develop collective forms of actions and thereby become self-effective;[55] fourthly employee representatives (Betriebsräte).

a) Platform Operators and Code of Conduct

One of the most important steps on behalf of the first group (platform operators themselves) was the Code of Conduct that was initiated in 2015 by German platform operator Testbird and afterwards in 2017 was signed by seven German crowdworking companies and one British crowdsourcing company active in Germany. This code provides for various general principles. For example, only legally compliant tasks are to be assigned, information about the legal situation is to be provided and respectful interaction is to be cultivated, furthermore, there is mention of constructive feedback, a user-friendly working environment, opportunities for further training, etc.[56] Code of

[54] Klebe/Heuschmid, in: Ales/Deinert/Kenner (Hrsg.), Core and Contingent Work in the European Union: A Comparative Analysis, 2017, 185 (199 f.).
[55] Krause, in: Carinci/Dorssemont (Hrsg.), Platform Work in Europe: Towards Harmonisation?, 2021, 29 (47).
[56] Grundsätze für bezahltes Crowdsourcing/Crowdworking

Conduct is not a contractual agreement and therefore it is not a binding but soft law, which is merely vaguely formulated and therefore, it is difficult to solve a concrete issue based on it. It is the first initiative that refers to the main problems in this area, therefore it should be considered as a significant step regardless of its non-binding character. [57]

b) Trade Unions

German trade unions are important actors in the context of platform work, such as ver.di Union for service workers (Vereinte Dienstleistungsgewerkschaft, founded in 2001, with about 2 million members), IG Metall - the trade union for metal workers (Industriegewerkschaft Metall, founded in 1949 with more than 2 million members) and the Food, Beverages and Catering Union (NGG - Gewerkschaft Nahrung-Genuss-Gaststätten, founded in 1949 with more than 200.00 members) One of the most important things about German trade unions that distinguishes them from many other trade unions from various states, is that not only employees but also self-employed persons can become trade union members, including platform workers, this applies to ver.di,[58] also the NGG[59] and IG Metall that expanded its statutes in 2015.[60]

"Crowdsourcing Project" in 2015, which aims to improve working conditions and the so-called "Frankfurt Paper on Platform-based Work" from 2016 are launched and developed by IG Metall in collaboration with other non-german trade unions. "Frankfurt Paper on Platform-Based Work" outlines one of the most important issues - the misclassification of platform-workers in point of their legal status and considers them as a vulnerable group with the need for security exactly as classic employees and brings attention to the right to organize with following: 'Laws that prohibit platform-based workers classified as independent contractors from organizing and negotiating collective agreements with platform operators should therefore be reassessed. We affirm in the strongest possible terms the central importance of workers' right to organize. The document includes a proposal for platform operators and other appropriate actors for working together to increase transparency in this sector. The

[57] Krause, in: Carinci/Dorssemont (Hrsg.), Platform Work in Europe: Towards Harmonisation?, 2021, 29 (47-48).
[58] Statutes of ver.di, Section 6, No. 1.
[59] Statutes of NGG, Section 4, No. 1.
[60] Statutes of IG Metall, section 3, No. 1, para. 5.

document is concluded with a reflection of the founding principle of the International Labour Organization: 'Labour is not a commodity', the philosophical principle that asserts the fundamental and universal dignity of human beings, regardless of the indifference with which they may be treated in any given social, political, or economic context.[61]

Another significant initiative of IG Metall is *"Fair Crowd Work"* (2017). It aims to enable crowdworkers to effectively represent and protect their work-related interests. Crowdworkers are able to rate platforms through reviews and it encourages the platforms to perform in a way that leads to a good reputation, therefore gaining the sympathy of crowdworkers.[62] It could also break down the isolation and encourage platform workers to spread and share their opinions and issues.

Another important initiative of trade unions is the *Ombuds Office*. Eight European crowdsourcing platforms, the German Crowdsourcing Association (Deutscher Crowdsourcing Verband), and the German Metalworkers' Union (IG Metall) announced in 2017 the establishment of a joint Ombuds Office. The main function of the Ombuds office is resolving disputes between crowdworkers, clients, and crowdsourcing platforms.

