

# ITEM Grenseffectenrapportage 2022: Dossier 2: Sociale Zekerheid

Citation for published version (APA):

Montebovi, S., & Weerepas, M. J. G. A. M. (2022). *ITEM Grenseffectenrapportage 2022: Dossier 2: Sociale Zekerheid: Grenseffecten van het EU-voorstel voor een richtlijn inzake platformwerkers (ex ante)*. (2022 ed.) ITEM.

## Document status and date:

Published: 18/11/2022

## Document Version:

Publisher's PDF, also known as Version of record

## Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

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# Cross-Border Impact Assessment 2022

## Dossier 2: Cross-border effects of the EU proposal for a Directive on platform workers (ex-ante)





Maastricht University

# Cross-Border Impact Assessment 2022

Dossier 2: Cross-border effects of the EU proposal for a Directive on platform workers  
(ex-ante)

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The *Institute for Transnational and Euregional cross-border cooperation and Mobility / ITEM* is the pivot of research, counselling, knowledge exchange and training activities with regard to cross-border mobility and cooperation.

ITEM is an initiative of Maastricht University (UM), the Dutch Centre of Expertise on Demographic Changes (NEIMED), Zuyd University of Applied Sciences, the City of Maastricht, the Euregio Meuse-Rhine (EMR), and the Dutch Province of Limburg.



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## Table of Contents

<b>1. Introduction</b> .....	<b>1</b>
<b>1.1 Brief outline and introduction to the topic</b> .....	<b>1</b>
<b>1.2 Research question</b> .....	<b>3</b>
<b>1.3 Concepts</b> .....	<b>3</b>
<b>1.4 Situation Directive proposal</b> .....	<b>6</b>
<b>2. Objectives &amp; Method</b> .....	<b>12</b>
<b>2.1 Effects Today or in the Future: Ex-ante</b> .....	<b>12</b>
<b>2.2 Delineation</b> .....	<b>12</b>
<b>2.3 Research themes, principles, benchmarks and indicators</b> .....	<b>13</b>
2.3.1 Research themes .....	13
2.3.2 Dossier Platform WorkersX: Principles, Benchmarks and Indicators for a Favourable Situation in Border Regions .....	14
<b>3. Evaluation of Theme 1: European Integration</b> .....	<b>16</b>
<b>3.1 Correct employment status</b> .....	<b>16</b>
<b>3.2 Transparency of platform rules and enforcement</b> .....	<b>19</b>
<b>4. Evaluation of Theme 2: Sustainable and socioeconomic development</b> .....	<b>19</b>
<b>4.1 Platform workers</b> .....	<b>20</b>
<b>4.2 The platforms and national governments</b> .....	<b>20</b>
<b>4.3 The Benelux Union</b> .....	<b>21</b>
<b>5. Evaluation of Theme 3: Euregional cohesion</b> .....	<b>22</b>
<b>5.1 Correct employment status</b> .....	<b>22</b>
<b>5.2 Transparency of platform rules and enforcement</b> .....	<b>26</b>
<b>6. Fiscal analysis of the Directive proposal</b> .....	<b>26</b>
<b>6.1 Difficult qualification of labour relationship</b> .....	<b>26</b>
<b>6.2 Qualifying social security contributions and taxes</b> .....	<b>28</b>
<b>6.3 Possible (tax) issues</b> .....	<b>29</b>
<b>7. Conclusions and recommendations from a Euregional perspective</b> .....	<b>31</b>
<b>7.1 Substantive conclusions</b> .....	<b>31</b>
<b>7.2 Prospects</b> .....	<b>33</b>

***The platform economy brings innovation, flexibility, access to the labour market, and it responds to consumer demand. People working through digital labour platforms should benefit from appropriate labour rights and social protection.***<sup>1</sup>

## 1. Introduction

### 1.1 Brief outline and introduction to the topic

On 9 December 2021, the European Commission (EC) presented a proposal for a Directive of the European Parliament and the Council on the Improvement of Working Conditions in Platform Work.<sup>2</sup> The overall aim of this Directive is to improve the working conditions and social rights of people working through labour platforms, while also supporting the opportunities, flexibility and innovation of the platform economy.<sup>3</sup>

This proposed Directive follows, among other things, a European Parliament (EP) resolution of September 2021, in which the EP invited the EC to take action on platform work and, more specifically, to protect those who work through platforms and are therefore often in a precarious legal position.<sup>4</sup>

Principle 5 of the European Pillar of Social Rights (2017) also stresses that "[r]egardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training".<sup>5</sup> It is this European Pillar that has spurred previous initiatives for recommendations and directives.<sup>6</sup>

The problem with platform work – and the main reason for this proposed Directive – lies in the poor working conditions and limited access to social protection for millions of platform workers. A decent working relationship is lacking in many cases; essential factors are absent or deficient.<sup>7</sup> Firstly, decent pay is often lacking, as about 55% of platform workers work below the national minimum wage. Secondly, there is an imbalance between paid and unpaid hours worked as platform workers face a disproportionate amount of unpaid working hours.<sup>8</sup> A third factor that is often problematic is the lack of insurance against occupational accidents and illness. Fourth, it appears that platforms rarely pay unemployment premiums. Finally, to date, court proceedings are usually the only way to report or

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<sup>1</sup> EC, Improving working conditions in platform work, December 2021, 2p.; see also <https://ec.europa.eu/social/BlobServlet?docId=24991&langId=nl>

<sup>2</sup> EC, 9 December 2021, COM(2021) 762 final, 'Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work.'

<sup>3</sup> See COM(2021) 762 final, Explanatory note p.3 and art.1; and also EC, 'Questions and answers: improving working conditions in platform work', 9 December 2021.

<sup>4</sup> See P9\_TA(2021)0385: European Parliament resolution of 16 September 2021 on fair working conditions, rights and social protection for platform workers - new forms of employment linked to digital development (2019/2186(INI))

<sup>5</sup> European Pillar of Social Rights (Gothenburg 2017), principle no.5; [https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles\\_nl](https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_nl)

<sup>6</sup> See also, for example, Recommendation on access to social protection for workers and the self-employed of 9 November 2019 (2019/C 387/01) and Directive on transparent and predictable working conditions in the European Union of 20 June 2019 (2019/1152).

<sup>7</sup> See also, among others, EC, 9 December 2021, SWD(2021) 397 final, p.7-8.

<sup>8</sup> EC, 'Questions and answers: improving working conditions in platform work', 9 December 2021.

change abuses. As a result, large numbers of platform workers cannot rely on the social protection appropriate to the modern labour market.

Since adequate European legislation is lacking, the regulations of the member states sometimes differ (strongly) from each other, and in a large number of cases, platform workers are wrongly classified as self-employed, they are (too) often left with no or limited protection under labour and social security law.<sup>9</sup> This lack of clarity then also affects their tax position.<sup>10</sup> It is estimated that more than 90% of digital labour platforms in the EU qualify the people working for them as self-employed.<sup>11</sup> Moreover, platform work is pre-eminently a form of employment that can take place across borders, for example by performing online work for a company based in another country (i.e. online platform work) or by temporarily becoming, for example, a bicycle courier in another country without moving one's official place of residence (i.e. on-site platform work).