The Ombuds Office board represents platforms and workers equally and its members are volunteers. Crowdworkers have the possibility to file a case with Ombuds Office via an online form after they first tried to resolve the case directly with the platform operator. The regularly published annual reports show that the Ombuds office is definitely being used. Most disputes were settled amicably. In some cases the Ombuds Office has also expressed its interpretation of the Code of Conduct and of the rights or obligations of parties, this could finally be a step forward to the development of a "Platform Law".[63]

[61]Frankfurt Paper on Platform-Based Work, 2016 (https://crowdwork-igmetall.de/Frankfurt_Paper_on_Platform_Based_Work_EN.pdf, letzter Zugriff: 28.4.2023).
[62] Krause, in: Carinci/Dorssemont (Hrsg.), Platform Work in Europe: Towards Harmonisation?, 2021, 29 (50).
[63] Krause, in: Carinci/Dorssemont (Hrsg.), Platform Work in Europe: Towards Harmonisation?, 2021, 29 (51).

In 2018 one more platform *"FairTube"* was founded as an internet movement by IG Metall and Youtubers union and in 2020 turned into the association FairTube e.V.[64] According to the ideology of the platform, FairTube stands for fairness, transparency, accountability, dialogue, freedom from discrimination, and democratic participation for all platform workers. It is a new not-for-profit organization that welcomes members and partners from all over the world that share our goals and values.

It is not a comprehensive description of all the activities initiated by German trade unions, which actively participate in this field and are one of the most important actors in the context of platform work.

c) Platform Workers (Gorillas Case)

The third group of actors are platform workers themselves. Firstly, it must be mentioned that it is challenging for platform workers to organize and collectivise their interests, especially for online contest workers, who, according to Eurofound, have overall little interest in representation efforts, so do most interviewees going on on-location worker-initiated work. The situation differs for on-location platform-determined work, both the literature and the interviews confirm that the characteristics of on-location platform-determined work facilitate efforts to organize workers.[65]

In Germany, it was mostly the case of food-delivery platform workers, who also have the possibility to meet each other at work and get to know each other personally which makes it much easier for them to exchange information and organize for their common interests.

One of the recent and resonant cases was *"Gorillas Workers Collective" (GWC),* which was organized by the riders (temporarily employed employees) at a German food delivery company on social media (2021). Platform workers have used the hashtag "wildstrikes" regarding protest whereas wild strike as such is considered to be illegal under German law. There are two basic requirements that could avoid the illegal character of Gorilla's strike: first, the action (in this case strike) needs to be supported by the trade union and second, it must be aimed at concluding a collective agreement.

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[64] Krause, in: Carinci/Dorssemont (Hrsg.), Platform Work in Europe: Towards Harmonisation?, 2021, 29 (52).
[65] Eurofound, Employment and working conditions of selected types of platform work, 2018.

Gorilla's strike was organized by a workers' association, the 'Gorillas Workers Collective' and the fact that this does not belong to one of the widespread trade unions in Germany, it is not relevant to be considered while analyzing the legality of the strike.[66]

However, 'Gorilla's Workers Collective' (GWC) could not be considered an organization according to criteria that labour courts have developed over the years. The first criterion is independence from the employer, which has not caused any doubt in Gorilla's case; Another element is a certain hierarchical form of organization. In case of doubt, i.e. as long as there are no concrete indications to the contrary, it must first be assumed that non-hierarchical collective structures can also organize self-binding decisions. First, GWC was also assumpted in this way, even though there were indications here that the joint formation of wills across the individual companies/camps was not yet fully completed at the time of the strikes if it was intended at all. The demands against employers were not precise enough during the strike and besides that, when strike leaders proudly display the label "wild strike" even though it entails considerable legal risks for all strike participants, this may confirm that they would rather not take responsibility as a "union.[67]

German law ensures a great deal of autonomy for the parties to labour disputes - as long as they are willing to assume certain regulatory functions. German law insists that (on the employees' side) trade unions not only take responsibility for industrial actions but also channel them into collective bargaining and thus bring them to compromise and to a conclusion. This orderly character is particularly visible in the fact that the labour courts consider it permissible for a trade union to "take over" a labour dispute (and thus responsibility for its further conduct) even retroactively.[68]

The Gorillas company is comparable to another digital platform in another respect: It deliberately keeps the entry requirements for employment formally low, relies on young migrant employees, some with temporary work permit in particular precariousness, and cultivates a culture of communication that blurs hierarchies as

[66] Kocher, Gorillas im Arbeitskampf, 2021, (https://verfassungsblog.de/gorillas-im-arbeitskampf/, letzter Zugriff: 28.4.2023).
[67] Kocher, Gorillas im Arbeitskampf, 2021, (https://verfassungsblog.de/gorillas-im-arbeitskampf/, letzter Zugriff: 28.4.2023).
[68] Kocher, Gorillas im Arbeitskampf, 2021, (https://verfassungsblog.de/gorillas-im-arbeitskampf/, letzter Zugriff: 28.4.2023).