Various figures illustrate the relevance of this dossier on 'improving the social rights of platform workers': The number of platform workers working in the EU is estimated to exceed 28 million in 2021 and could reach 43 million by 2025. Of those 28 million platform workers, the majority – some 22 million – work online.<sup>12</sup> A smaller group of about 6 million work on location through a platform. Of the current 28 million platform workers, 22.5 million are considered to be correctly classified as employees or self-employed workers. However, this also means that 5.5 million are at risk of not having the correct employment status.<sup>13</sup> Besides the numbers of workers involved, the financial stakes are high as well. Indeed, the revenues from the platform economy are said to amount to €20 billion.<sup>14</sup> Hence the great importance of gaining insight into this large group of workers, as well as providing them with sufficient social protection. See also Table 1.

Table 1: Some figures on platform work

Platform work EU	Impact Directive
Platform workers 2021	28 million people
Platform Workers 2025	43 million people
Platform economy revenue 2020	EUR 20 billion
Re-qualification as an employee	1.7-4.1 million people
Confirmation as self-employed	3.8 million people
Increase in annual employee earnings	0-1,800 euro/year

<sup>9</sup> EC, 9 December 2021, COM(2021) 762 final, p.1-5.  
<sup>10</sup> While the proposed Directive does not directly allude to this, labour law, social security law and tax law are inseparable. It does outline that better enforcement of existing labour and tax rules is needed. See EC, 9 December 2021, COM(2021) 762 final, Explanatory Memorandum p.14-15.  
<sup>11</sup> EC, 'Questions and answers: improving working conditions in platform work', 9 December 2021.  
<sup>12</sup> EC, 9 December 2021, SWD(2021) 396 final, p.8-9.  
<sup>13</sup> EC, 9 December 2021, SWD(2021) 397 final, p.1.  
<sup>14</sup> Eures, EU proposes directive to protect platform workers' rights, news article 17 March 2022, see: [https://ec.europa.eu/eures/public/eu-proposes-directive-protect-rights-platform-workers-2022-03-17\\_nl](https://ec.europa.eu/eures/public/eu-proposes-directive-protect-rights-platform-workers-2022-03-17_nl); EC, 9 December 2021, COM(2021) 762 final: p.1; EC, Improving working conditions in platform work, December 2021, 2p.

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Additional costs for platforms	4.5 billion euro/year
Additional collection fisc.&soc.sec. *	€4 billion/year

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*Source: S. Montebovi, generated based on excerpts from EC, 9 December 2021, COM(2021) 762 final, p.1 and p.14-15.*

\* fisc.& soc.sec : fiscal and social-security contributions

As the figures in Table 1 show, the projected effects of this proposed Directive are very diverse. Not only will it affect workers (employees and self-employed), platforms and their clients, but also the economy and the implementing bodies responsible for collecting social and fiscal contributions. The comprehensive impact assessment states – in a short paragraph – that there is much uncertainty about the figures and projected impacts. Due to a lack of accurate figures and comparable data, this proposed Directive therefore appears to rely on a lot of assumptions and estimates.<sup>15</sup> In the following sections, its targets and expected impacts are discussed further.

## 1.2 Research question

Platform work has become part of our labour market, and it will increase in the coming years in terms of the number of employees and turnover. However, legislation at Member State and European level is still insufficiently tailored to the platform economy. As a result, many platform workers are wrongly classified, making them false self-employed workers rather than employees, meaning that labour platforms (need to) arrange little to no protection for those workers. Apart from these false self-employed workers and regular employees, there are, of course, also truly self-employed platform workers in the labour market. Some of them have a weak labour-market position while others have more control over their income and protection thanks to their expertise or their strong labour-market position. This imbalance between the rights and obligations of workers and those of platforms has led to the proposal for a Directive on improving the working conditions and social rights of platform workers. The central question in this dossier is:

*What might/will be the impact of the rules pursuant to the December 2021 proposal for a Directive on improving the working conditions in cross-border platform work?*

## 1.3 Concepts

When introducing this research topic, it is also appropriate to define a number of terms and further situate the proposed Directive. We will start by defining the terms (1.3) and then discuss the proposed Directive proposal in more detail (1.4).

A comprehensive European study from 2017 shows that defining platform work is not straightforward. Indeed, multiple perspectives are possible, and country experiences also play a role in delineating and

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<sup>15</sup> EC, 9 December 2021, SWD(2021) 397 final, p.33 and Annex 5.

defining the term.<sup>16</sup> For some, platform labour is equivalent to freelance work for instance, whereas others want to make a further distinction between the gig economy – where the work is split into chunks/gigs and performed – and the sharing economy – where goods or services are shared. Still others use Uberisation, for example, as a synonym for the gig economy. In short, a single legal definition that is globally accepted is lacking. In the literature, the definitions vary widely too.<sup>17</sup> However, since December 2021, a number of definitions have been included in Article 2 of the proposed Directive that apply for the purposes of that Directive. Whether those definitions are indeed obvious and indisputable remains to be seen after the eventual implementation of this proposed Directive. We outline below the concepts currently used in the labour market, in the literature and in policy making.

## Platform work

*Platform work* is one of the new forms of work that has entered our labour markets and is still growing.<sup>18</sup> Depending on the context and the author, different descriptions are possible. A study by Eurofound on platform work (2018) gives a brief overview of the alternative terms in use in 18 EU Member States. It shows, for example, that a majority of member states use the terms 'sharing economy', 'platform economy' and 'gig economy' interchangeably, whereas in other countries, the terms 'on-demand economy', 'crowd employment' or 'collaborative economy' are more common.<sup>19</sup>

The definition used by EURES is concise and reads as follows:<sup>20</sup>

'Platform work is a new form of organising paid work through digital platforms.'

Arets describes the 'gig economy' – which he uses as an alternative term for platform work – as follows:

'Making skills temporarily available to others, either individuals or companies, through a digital layer.'<sup>21</sup>

Eurofound defines platform work as follows:<sup>22</sup>

'Platform work is an employment form in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services in exchange for payment.'

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<sup>16</sup> See a European study on the different definitions: EP, *The Social Protection of Workers in the Platform Economy*, by C. Forde, M. Stuart, S. Joyce, L. Oliver, D. Valizade, G. Alberti, K. Hardy, V. Trappmann, Ch. Umney & C. Carson, November 2017, pp.25-26.

<sup>17</sup> H. Bennaars, 'De kwalificatie van de platformwerker: de gezagsverhouding naar een nieuw 'level'?', in: M.S. Houwerzijl e.a. (red.), *Platformisering, algoritmisering en sociale bescherming*, Deventer: Kluwer 2021, p.36.

<sup>18</sup> Other forms of work where growth is expected include voucher-based work, job-sharing, employee-sharing, ICT-mobile work. See: Eurofound, *New forms of employment: 2020 update*, December 2020.

[https://www.eurofound.europa.eu/sites/default/files/platform\\_work\\_infographic\\_27042021.pdf](https://www.eurofound.europa.eu/sites/default/files/platform_work_infographic_27042021.pdf)

<sup>19</sup> Eurofound, *Employment and working conditions of selected types of platform work*, 2018, p.10.

<sup>20</sup> Eures, news article: 'EU proposes directive to protect the rights of platform workers', 17 March 2022 via [https://eures.ec.europa.eu/eu-proposes-directive-protect-rights-platform-workers-2022-03-17\\_en](https://eures.ec.europa.eu/eu-proposes-directive-protect-rights-platform-workers-2022-03-17_en).

<sup>21</sup> M. Arets, *Platformrevolutie. Van Amazon tot Zalando, de impact van platformen op hoe wij werken en leven*, Boom/Management Impact, 2020, p.28-29. Own translation.

<sup>22</sup> Eurofound, 29 June 2018, Platform work, <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/platform-work> or

[https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef18001en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef18001en.pdf), p.9.



According to Eurofound, the key features of platform work are:<sup>23</sup>

- paid work is organised through online platforms
- three parties are involved: the online platform, the worker and the client
- work is contracted out
- jobs are broken down into tasks
- services are provided on demand.

Platform work can be done online or offline (i.e. in person, on location). According to Eurofound, the following tasks are considered the most common:<sup>24</sup>

- professional tasks (for example, software development or graphic design)
- transport (for example, person transport or food delivery)
- household tasks (for example, cleaning)
- micro-tasks (for example, tagging images on web pages).

Yet another description of platform work follows from a 2020 report commissioned by the EC and carried out by CEPS, EFTHEIA and HIVA-KU Leuven. It defines platform work as follows:

'Digitalisation can drive down transactions costs, which allows for smaller jobs (units of work) to be intermediated separately. When the intermediation of these paid jobs between the worker and the client is performed by an online platform, it is considered platform work.'<sup>25</sup>

### **Platform worker**

*Platform workers*, sometimes called platform labourers or platform employees, are persons employed through a platform in exchange for money. As such, they are one of the three parties involved in platform work: the platform, the client/customer/user and the platform worker.<sup>26</sup> The parties are connected through an algorithm that offers, distributes and processes the work (also called the job), which can be performed offline or online. Thus, a platform worker is a person who provides the work/service/product to a customer or client, through a mediating platform controlled by an algorithm.

### **Labour Platform**

A *labour platform* is a business model that enables transactions between customers and workers through the use of a digital process, i.e. the algorithm. The job offered online via the platform can be performed either online or on location.

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<sup>23</sup> Eurofound, 29 June 2018, Platform work, <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/platform-work> or [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef18001en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef18001en.pdf), p.9.

<sup>24</sup> Eurofound, 29 June 2018, Platform work, <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/platform-work>

<sup>25</sup> EC, *Study to gather evidence on the working conditions of platform workers, Final Report, 13 March 2020, CEPS, EFTHEIA and HIVA-KU Leuven*, p.225.

<sup>26</sup> H. Bennaars, 'De kwalificatie van de platformwerker: de gezagsverhouding naar een nieuw 'level'?', in: M.S. Houwerzijl e.a. (red.), *Platfomisering, algoritmisering en sociale bescherming*, Deventer: Kluwer 2021, pp.38-39.

Arets calls platforms two-sided marketplaces through which supply and demand flow. What makes a platform so unique is the interaction between supply and demand, without any ownership.<sup>27</sup> At the same time, he warns against platforms' lack of responsibility as market masters.<sup>28</sup>

It is widely recognised that labour platforms can have three functions: First, they can serve as a digital noticeboard (e.g. Werkspot). In this role, little to no labour-law issues come into play between platform and worker.<sup>29</sup> Secondly, the platform can assume the role of intermediary (e.g. Temper, Charly Cares, Helping) or, thirdly, that of employer/customer (e.g. Deliveroo, Uber, Foodora). The latter two roles do, of course, involve labour-law issues.

#### 1.4 Situation Directive proposal

##### *Is an EU scheme necessary?*

The above descriptions of the terms 'platform work', 'platform worker' and 'labour platform' set the context for the international dossier on platform work and the desire to better protect platform workers.

However, prior to the further analysis of the proposal for a Directive, the following observation should be made: there should be no need for new regulations for the additional protection of platform workers if these workers were classified as 'regular' employees and thus subject to existing legislation, both national and European. This is also what Verhulp, Professor of Labour Law at the University of Amsterdam, explains in a short video message.<sup>30</sup> Indeed, the crux with respect to platform labour lies precisely in the employment status of platform workers: platforms often wrongly employ them as self-employed workers, making them fall outside the legal labour and social security protection available to employees.<sup>31</sup> Taking the same critical stance, Pennings, Professor of Social Law at Utrecht University, also indicates that the real problem with platform work may be not so much the inability to regulate it at Member State level, but rather an unwillingness to do so (sufficiently).<sup>32</sup>

The European Commission explained the concept of platform work in its 2016 European Agenda for the Collaborative Economy<sup>33</sup>, in which it stressed that 'guidance' is needed for member states, now that a patchwork of regulations is emerging in member states, all dealing with this new type of economy. The sharing economy has even been labelled 'the new European unicorn'. Commission Vice-President Jyrki Katainen, responsible for Jobs, Growth, Investment and Competition declared that:<sup>34</sup>

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<sup>27</sup> M. Arets, *Platformrevolutie. Van Amazon tot Zalando, de impact van platformen op hoe wij werken en leven*, Boom/Management Impact, 2020, p.35 and p.28.

<sup>28</sup> M. Arets, *Platformrevolutie. Van Amazon tot Zalando, de impact van platformen op hoe wij werken en leven*, Boom/Management Impact, 2020, p.29.

<sup>29</sup> H. Bennaars 2021, p.37.

<sup>30</sup> Search on youtube for: 'Professor Evert Verhulp on Policy Challenges in the Platform Economy' - 2021 – Reshaping Work.

<sup>31</sup> See also P. Schoukens, A. Barrio & S. Montebovi, 'Social protection of non-standard workers: the case of platform work', in: B. Devolder (ed.), *The Platform Economy. Unravelling the Legal Status of Online Intermediaries*, Cambridge-Antwerp-Chicago: Intersentia, pp. 227-258.

<sup>32</sup> F. Pennings, 'Bescherming van platformwerkers: door Europa of door lidstaten?', *TRA* 2022/19, p.1.

<sup>33</sup> EC, Press Release, 'A European agenda for the collaborative economy', Brussels, 2 June 2016, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_2001](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2001)

<sup>34</sup> EC, Press release, 'A European agenda for the collaborative economy', Brussels, 2 June 2016, p.1.

"[a] competitive European economy requires innovation, be it in the area of products or services. Europe's next unicorn could stem from the collaborative economy. Our role is to encourage a regulatory environment that allows new business models to develop while protecting consumers and ensuring fair taxation and employment conditions."

The European Agenda for the Collaborative Economy (2016) thus encourages the monitoring of developments in the platform economy. This includes, on the one hand, attention for opportunities, innovation, economic growth and competition but, on the other, concerns about working conditions and the protection of workers and consumers.<sup>35</sup> These positive and negative aspects of the platform economy were later also included in the European Pillar of Social Rights (2017) and eventually in this proposal for a Directive (2021).