long as there is no threat of conflict, that leads the activism organized by young workers who are not well integrated into the trade union system. Communication between these activists and German trade unions is not only complicated by language barriers but also by different forms of organization. The tendency toward hierarchical structures in German trade unions is suitable for the structured organization of collective bargaining movements but is probably not so well suited for social media campaigns.[69]

As the conclusion could be summed up, German law is more focused on a structural, organized form of labour strike-through trade unions and sets wider borders for this method rather than self-organized strikes, furthermore, a wild strike is as illegal under German law and could give a reason for summary dismissal, therefore it is in the interest of all strike participants, not to expose to the risk of dismissal with lack of caution, that was a case for Gorilla's strikers. Gorilla's case is one of the examples for that, where so-called "wild strike" has lead to dismissal of hundreds of employees and the dismissal was approved by Labour Court. A request for an appeal was also rejected. What remains for the former employees are appeals against the rejected appeal. Further paths lead to the Federal Constitutional Court and the European Court of Human Rights.[70]

d) Works Council (Betriebsräte)

In cases where workers are employees, the establishment of a works council (Betriebsrat) is possible. Works councils are elected in companies with at least five employees. All employees who have reached the age of 16 by the election day at the latest (sec 7 (1) Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) and are integrated into the company, i.e. are employed there, are entitled to vote. The legal obligation, i.e. the existence of an employment contract alone is not sufficient; the employee must also be integrated into the company. Therefore, part-time, probationary and temporary employees, as well as marginal employees (e.g. newspaper delivery staff) are also entitled to vote. Any employee who is 18 years of age and has been a

[69] Kocher, Gorillas im Arbeitskampf, 2021, (https://verfassungsblog.de/gorillas-im-arbeitskampf/, letzter Zugriff: 28.4.2023).
[70] Aschemeyer, Streikrecht: Arbeitskampf bei Gorillas als Präzedenzfall, 2023 (https://www.nd-aktuell.de/artikel/1172738.lieferdienst-gorillas-streikrecht-arbeitskampf-bei-gorillas-als-praezedenzfall.html, letzter Zugriff: 28.4.2023).

member of the company, enterprise or group for at least six months may stand for election. An exception is made if the company has not yet existed for six months. Of course, members of the election committee may also stand for election.[71] Six months prerequisite is another reason, what makes more difficult for platform workers to be represented by works council, since mostly they are temporary workers and do not have long term working history with companies.

Works Constitution Act entitles a works council with the right to representation of the interests of the employees in the company and can negotiate on their behalf with the employer. The number of people on a works council depends on the size of the company. The works council ensures that the rights of employees are respected and has legally guaranteed rights, which it can also enforce in court if necessary. In regular works council elections, the employees elect which employees belong to a works council, so the works council is representative and based on democracy. Because the works council enjoys special protection, it can face the employer with greater courage and confidence. The employment relationships of works council members cannot simply be terminated. Ordinary termination is prohibited under Section 15 of the Dismissals Protection Act (Kündigungsschutzgesetz, KSchG). An extraordinary termination is only possible with the consent of the works council.[72] Because of all above mentioned benefits, that works council can bring to employees, it it often delayd by employers, like it was the case in Lieferando, which besides obstacles finally ended up by stablishing a works council.[73]

Therefore, if platform workers have the legal status of employees for at least six months (which is often the case for food delivery platforms in Germany), it is a much safer option for them to organize through the works council rather than on their own. However, in most cases as forehead mentioned, platform workers do not have the status of the employee or is is temporary and less than six months, which excludes the possibility for them to elect a works council that represents and protects their labour rights and is distinguished from German trade unions, for the opportunity of being represented by the works council, the employee's status is decisive.

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[71]Koch in: Schaub/Koch (Hrsg.), Arbeitsrecht von A-Z, 27. Aufl., 2023, Betriebsratswahlen.
[72] Works Constitution Act (Betriebsverfassungsgesetz - BetrVG), 2001.
[73] Ifb Redaktion, Kein leichter Weg, 2022 (https://www.betriebsrat.de/news/kein-leichter-weg-2703962, letzter Zugriff: 28.4.2023).