Legislative action through a common EU legal framework, as supported by this proposed Directive, thus seems necessary, for various underlying reasons:

First, we may assume that, in the short term, it is unlikely that all EU member states will indeed award all platform workers who meet the authority criterion the legal status of employees based on their national legislations.

And, secondly, even if not all platform workers are indeed employees, the legal distinction (again at the national level) between employee and self-employed worker is not to be expected, in the short term, to be so clear that a qualification as either 'employee' or 'self-employed worker' will always be uncontested.

Third, platforms also need legal clarity in carrying out their activities. Fourth, due to the digital nature of platform work, cross-border aspects do not constitute an obstacle to the distribution and performance of work in this type of employment relationship. Therefore the EC believes that it is neither necessary nor useful to wait for national initiatives and solutions as it would always have platforms looking for those Member States with the most favourable regulations.

In the absence of such a clear legal qualification, judicial intervention has been invoked in recent years. In the absence of regulation itself or the enforcement of regulations, many EU member states, as well as the United States and the United Kingdom, have seen more court rulings in favour of employee status for platform workers than of the self-employed status.<sup>36</sup> This means that judges usually rule that these workers are not independent contractors but employees, and the platforms are considered employers rather than principals.<sup>37</sup> More than 100 court rulings and 15 administrative decisions on the employment status of platform workers had been issued in the EU by the end of 2021, with many court cases still pending.<sup>38</sup>

The increase in litigation on platform work is also evident from the report *Study to gather evidence on the working conditions of platform workers*, which stated that 16 of the 30 countries surveyed had case law on platform work,<sup>39</sup> relating to either employment status and corresponding rights, competition

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<sup>35</sup> Eurofound, Employment and working conditions of selected types of platform work, summary, p.1

<sup>36</sup> At an international level, this is certainly true for the Uber and Deliveroo platforms. Country-specific cases for smaller platforms or nationally operating platforms confirm this trend (e.g. Helping in the Netherlands).

<sup>37</sup> It should be noted that this mainly applies to platform work on location (i.e. offline).

<sup>38</sup> EC, 'Questions and answers: improving the working conditions of platform workers', 9 December 2021; EC, 9 December 2021, SWD(2021) 396 final, p.10.

<sup>39</sup> Zachary Kilhoffer et al, Study to gather evidence on the working conditions of platform workers, 2020, p. 18

law, licensing requirements, taxation or data protection.<sup>40</sup> The increase in the number of court cases involving platform work could be an indication that the current regulations are insufficiently tailored to this phenomenon.

The most appropriate EU instrument to (help) regulate platform work at European level at this moment would be a Directive, the EC decided.<sup>41</sup> If adopted, Member States will have two years to transpose the Directive into national legislation, including the opportunity to add local accents within the minimum framework set out by the Directive.

### ***Character of platform work?***

That platform work – as a 'new' form of work – requires a different legislative framework from existing regulations is well defensible, in that current legislation, both national and European, is still mainly geared to standard workers, i.e. employees in full-time, indefinite employment with one employer.<sup>42</sup> While this standard employment relationship is still considered normative in the existing legislative frameworks, it obviously does not adequately reflect the situation of the platform worker.

Platform work performed outside the framework of an employer-employee relationship – as has been the case in the majority of cases so far – is seen as a typical example of non-standard work because the classic elements of a standard employment relationship are missing: workers are not instructed by an employer, for example, but by an algorithm, or remuneration does not take the form of a salary paid at fixed intervals but is provided per task.

Furthermore, the relationship between the platform worker and the platform is less permanent than a standard employment relationship; at least, in a large number of cases, that is the sort of relationship sought by one party – and sometimes both parties. In most cases, this implies working according to an irregular pattern; combining multiple clients; alternating between short-term and long-term jobs; (in theory) enjoying the freedom to quote for and accept jobs; and having fewer rights and obligations than in a classic standard employment relationship, where employer and employee can rely on mutual commitments.

The question to what extent platform workers are indeed 'new' workers and/or platform work does indeed differ so much from 'regular' work is not addressed here. Indeed, a mixed perspective on the issue is possible: on the one hand, platform workers are simply workers who do not (yet) fit into the classic system of either being an employee or a self-employed person; on the other hand, they are workers on the labour market who work through a digital tool to a greater extent than the classic employee or self-employed person for whom the legislation was written decades ago. In other words, the work done within the platform economy is not that new or different from the work carried out in

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<sup>40</sup> Zachary Kilhoffer et al, Study to gather evidence on the working conditions of platform workers, 2020, p. 100.

<sup>41</sup> For an elaboration on the legal basis and the subsidiarity test, see EC, 9 December 2021, SWD(2021) 396 final, p.16-17, among others.

<sup>42</sup> K.V.W. Stone & H. Arthurs, 'The transformation of employment regimes: a worldwide challenge', in: K.V.W. Stone and H. Arthurs (eds.), *Rethinking workplace regulation: Beyond the standard contract of employment*, New York: Russell Sage Foundation 2013. See also: EC, *Study to gather evidence on the working conditions of platform workers, Final Report, 13 March 2020*, CEPS, EFTHEIA and HIVA-KU Leuven, p.35.



the past century. What differs is the way the work is distributed and performed.<sup>43</sup> There is a digital shell around it: 'the "online" mentality and way of working are projected onto the "offline" world.'<sup>44</sup>

### ***Cross-border labour market***

What should also be noted is that platform work in a cross-border context adds to the complexity of modern, already complex, work situations. Indeed, non-standard work situations, such as *platform work*, are already challenging labour law, social security law and tax law much more than standard work situations do. *Cross-border* platform work is even more difficult to fit into existing legislative frameworks. This is due to a combination of factors, the most important of which are listed here: Not only are multiple parties (i.e. the client, the platform and the worker) involved, the use of digital technology and algorithms, as well as the lack of information exchange between countries, are additional factors that complicate the legal regulation of cross-border platform work. This increases the risk of fraud, abuse, undeclared work and a lack of rights.<sup>45</sup> Of course, the fact that platform workers (may) work simultaneously through multiple platforms, as well as the fact that platforms (may) operate in multiple countries, must also be taken into account. In short, cross-border platform work is a "multi-faceted and highly dynamic phenomenon" that twists and turns and is difficult to fathom and predict. Cross-border platform work thus requires legislators – at both national and European levels – to be creative, smart and open-minded in order to mould it into legislative frameworks.

### ***Advantages and disadvantages of platform work***

The advantages of platform work are many, both for the workers and the platforms: flexibility, easy access to the labour market (including for vulnerable people, who otherwise would not be able to enter or participate in the labour market so easily), innovation, rapid matching of supply and demand, ...

Besides these benefits, there are also negative effects and risks associated with platform work.<sup>46</sup> These include the unclear status of the workers, limited health and safety protection at work (e.g. on the road or behind one's PC at home), low compensation, lack of training, lack of collectivity among workers<sup>47</sup>, the potential erosion of existing rights and obligations derived from labour and social security law, etc. Our main focus will be on the latter effect.

These negative impacts and challenges are the main drivers for action at EU level. This is literally evident from the Directive proposed in December 2021, as well as from recent reports about platform work. Indeed, there are still too many shortcomings regarding platform work in just about all Member

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<sup>43</sup> See, for example, Social Economic Council of the Netherlands (SER) Verkenning 20/09; see also B. Devolder (ed.), *The Platform Economy. Unravelling the Legal Status of Online Intermediaries*, Cambridge-Antwerp-Chicago: Intersentia,

<sup>44</sup> M. Arets, *Platformrevolutie. Van Amazon tot Zalando, de impact van platformen op hoe wij werken en leven*, Boom/Management Impact, 2020, p.29.

<sup>45</sup> EC, *Study to gather evidence on the working conditions of platform workers, Final Report, 13 March 2020, CEPS, EFTHEIA and HIVA-KU Leuven*, p.94.

<sup>46</sup> See, inter alia, EC, 9 December 2021, COM(2021) 762 final. In Working Paper 70 of 21 June 2022 (A global analysis of worker protest in digital labour platforms), the ILO also confirms that the four main reasons for platform workers to protest are money, work(er) status, health and safety. See [www.ilo.org](http://www.ilo.org).

<sup>47</sup> However, very recently, in a communication dated 29 September 2022, the EC provided guidelines related to collective agreements for solo self-employed persons. See EC, 29 September 2022, C(2022) 6846 final.

States and at European level.<sup>48</sup> Some aspects that definitely still require (better) regulation include: working hours, compensation, representation, workplace, employer determination and worker-status determination.<sup>49</sup> A number of actions are thus demanded from platforms towards better protection of workers.

### ***One general goal and three specific goals***

The **overall goal** of the proposed Directive – improving the working conditions and social rights of platform workers while supporting the sustainable growth of digital-labour platforms in the EU – is pursued through **three specific objectives**<sup>50</sup> :

- 1) To determine the **correct employment status** of platform workers: are they employees or self-employed? A correct qualification of their employment relationships means, on the one hand, that more workers in the EU will obtain the status of employees and thus all the rights associated with that status. On the other hand, other workers will become genuinely self-employed as some platforms will be adjusting their business models.<sup>51</sup> If the European Commission gets its way, this Directive will mean, for example, that specifically drivers, cleaners and meal deliverers within the EU who are currently self-employed may soon call themselves employees, with all the associated rights. In short, false self-employment through digital platforms will be tackled.
- 2) To provide more rights and achieve more transparency and accountability in **algorithmic management**. This offers platform workers greater insight into pricing and how they are assigned (or not assigned) to tasks. Also, as a result, they will be able to challenge decisions regarding their working conditions.<sup>52</sup>
- 3) To improve **traceability and enforcement** in platform work, including in cross-border situations. This is achieved by asking platforms to declare work in the country of performance and make certain data on platform workers and working conditions available to national authorities.<sup>53</sup>

A fourth specific goal is cited separately: the EC also wants to strengthen **collective bargaining and social dialogue**. The proposed Directive therefore also stresses the importance of proper information for and consultation of workers and their representatives on algorithmic management decisions. The proposal indicates, particularly in Article 9, that a social dialogue on algorithmic management should be promoted in this way.<sup>54</sup>

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<sup>48</sup> For more information on the challenges at national and European levels, see also EC report, *Study to gather evidence on the working conditions of platform workers, Final Report, 13 March 2020, CEPS, EFTHEIA and HIVA-KU Leuven*, chapter 7.

<sup>49</sup> For an overview of the aspects in the different EU member states, see also EC report, *Study to gather evidence on the working conditions of platform workers, Final Report, 13 March 2020, CEPS, EFTHEIA and HIVA-KU Leuven*, Chapter 4 and p.223-224.

<sup>50</sup> For these three specific objectives, see: art.1 & Explanatory Memorandum p.3-4 of COM(2021) 762 final or EC, SWD(2021) 396 final, p.19ff.

<sup>51</sup> Eures, *EU proposes directive to protect rights of platform workers*, news article 17 March 2022, see: [https://ec.europa.eu/eures/public/eu-proposes-directive-protect-rights-platform-workers-2022-03-17\\_nl](https://ec.europa.eu/eures/public/eu-proposes-directive-protect-rights-platform-workers-2022-03-17_nl)

<sup>52</sup> EC, 'Questions and answers: improving working conditions for platform workers', 9 December 2021.

<sup>53</sup> EC, 'Questions and answers: improving the working conditions of platform workers', 9 December 2021; also: EC, SWD(2021) 396 final, p.18.

<sup>54</sup> Very recently, in a communication of 29 September 2022, the EC provided guidelines related to collective agreements for solo self-employed persons. See EC, 29 September 2022, C(2022) 6846 final.

Although the proposal mainly focuses on labour and social rights law, the reviews in sections 3, 4 and 5 are followed by a consideration of possible fiscal implications. After all, the taxation of income obtained from platform work could be problematic.<sup>55</sup>

In summary, the proposed Directive for the improvement of working conditions in platform work complements the EU acquis and fits the rapidly changing world of work. The new challenges that platform work presents to both employees and self-employed workers, clients, the labour market, national authorities, cross-border relations and the platforms themselves have spurred this initiative by the European Commission.

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<sup>55</sup> For example, in Denmark, taxing income acquired from platform work has proven challenging. See Zachary Kilhoffer et al, Study to gather evidence on the working conditions of platform workers, 2020, p. 67.

## 2. Objectives & Method

### 2.1 Effects Today or in the Future: Ex-ante

This cross-border impact assessment has an ex-ante character, given that the analysis focuses on the proposal for a European Directive, dated December 2021, on improving working conditions in platform work.

If the proposal indeed turns into a Directive, it will affect a large group of people working in the EU.<sup>56</sup> As mentioned above (under 1.4), specific objectives are being pursued alongside its general aim.

If the first specific target – achieving correct employment status – is met, this will lead to the re-qualification of between 1.72 million and 4.1 million workers as ‘employees’, around 2.35 million of whom are active on-site and 1.75 million online.<sup>57</sup> It will give these new workers access to the national and EU labour acquis. Also, those who currently earn less than the minimum wage will collectively earn up to EUR 484 million more per year, amounting to an average annual wage increase of EUR 121 (ranging from EUR 0 to EUR 1,800 per person per year).

For the **self-employed**, this directive would lead to confirmation of their self-employed status for 3.8 million people, giving them more autonomy and flexibility and making them less dependent on platforms as 'employers'.

If the second specific objective – greater fairness, transparency and accountability in algorithmic management across platforms – is also achieved, it could lead to improved working conditions for more than 28 million people, both employees and self-employed workers, as well as greater transparency regarding the use of artificial intelligence in the workplace.<sup>58</sup>

The third specific objective – improving the transparency and traceability of platform work, including in cross-border situations – should lead to better enforcement by national authorities of existing labour, tax and social-security legislation.

### 2.2 Delineation

In this dossier, the term 'border region' is used broadly. It is not linked to certain Euregions or other border regions but applies to Dutch territories that face or may face cross-border traffic. The 'border region', as referred to here, thus includes Dutch territories in which any form of intra-European cross-border work activity takes place. As such, the term 'border region' applies to the classic cross-border workers who commute at least weekly as well as to those workers who, for example, combine living and/or working in the Netherlands with a (digital) job in another EU member state.