3. Compatibility of collective actions and agreements of platform workers with competition law

According to Eurofound, in some countries, national competition laws prohibit the organization of self-employed platform workers. Whereas in a number of countries, trade unions have opened up their membership to the self-employed, making them accessible to platform workers (As above mentioned German trade unions). [74]

Above it emphasizes the importance of the legal status of platform workers in order to ensure their social and labour rights, particularly the right of collective action and agreement. This aspect is actively discussed not only nationally but also on the EU level. In 2020 the European Commission launched a process to ensure that the EU competition rules do not stand in the way of collective bargaining for those who need it. The initiative seeks to ensure that working conditions can be improved through collective agreements not only for employees but also for those self-employed who need protection.[75]

In 2022 The European Commission has adopted its guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed people. The Guidelines clarify when certain self-employed people can get together to negotiate collectively better working conditions without breaching EU competition rules. [76]

In particular, the Guidelines clarify that: Competition law does not apply to solo self-employed people that are in a situation comparable to workers. These include solo self-employed people who: (i) provide services exclusively or predominantly to one undertaking; (ii) work side-by-side with workers; and (iii) provide services to or through a digital labour platform. The Commission will not enforce EU competition rules against collective agreements made by solo self-employed people who are in a weak negotiating position. This is for instance, when solo self-employed people face

[74] Eurofound, Employment and working conditions of selected types of platform work, 2018.
[75] https://ec.europa.eu/commission/presscorner/detail/it/IP_20_1237 (letzter Zugriff: 28.4.2023).
[76] https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5796 (letzter Zugriff: 28.4.2023).

an imbalance in bargaining power due to negotiations with economically stronger companies or when they bargain collectively pursuant to national or EU legislation.[77]

The European Court of Justice (ECJ) clarified that competition law does not apply to collective agreements dealing with the working conditions of the self-employed who are in a similar situation to regular employees.[78]

The compatibility issue with anti-trust law has been familiar to German trade unions as well. It is shown by the ‘ Frankfurt Paper on Platform-based Work ’, which addresses this issue with the wording that: ‘Laws that prohibit platform-based workers classified as independent contractors from organizing and negotiating collective agreements with platform operators should be reassessed.[79]

Considering both the national and EU levels, there could be concluded, that both of them follow a similar approach with respect to the compatibility issue of collective agreements and actions with anti-trust law and according to the general principle, anti-trust law could not be considered as an obstacle for fulfilling the right of collective agreements in the context of platform workers.

V. EU Directive proposal – A new idea or just a recycled dream?

As already shown in this report, platform work is stressful for those affected, not only in the legal sense but also on a social level. Platform work itself represents a sustainable type of work, precisely because of the digitalization of our world. Therefore, it is also important that the conditions for workers in this sector are improved. To achieve this and harmonize it across Europe, the Europe Commission proposed a directive in 2021. The goal is the improvement of the conditions for platform workers. The directive on improving working conditions in platform work has three main objectives:

(1) Legal definition of platform worker status

(2) Transparency and fairness in the use of algorithms

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[77] Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022XC0930%2802%29

[78] ECJ, Urt. v. 4.12.2014 – C-413/13 (FNV Kunsten Informatie en Media).

[79] Krause, in: Carinci/Dorssemont (Hrsg.), Platform Work in Europe: Towards Harmonisation?, 2021, 29 (49).

(3) Transparency and awareness in relation to the developments within the platform work.

The Directive itself will be complemented by existing EU acts, such as the General Data Protection Regulation and the Minimum Wage Directive. However, it is questionable to what extent the proposal is suitable to solve the problems of platform workers. In this chapter, the Directive will be examined for its effectiveness concerning the problems of the German platform workers that have already been identified in the previous chapters.

1. Attempt to define the legal status of platform workers by the proposal.

According to Article 2 (2) of the proposed directive, 'platform work' is defined as any work organized through a digital labor platform and performed in the Union by an individual based on a contractual relationship between the digital labor platform and the individual, irrespective of whether a contractual relationship exists between the individual and the recipient of the service.

The legal status of the person performing platform work as a platform worker is determined by Member State law in accordance with the Directive. The criteria for this are the employment contract between the worker and the platform and the working relationship between the two parties. According to Article 3 (2), the determination of the criteria should be based mainly on the facts relating to the actual performance of work, considering the use of algorithms in the organization of platform work, irrespective of how the relationship is classified in any contractual arrangement that may have been agreed between the parties involved.

Article 4 of the directive provides for a legal presumption of legal status as platform work in cases where the platform controls the performance of work. The burden of proof here should lie with the platform.

For German platform workers, this means that they are still determined in accordance withSection 611a of the German Civil Code (BGB). Until now, this has meant that the contractual relationship with the platform operator represents a continuing obligation

and that the platform worker owes personal performance and is personally dependent due to being bound by instructions.[80]

A significant change could be the presumption created by the Directive. This would be the case if at least two of the criteria of Article 4 (2) were met. According to these, the platform would have to set the ceiling for remuneration, oblige the worker to keep certain rules, monitor the work, impose sanctions for non-acceptance of orders or absenteeism, and limit the customer base. The criteria themselves should be seen in the light of Member State law. According to Article 4 (3), startups will be exempted here, the impact on startups will be considered, and supporting measures will be taken to make the presumption easier to understand and handle.

The effectiveness of the presumption is rather questionable solely due to the requirement of the cumulative existence of the criteria and the revocable nature of the presumption. This is indicated by the possibility of refutation in principle. In particular, in the case where the two criteria of management and control of the indirect work performance (Art. 4. para. 2 lit. c and d.) are not sufficient for the justification of the employee status if there is no clear legal subordination between the platform workers and the employees. Therefore, the question also arises here as to the effectiveness of the Directive in relation to German law. This is because according to the criteria of Sec. 611a BGB, the assumption of management and control of a worker's work performance already implies a dependence on instructions. This already implies an employment relationship.

Accordingly, the possibility is opened for the platform operators to change the requirements through regulations and technical design in such a way that they are no longer present for the fulfillment of the employee status. On the one hand, this shows that the regulatory technique, which links the presumption of the existence of a legal position to the existence of certain material criteria, entails operational problems. Even if, at the same time, it remains unclear which material criteria must be present in the result for the legal position to exist.

In other respects, too, the effectiveness of the proposed regulations is rather uncertain, because they are to apply only from the date of expiry of the implementation period

[80] Krause, NZA 2022, 529; Heckelmann NZA 2022, 73 (74 ff.).

(Article 4 (4)) and thus are not to give rise to any claims for the past, which admittedly can hardly result in justifiable unequal treatment. However, this is a fundamental problem with the implementation of EU directives. However, this can be solved at the latest by the principle of equality in Article 3 GG through case law. Nevertheless, this is connected with a higher legal and administrative effort and initially leads to a slowdown and partial obstacles in the enforcement of claims by platform workers.

After all, platform work already poses problems and unequal treatment for people working in this sector and is therefore not something that should be treated uniformly only after the implementation period. Therefore it is conceivable that in future case law, the earlier claims will be treated similarly to the claims arising after the transposition period. This may eliminate the unequal treatment of cases.

In particular, the criteria mentioned in the proposal do not constitute a major innovation for Germany, because German law already knows the control criteria in sec. 611a BGB and uses them to determine employee status. The German criteria are also designed to determine the dependence on instructions. The criteria in the Directive also examine the worker's dependence on instructions, so that it remains open here to what extent these become superior to the already existing valuation because of the new case law. Therefore, their effectiveness, especially regarding German law, is rather questionable. In addition, the proposal invites operators to manipulate the criteria in such a way that the person concerned loses the status of "worker".However, it is likely that future case law will make it considerably more difficult for platform operators to manipulate the Directive and its implementation. For it is precisely through the criteria and the legal presumption that several new types of circumstances will undoubtedly go before the responsible courts that will affect the status of platform workers. Therefore, the initially increased possibilities for manipulation by platform operators is a transitional phase, which is also already taking place in practice.

The proposal establishes a legal presumption of employee status, which is assumed by the fulfillment of the control criteria of Article 4. It is particularly important that the Directive requires at least 2 of the criteria to be met as a precondition for acceptance. The only thing that should be emphasized here is that the methodology is something new, because this is the first time that a legal presumption has been established in the context of the directive, and this is quite unusual. German law already introduced a

similar presumption in 1999-2003 with sec. 7 (4) Social Security Code (SGB) IV.[81] This presumed rebuttable the existence of employment in the sense of social security law if at first at least two of four criteria were met, and later at least three of five criteria. The criteria at that time were accused of being too vague and creating legal uncertainty. Therefore, in the attempted harmonization of the EU, the question arises as to how far the exception is implemented effectively and clearly by the individual Member States so that no legal uncertainties arise here either.

As a result, the attempt at the presumption of employee status aimed by the directive is indeed a nice attempt. However, without further specification of the criteria and considering the technical and operational possibilities of the operators, this is completely insufficient in practice to improve the conditions for the platform workers.

The presumption does not solve any legal uncertainties, rather it creates further uncertainties due to the large scope of freedom for the platform operators. These are rooted, on the one hand, in the nature of the algorithmic design of the platform and, on the other hand, in the operators' monopoly of power.

It would be advantageous to base the implementation on the state of the art within the algorithmic design of the platforms, which could then be specified in further EU-wide reports and would apply as a standard for the platforms. This would also reduce the power monopoly of the operators, at least regarding algorithmic management, because the assessment criteria for algorithmic control would no longer depend on the operator and thus on the individual case but would now be tied to a collective understanding of technological progress within the platform providers.

This would also make a possible manipulation of the requirement by the operator for the purpose of eliminating the employee status more difficult. However, this is outside the scope of the Directive and therefore shifted to the individual Member States in the spirit of implementation.