The second delineation concerns the group of workers studied in this analysis, i.e. platform workers. Platform work is pre-eminently a form of work that is not necessarily tied to physical places of work.

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<sup>56</sup> EC, 9 December 2021, COM(2021) 762 final, Explanatory note p.14.

<sup>57</sup> EC, 9 December 2021, COM(2021) 762 final, Explanatory note p.14.

<sup>58</sup> EC, 9 December 2021, COM(2021) 762 final, Explanatory note p.14.



Of course, some of the platform workers are physically mobile for work (e.g. taxi drivers, bicycle couriers, cleaners, and catering staff, whose work is chosen or designated via an algorithmic app), so they still have physical workplaces. For another group of platform workers, however, this physical travel to a place of work at a client's or a principal's is not necessary because the work exclusively takes place online (e.g. IT, design, accountancy, click work). Together, these two groups of platform workers form the group of workers addressed in this cross-border impact assessment. Consisting of around 28 million people across Europe, this is a (potentially) large group of people.

The third demarcation in this dossier concerns the research subject: the consequences of this Directive for the social protection and taxation of platform workers. Here, we should mention that the fiscal aspects, although of great importance to platform workers, are only briefly addressed in the Directive and are therefore also discussed concisely in this dossier. Since our focus is on aspects of social security and labour law, we have decided to leave aside the discussion of Chapter III of the proposed Directive on algorithmic management (i.e. the second specific objective, cf. '1. Introduction').

## **2.3 Research themes, principles, benchmarks and indicators**

### **2.3.1 Research themes**

The ITEM cross-border impact assessment dossiers are organised around the following three themes: European integration, sustainable development/socio-economic development and Euregional cohesion.

Under Theme 1, European integration, the cross-border effects on workers, the self-employed, digital labour platforms, other companies and Member States are studied. All these parties are named, whether or not explicitly, in the Explanatory Memorandum to the proposed Directive and thus deserve further investigation. We do so using the items 'correct employment status' and 'transparency of platform rules and enforcement', the Directive's first and third specific objectives, respectively.

Theme 2, sustainable development, is also mentioned by the EC as a spearhead of the proposed Directive because platform work can be a permanent form of work in the future labour market and can moreover take place across borders due to its digital nature. This theme relies heavily on quantitative data. While the EU does present data in the Explanatory Memorandum to the proposed Directive as well as in other documents, it indicates that these data are estimates. Though understandable in part, the wide range of these estimates is remarkable. For example, the total group of platform workers is estimated at 28 million people in 2021 and projected to be 43 million in 2025, and the number of people who ought to be re-qualified as 'employees' according to the Directive criteria is estimated between 1.72 million and 4.1 million.<sup>59</sup>

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<sup>59</sup> EC, 9 December 2021, COM(2021) 762 final, Explanatory note p. 1 and p. 14.

Theme 3, Euregional cohesion, covers the cooperation of public authorities, citizens and companies from a Euregional or European perspective. It is interesting to investigate whether entrepreneurs and workers on both sides of the border will grow closer as a result of the proposed Directive or whether it will have the exact opposite effect and make platform work less attractive in border regions. Again, the analysis is linked to the items 'correct employment status' and 'transparency of platform rules and enforcement', i.e. the Directive's first and third specific objectives, respectively.

### 2.3.2 Dossier Platform WorkersX: Principles, Benchmarks and Indicators for a Favourable Situation in Border Regions

Theme	Principles	Benchmark	Indicators
<b>European integration</b>	<ul style="list-style-type: none"> <li>• Welfare of EU peoples <ul style="list-style-type: none"> <li>○ art.3(1) TEU<sup>60</sup></li> </ul> </li> <li>• Right to healthy, safe and dignified working conditions <ul style="list-style-type: none"> <li>○ art.31 EU Charter of Fundamental Rights</li> </ul> </li> <li>• Employees' right to information and consultation <ul style="list-style-type: none"> <li>○ art. 27 EU Charter of Fundamental Rights</li> </ul> </li> <li>• Right to protection of personal data <ul style="list-style-type: none"> <li>○ art.8 EU Charter of Fundamental Rights</li> <li>○ art.16(2) TFEU</li> </ul> </li> <li>• Freedom of entrepreneurship <ul style="list-style-type: none"> <li>○ art.16 EU Charter of Fundamental Rights</li> </ul> </li> <li>• Free movement of services art.56 TFEU<sup>61</sup></li> <li>• Free movement of persons <ul style="list-style-type: none"> <li>○ article 3(2) TEU</li> </ul> </li> <li>• Free movement of workers <ul style="list-style-type: none"> <li>○ art.45(1) TFEU</li> </ul> </li> <li>• All workers entitled to fair and equal treatment regarding working conditions, social protection and training <ul style="list-style-type: none"> <li>○ principle 5 European Pillar of Social Rights</li> </ul> </li> <li>• Employees and false self-employed workers under EU labour law (EU minimum standards <i>acquis</i>) <ul style="list-style-type: none"> <li>○ art.153 TFEU</li> <li>○ Eur.Court of Justice:</li> </ul> </li> </ul>	<ol style="list-style-type: none"> <li>1) <i>Comparison of problems platform work in national work situation with platform work in cross-border work situations</i></li> <li>2) <i>Comparison of problems standard workers (full-time employees) with problems platform workers</i></li> </ol>	<ol style="list-style-type: none"> <li>1) platform workers are correctly qualified in terms of employment status: they are either employees or self-employed workers; they are aware of their status; and thus gain access to applicable labour rights and social protection</li> <li>2) the rules for automated monitoring and decision-making in platform work are clear.</li> <li>3) transparency and traceability of platform developments, including in cross-border situations, as well as enforcement</li> </ol>

<sup>60</sup> TEU: Treaty on the European Union.

<sup>61</sup> TFEU: Treaty on the Functioning of the European Union.

	C-256/01 (Allonby) and C-413/13 (FNV Kiem)		
<b>Sustainable development/ Socio-economic development</b>	<ul style="list-style-type: none"> <li>• Sustainable development of Europe &amp; social market economy with high competitiveness &amp; aiming at full employment and social progress <ul style="list-style-type: none"> <li>○ art.3(3) TEU</li> <li>○ art.151 TEU</li> </ul> </li> <li>• Right to collective bargaining <ul style="list-style-type: none"> <li>○ ILO Convention 98, supplemented by 135 and OECD Guidelines V, art.8</li> </ul> </li> </ul>		Directive affects 28 million (2021) and 43 million platform workers (2025)
<b>Euroregional cohesion</b>	<ul style="list-style-type: none"> <li>• Economic, social and territorial cohesion, and solidarity between member states <ul style="list-style-type: none"> <li>○ art.3(3) TEU</li> </ul> </li> <li>• Loyal cooperation <ul style="list-style-type: none"> <li>○ art.4(3) TEU</li> </ul> </li> <li>• Free movement of persons <ul style="list-style-type: none"> <li>○ art.3(2) TEU and art.45 TFEU</li> </ul> </li> <li>• Internal market <ul style="list-style-type: none"> <li>○ art.3(3) TEU</li> </ul> </li> <li>• Free movement of services <ul style="list-style-type: none"> <li>○ art.56 TFEU</li> </ul> </li> </ul>	•	Possible consequences: <ol style="list-style-type: none"> <li>1) Fewer activities in border areas due to the Directive</li> <li>2) No/fewer platform companies in the Euregion, so as to avoid problems with their workers</li> <li>3) Certain platform companies (or headquarters) move their operations to other member states</li> <li>4) Other platform companies welcome the departure of their competitors from the region</li> </ol>

### 3. Evaluation of Theme 1: European Integration

Under Theme 1, European integration, the expected cross-border effects of the proposed Directive are studied for the following stakeholders: employees, self-employed workers, digital labour platforms, other companies and Member States.<sup>62</sup> As indicated in 2.3.1, the analysis is performed using two items: 'correct employment status' and 'transparency of platform rules'.