2. Fairness and Transparency in the Usage of algorithmic management

In the context of platform work, the practice and use of algorithmic management are often resorted to. An algorithmic management system uses smart algorithms and

[81] Stöhr, EuZA 2022, 421.

digital technologies to automate coordination and control tasks in algorithmic management[82] Even though the configuration of relevant management mechanisms and their associated algorithms is often the responsibility of human actors, artificial intelligence (AI) is becoming increasingly important.[83]Algorithms and digital technologies will then be used to implement and communicate the mechanisms. In addition to data and liability issues, discrimination issues in German labor law are particularly controversial. Equal treatment in the workplace is regulated in Germany by the AGG. Due to algorithmic management, there is often a risk that the worker will receive fewer paid jobs than someone who has a different ethnic origin due to his personal characteristics such as ethnic origin. Therefore, algorithmic management can also intervene in the AGG.[84] In addition to the legal implications, such treatment often also has strong personal implications, because the poorer profits expose a platform worker to greater pressure to accept more orders. In addition to algorithmic order distribution, algorithmic management is also used in other areas, such as user profile management or even working condition design. Here the problem of discrimination arises, too. Which, in turn, leads to psychological stress and often to psychosomatic symptoms among platform workers.

This type of management is used in platform work, especially in automatic assessment, shift scheduling, and job allocation. The main problem with this type of people management is the artificial intelligence that gradually takes over the human decisions of the platform workers. Usually, the AI's underlying algorithms and databases are fed with data to train the AI in its specific area of expertise. The AI then makes its decision based on the training data and the conclusions it draws. Where the training data comes from is often unclear, even the use of algorithmic management remains hidden from the workers.[85]

On the one hand, this raises the issue of data protection since it ultimately involves the processing of the personal data of the platform workers. On the other hand, the

[82] Cram, W. A., & Wiener, M. (2020) in Technology-mediated control: Case examples and research directions for the future of organizational control. Communications of the Association for Information Systems, 46 (Article 4), 70-91.
[83] Wiener, M., Cram, W. A., & Benlian, A. in (2021). Algorithmic control and gig workers: A legitimacy perspective of Uber drivers. European Journal of Information Systems, forthcoming.
[84] Scott Waas in Artificial intelligence and Labour law p. 115 ff.
[85] Holubová, Algorithmisches Management, Bewusstsein, Risiken und Reaktion der Sozialpartner, 2022, S. 6.

algorithm is only as effective and efficient as the training data with which it has been trained. In practice, this means that the AI in the management itself corresponds to the training data and is therefore also prone to error.

Because it cannot be excluded that these are partially biased. So, it can happen that the AI discriminates against persons of a certain ethnic group, because of the affiliation, by assigning to the person fewer orders or badly paid orders. It can also be that the orders for the person are reduced to a certain area, which can be considered a dangerous one.[86]

Overall, this raises the question of the liability of the operator for the damage caused by the AI. The question of liability is covered, at least in Germany, by sec. 280 and sec. 823 BGB, if there is a contractual or tortious breach of duty on the part of the operator. However, it remains open whether the platform operator is considered responsible for the algorithmic damage because after all he is only a user of the AI and as such, he has little influence on the decision.

To overcome these ambiguities, the draft standardizes a duty to inform. According to Article 6, the platform operators are obliged to provide a corresponding document on the type and use of algorithmic management. In addition, they are obliged to communicate this with the relevant labour authorities. This is primarily intended to ensure that both the parties concerned, and the supervisory bodies are aware that an algorithm is used in the relevant places.

Due to the information obligation, both parties get the opportunity to learn about the risks associated with AI and its application, which creates general transparency. The data subjects at least have the possibility to object to the decisions of the AI regarding the working conditions. In addition, the processing of sensitive personal data of workers, as well as the general collection of personal data outside the exercise of work is prohibited. The notification to the supervisory authorities also ensures that they can have an influence on the developments within the AI and, in the worst case, ban the use of certain AI. The duty to inform also forms a legal obligation for the German legal system, which can at best construct a claim for damages against the operator in the event of a breach.

[86] Orwat, Diskriminierungsrisiken durch Verwendung von Algorithmen, S. 34 ff.

Much more interesting than the right to information are the monitoring obligations of the systems (Article 7) and the important decisions (Article 8) by humans. The purpose of these is to shift the liability for decisions to human personnel. At the same time, monitoring should prevent algorithms from arbitrarily determining the work of platform workers. After all, at the end of the decision chain, a human will again be the judge of the decision within the platform. In addition, these standards prompt member states to create new prevention and protection measures. However, it remains open whether the directive means monitoring by internal or external bodies here. Should this, similar to data protection monitoring, be left predominantly to internal bodies, the question of the effectiveness of the regulation also arises here.