#### 3.1 Correct employment status

As Article 4 of the proposed Directive shows, one of the Directive's main goals is to achieve clarity concerning the employment status of platform workers. On the one hand, this should prevent false self-employment, while, on the other hand, also strengthening the positions of genuine employees (by offering them more protection and clarity) and genuine self-employed workers (by allowing them more entrepreneurship and freedom).

##### **Employees and self-employed workers**

The main consequence for employees and self-employed workers sought by Article 4 of this proposed Directive is the establishment of a clear employment status.

For the majority of platform workers, this would mean a re-qualification of their status as 'employees', and for some platform workers, it would mean confirmation of their self-employed status (see 1. and 2.1). Thus, both groups of workers would benefit from achieving clarity about their status.

We would like to note that, in addition to these two groups of workers, another group is sometimes distinguished: workers who combine characteristics of an employee and a self-employed person. In the new labour market of which the sharing economy is a part, platform workers fit into this third category according to some.<sup>63</sup> The debate about a possible third employment status has not yet produced any regulations along these lines however. The proposed Directive does not introduce a new category either but adheres to the two existing statuses of 'employee' or 'self-employed person'.

It is precisely this lack, to date, of a clear status of either being an employee or being self-employed which raises many questions about working conditions, working hours, health and safety issues, sick leave, unemployment, pension accrual, health insurance and taxation.

Article 4(1) of the proposed directive reads as follows:

'The contractual relationship between a digital labour platform that controls, within the meaning of paragraph 2, the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship. To that

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<sup>62</sup> These parties are mentioned in the Explanatory Memorandum to the proposed Directive.

<sup>63</sup> See, inter alia, European Committee of the Regions, 'Opinion, Platform work - local and regional regulatory challenges', 4-5 December 2019, SEDEC-VI/051, p.6.



effect, Member States shall establish a framework of measures, in accordance with their national legal and judicial systems.’

Article 4(2) states that *control over the performance of work* applies if at least two of the five criteria listed there are met. If so, it must be decided that an employee-employer relationship exists between the platform and the worker. The five elements that are tested before the start of the employment relationship are: the platform determines the remuneration; obliges the worker to behave and look a certain way; supervises the work; limits the freedom to organise/accept/reject the work; and limits the possibility of building one's own client base or working for third parties.

If all member states are made to adhere to these criteria, this will indeed promote European integration. Nevertheless, the list of the five criteria has also met with criticism. The European Economic and Social Committee (EESC), for example, stresses that these qualification criteria 'do not reflect the dynamic and rapid evolution of the digital market and would need to be constantly updated, making them vague and ambiguous'.<sup>64</sup> The EESC believes that the criteria set out in Article 4 place too much emphasis on the degree of control the platform has over the platform worker's work, which does not sufficiently adjust for the imbalance of power. Furthermore, the EESC indicates that the constantly changing environment makes it too easy for platforms to circumvent these criteria. Therefore, the EESC recommends retaining only one criterion for the legal presumption of an employment relationship, which platforms can then (of course) rebut under Article 5.

We agree with the EESC's criticism of those five criteria in terms of their relativity and the fact that platforms will try to circumvent them. The solution the EESC offers as much more appropriate is the legal presumption of an employment relationship for all platform workers working under the direction, control and/or organisation of a digital platform that uses algorithmic management.<sup>65</sup> Only by demonstrating that they are not exercising commercial control over how platform workers perform their work or services can platforms rebut this legal presumption.<sup>66</sup>

In short, the legal presumption of an employment relationship as per the criteria in Article 4 offers *prima facie* advantages for European integration by creating a similar legal framework for the member states. This implies that more rights and social protection will become available to a large group of platform workers. After all, Article 4 would ensure that platforms and their relationship with their workers are assessed in the same way across Member States. However, as the Committee points out, the question is whether the criteria used are the most appropriate, given that platforms are expected to try to circumvent them.

## **The platforms**

The question of whether the Directive would also further European integration from the perspective of the platforms can probably be answered in the affirmative. Indeed, platforms would be assessed in roughly the same way across member states since the Directive provides minimum conditions that need to be fleshed out at member-state level and can differ only slightly per country.

Article 1 of the proposed Directive states that the Directive applies to digital labour platforms that organise platform work in the EU, regardless of their place of establishment and regardless of the law

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<sup>64</sup> EESC, Opinion on Working conditions package - platform work, SOC/709 at paras 1.11 and 4.2.

<sup>65</sup> EESC, Opinion on Working conditions package - platform work, SOC/709 at para 4.2.5.

<sup>66</sup> EESC, Opinion on Working conditions package - platform work, SOC/709 at para 4.2.5.

otherwise applicable. The decisive element for the territorial application of the Directive is thus the place where the work is carried out rather than the seat of the platform company. This element, together with the legal presumption outlined in Article 4, to some extent limits the freedom and flexibility of platform companies to organise themselves so as to operate in those Member States and circumstances most favourable to them.

Whether European integration is indeed so easily served by this proposal depends on how Member States will interpret the Directive, as well as on the inventiveness of the platform companies. How they will respond once this proposed Directive is implemented is difficult to predict.

As indicated in the various documents accompanying this proposal, the overall aim is to maintain and strengthen the internal market by ensuring a level playing field for all actors<sup>67</sup>, i.e. both traditional businesses and those that operate largely on the basis of algorithmic management (offering online as well as offline work).

### **Other companies**

Indeed, an important aim of the Directive is to treat the other companies, i.e. the more 'traditional companies', on an equal footing with digital companies.<sup>68</sup> To date, traditional companies with premises and staff generally face higher costs, which digital companies are trying to avoid as much as possible. Companies that employ people and pay social contributions for them incur costs that are, on average, 24.5% higher than companies that only hire self-employed workers, regardless of whether they are traditional companies or platform companies.<sup>69</sup> The EC seeks to create a more level playing field between all companies in the European market and uses this proposal to achieve it. If successful, it will certainly benefit European integration and cross-border traffic.

### **Member states**

A proper employment status classification, based on the proposed Article 4, will increase the revenues of member states. It is estimated that Member States will be able to collect many billions of euros in additional tax and social security contributions every year<sup>70</sup> since the legal presumption of an employment contract (under Article 4) will force platform companies to make contributions in all member states where work is carried out in order to provide social protection for the platform workers under their control. Overall, it can be inferred that this will further European integration in those member states that are indeed seeing a growing digital labour market within their economies.