3. Other Proposals Provisions

In addition to the focus areas already mentioned, the Directive also intends to introduce a governmental educational campaign regarding platform work within the relevant authorities to raise awareness of the problematic nature of platform work. In addition, those affected who use the rights of the directive should enjoy protection against dismissal, and the member states should also promote the exchange between the individual platform workers.

Considering the culture of trade unions and Betriebsräten in Germany, as well as the research and educational work already taking place in Germany, such as the studies of the Friedrich Ebert Foundation on algorithmic management, or the studies of the Bertelsmann Foundation on platform work and its conditions. Thus one can see that the sensitization regarding the platform work in Germany is already in the course. So that also here no special innovation will come by the guideline.

4. EU-proposal – an apparent innovation?

After all the proposal does not represent a particular innovation, at least for Germany, but rather incorporates concepts that already exist in Germany. Overall, the directive is a nice attempt to regulate platform workers' working conditions and problems. However, it misses the reality that the stakes are already being used and yet are not sufficient to address the problems of platform workers. It fails to recognize that protection can only take place through a clear direction in determining the status of workers, because it is precisely this that is unclear in most cases and at the same time

serves to "open up" the legal protection of those affected. It is also unclear to what extent the algorithms can be controlled by external or internal sources. After all, they are based on databases, which are often confusing even for the experts.

At the same time, the guideline constitutes a first attempt to regulate the gray area created by the platform work. It is an important step for the standardization and harmonious regulation of the sector, even if it still needs to be adapted to practice and problems.

VI. Conclusion

Platform work, especially the unclear legal classification of platform workers, is a problem for today's law. Due to digitalization and the increasing awareness of platform work, the problem affects more and more people. Precisely because of the legal uncertainty, these people have to fear for their usual labour law claims. Depending on the assessment of their status, they get the privilege of an employee. Otherwise, they have to hope that the algorithm will be merciful and not close their profile so that they would be dismissed at any moment. They have to hope that the platform algorithms have not been programmed in a discriminatory way and that they pay a fair remuneration. If they have problems with the platform, they have to be lucky to find other platform employees in Germany so that they can take collective action against the infringements. In the process, personal data is often processed for unknown purposes without their knowledge. And all this just to earn a little extra money.

The draft directive addresses the problems Europe-wide for the first time. The directive itself is just a collection of ideas and regulations that have been there before. And all of them have been classified as inadequate. Otherwise, the problems of platform work would not exist in Germany. Nevertheless, the directive is a glimmer of hope for those involved in platform work, because it is now being seen by politicians. But perhaps instead of reusing concepts that have already been tried and tested, the whole area of platform work should be clearly regulated by a regulation throughout Europe. After all, it cannot be ruled out that many platforms operate throughout Europe and it is often unclear according to which member state regulations the relationship between the worker and the platform is to be assessed. Perhaps instead of assessing the status of platform employees, this should be regulated by legislation. This remains open to this extent. One thing is certain, however: the directive itself will

not be sufficient to provide those affected with legal certainty, which is necessary, precisely because of the reusable concepts.

Bibliography

Aschemeyer, Streikrecht: Arbeitskampf bei Gorillas als Präzedenzfall, 2023.

Baethge, Catherine, Bettina/Boberach, Michael/Hoffman, Anke/Wintermann, Ole, „Plattformarbeit in Deutschland - Freie und flexible Arbeit ohne soziale Sicherung“, Studie der Bertelsmann -Stiftung, 2019, (https://www.bertelsmannstiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/Plattform_07lay.pdf, letzter Zugriff: 26.04.2023).

Bundesministerium für Arbeit und Soziales, „Eckpunkte des BMAS- Faire Arbeit in der Plattformökonomie“, (https://www.denkfabrik-bmas.de/fileadmin/Downloads/eckpunkte-faire-plattformarbeit_1_.pdf, letzter Zugriff: 26.04.2023).

Däubler, Wolfgang/Hjort, Jens Peter/Schubert, Michael/Wolmerath, Martin, Arbeitsrecht, 5. Auflage 2022.

Deinert, Olaf, Die heutige Bedeutung des Heimarbeitsgesetzes, RdA 2018, 359.

Eurofound, Employment and working conditions of selected types of platform work, 2018.

European Commission, Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02).

Fuhlrott, Michael, Regulierung der Plattformarbeit: Der EU-Richtlinienentwurf, ArbRAktuell 2022, 191.

Gramano, Elena/Stolzenberg, Eric, Platform work and the notion of ‘employee under the German legal System – possible consequences at a systematic level, Lavoro Diritti Eurpoa Numero 3/2021.

Grobys, Isabell/Panzer-Heemeier, Andrea, Stichwortkommentar Arbeitsrecht, 4. Auflage, 2023.

Hartung, Markus/Klaiber, David, Dienstleistersozialkasse für On-Demand-Worker, ZRP 2021, 78.

Heckelmann, Martin, Crowdworking – eine arbeitsrechtliche Bestandsaufnahme, NZA 2022, 73.

Heckelmann, Martin, Crowdworking- eine arbeitsrechtliche Bestandsaufnahme, NZA 2022, 73.

Hensel, Isabell/Schönefeld, Daniel/Kocher, Eva/Schwarz, Anna/Koch, Jochen, Selbstständige Unselbstständigkeit – Crowdworking zwischen Autonomie und Kontrolle, 2019.

Holubová, Barbora, Algorithmisches Management - Bewusstsein, Risiken und Reaktion der Sozialpartnern, Abschlussbericht der Friedrich- Ebert Stiftung, 2022.

Ifb Redaktion, Kein leichter Weg, 2022.

Ivanova, Mirela/Bronowicka, Joanna/Kocher, Eva/Degner, Anne, Foodora and Deliveroo: The app as a boss?, Control and autonomy in app-based management - the case of food delivery riders, Working Paper Forschungsförderung, no.107, December 2018.

Klebe/Heuschmid, in: Ales/Deinert/Kenner (Hrsg.), Core and Contingent Work in the European Union: A Comparative Analysis, 2017.

Koch, Schaub/Koch, Arbeitsrecht von A-Z, 27. Auflage, 2023.

Kocher, Eva, Gorillas im Arbeitskampf, 2021, https://verfassungsblog.de/gorillas-im-arbeitskampf/, letzter Zugriff: 28.4.2023.

Krause, Rüdiger, in: Carinci/Dorssemont (Hrsg.), Platform Work in Europe: Towards Harmonisation?, 2021.

Krause, Rüdiger, Auf dem Weg zur unionsrechtlichen Regelung von Plattformtätigkeiten, NZA 2022,521.

Krzywdzinski, Martin/Gerber, Christine, Varieties of platform work -Platforms and social inequality in Germany and the United States; Weizenbaum Series, No. 7, 2020.

Linck, Rüdiger/Preis, Ulrich/Schmidt, Ingrid, Kündigungsrecht, 6. Auflage, 2021.

Löwisch, Manfred/Rieble, Volker, Tarifvertragsgesetz, 4. Auflage, 2017.

Mengel, Anja, Compliane und Arbeitsrecht, 2. Auflage, 2023.

Müller- Glöge, Rudi/Preis, Ulrich/Schmidt, Ingrid, Erfurter Kommentar zum BGB, 23. Auflage, 2023.

Müller, Stefan, Homeoffice in der arbeitsrechtlichen Praxis, 3. Auflage, 2022.

Orwat, Carsten, Diskriminierungsrisiken durch Verwendung von Algorithmen, Eine Studie des Institut für Technikfolgenabschätzung und Systemanalyse (ITAS)Karlsruher Institut für Technologie (KIT), 2019.

Preis, Ulrich/Temming, Felipe, Arbeitsrecht – Individualarbeitsrecht, 6. Auflage, 2020.

Säcker, Franz Jürgen/Rixekcer, Roland/Oetker, Hartmut/Limperg, Bettina, Münchener Kommentar zum BGB, 9. Auflage, 2023.

Schneider-Dörr, Andreja, Erwerbsarbeit in der Plattformökonomie, Working Paper der Hans-Böckler Stiftung Nr. 116, 2019 (https://www.boeckler.de/fpdf/HBS-007097/p_fofoe_WP_116_2019.pdf, letzter Zugriff: 28.04.2023).

Schubert, Claudia, Arbeit in der Plattformökonomie, NZA-Beilage 2022, 5.

Stöhr, Alexander, Der arbeitsrechtliche Status von Plattformtätigen nach dem Richtlinienentwurf – Eine kritische Analyse, EuZA 2022, 41.

Waas, *Bernd*, Artificial Intelligence and Labour law, HSI-Working Paper No. 17, 2022.

Waltermann, Raimund, Abhängige Beschäftigung in der digitalisierten Arbeitswelt, NZA 2021, 297.

Wiener, Martin, Algorithmic Control and Gig Workers: A Legitimacy Perspective of Uber Drivers, European Journal of Information Systems, 2021.