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<sup>67</sup> See, inter alia, Explanatory Memorandum to EC, 9 December 2021, COM(2021) 762 final, pp. 16-17; EESC, Opinion on Working conditions package - platform work, SOC/709 at paras 1.3 and 1.4; EC, 9 December 2021, SWD(2021) 396 final, pp. 33-34.

<sup>68</sup> Explanatory note to EC, 9 December 2021, COM(2021) 762 final, p. 4 and 14.

<sup>69</sup> EC, 9 December 2021, SWD(2021) 396 final, p.33-34.

<sup>70</sup> Explanatory note to EC, 9 December 2021, COM(2021) 762 final, p.15.

### 3.2 Transparency of platform rules and enforcement

Transparency regarding platform work is addressed in Articles 11 and 12 of the proposed Directive. Article 11 addresses digital labour platforms as employers and imposes a duty on them to report the work carried out to the competent labour and social-security authorities of the Member State where the platform work is performed. Platforms must also share *relevant* data with those authorities in accordance with national rules and procedures. What is also striking about this article is the explicit reference to coordination regulations 883/2004 and 987/2009. They reinforce European integration based on, among other things, the free movement of persons and form the basis of the social-security regulations. However, some questions arise regarding the concept of *relevant* data. Article 11 states that the platforms will be obliged to share the relevant data according to the national rules of the Member State of work. This implies that the differences between member states may not always make data sharing between member states easy to achieve, so that platforms can probably (continue to) look for the most favourable environment. If this were to harm the social rights and protection of platform workers, the Directive would have failed to meet its objectives after all.

An interesting novelty in the proposed Directive is the obligation imposed on labour platforms<sup>71</sup> to also make other information available to Member States where work is performed, as laid down in Article 12. Member States will thus gain insight into a) the number of persons *regularly performing* platform work and their status (employee or not) and b) the applicable general terms and conditions of the contracts drawn up by the platform.<sup>72</sup> It is not yet clear to us what exactly is meant by 'regularly' however. Since social security – and to a lesser extent labour law – remains a national competence, it is understandable that no exact European standard is set here specifying a particular number of hours or days of work in a given period. However, it is a step forward for the protection of platform workers that the term 'regularly' gets a national interpretation that dovetails with the national systems of labour law, social security and perhaps taxation. Even though this implies that the meaning of 'regularly performing platform work' will continue to differ across Member States, European integration is nevertheless likely to be improved by the openness regarding certain relevant data.

The national authorities are deemed capable of enforcing the existing rights and obligations regarding working conditions and social security; they will have a better understanding of the data and the numbers of workers, allowing them to ensure that working conditions and social security contributions are met.<sup>73</sup> Introducing a similar approach across member states promotes European integration while preserving the national competences and approaches of the various member states.

## 4. Evaluation of Theme 2: Sustainable and socioeconomic development

The extent to which the Directive could impact sustainable and socio-economic development within the EU should be assessed mainly based on figures and clear objectives. Since the figures for the proposed Directive are largely estimates with a wide range (see 1.1 and 2.3.1) and the sustainability

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<sup>71</sup> See definition in Article 2 of the proposal for a Directive.

<sup>72</sup> EC, 9 December 2021, SWD(2021) 396 final, article 12. This information should be updated semi-annually (annually for SMEs).

<sup>73</sup> EC, 9 December 2021, SWD(2021) 396 final, Explanatory Memorandum p.4-5 and Articles 11-12.

targets in the proposal are also broadly defined, we have decided to keep this section of the dossier concise, in part also because the behaviour of platform workers – and certainly that of labour platforms – after the introduction of this proposal is difficult to predict.

#### 4.1 Platform workers

In the EU, the number of platform workers is estimated to have reached 28 million in 2021. While still a limited market, it is potentially large. By comparison, the EU is home to about 450 million people and had an employment rate of 73 percent<sup>74</sup> in 2021, which means it had about 328 million workers. By 2025, the number of platform workers will have risen sharply, and an estimated 43 million platform workers will be employed in the EU, the majority of whom will be working online (and thus independent of physical location) and a minority of whom will be working on location.<sup>75</sup> How this group of workers will affect sustainable development in the EU is difficult for lawyers to put in a legal framework.

At first glance, online labour seems to be beneficial for sustainable, socio-economic developments, partly because of the low-threshold nature of platform work and the flexibility it often seems to offer. As such, it could lead to more employment and social progress for a large group of people. However, there are more factors at play: what exactly is this sustainable development that is emphasised in reports and policy papers, and who has insight into how platform workers work? Indeed, the variation within this group is very wide, ranging from small, one-off jobs to side jobs, to jobs that provide the main income. So, if people indeed predominantly worked online, this could make a positive contribution to sustainable development within the EU. However, the consequences for sustainable development from the perspective of workers will be much harder to assess if, for example, it turns out that platform workers often have to combine jobs, have to travel, have to factor in many unpaid working hours and/or are expected to be highly flexible in terms of geography and office hours.

#### 4.2 The platforms and national governments

For the market, the financial stakes of the platform economy are high. Indeed, revenues from the platform economy would amount to EUR 20 billion.<sup>76</sup> It is estimated that member states could collect an additional EUR 4 billion annually in tax and social security contributions from this Directive proposal.<sup>77</sup> In contrast, it could cost digital labour platforms up to €4.5 billion a year.<sup>78</sup>

In short, it remains difficult to determine how these potential financial flows – along with the labour-law and fiscal aspects – resulting from the Directive will affect sustainable development within the EU and its member states.

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<sup>74</sup> [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment\\_-\\_annual\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_-_annual_statistics)

<sup>75</sup> EC, 9 December 2021, SWD(2021) 396 final, p.8-9; EC, 9 December 2021, COM(2021) 762 final, p.6-7.

<sup>76</sup> Eures, *EU proposes directive to protect the rights of platform workers*, news article 17 March 2022, see: [https://eures.ec.europa.eu/eu-proposes-directive-protect-rights-platform-workers-2022-03-17\\_en](https://eures.ec.europa.eu/eu-proposes-directive-protect-rights-platform-workers-2022-03-17_en); EC, 9 December 2021, COM(2021) 762 final: p.1; EC, *Improving working conditions in platform work*, December 2021, 2p. For more figures, see also EC, 9 December 2021, SWD(2021) 396 final, p.15-16.

<sup>77</sup> EC, 9 December 2021, COM(2021) 762 final, p.15.

<sup>78</sup> EC, 9 December 2021, COM(2021) 762 final, p.15.



### 4.3 The Benelux Union

The Benelux Union did, however, indicate in its Joint Work Programme 2021-2024 that it wants to devote extra attention to achieving a "competitive and sustainable Benelux". Among other things, the Benelux Union states that:

'[i]n the coming years, the Benelux Union is committed to exploring new forms of work and organising work at cross-border level, including teleworking and cross-border co-working. To this end, the Benelux Union is working towards the development of a borderless, fair labour market, the mutual recognition of professional qualifications and the implementation of the recommendations from the 'Benelux Retail 2025' study.<sup>79</sup>

Elsewhere in its Work Programme, the Benelux Union again refers to sustainability in the deployment of people and resources. See, for example:

'The Benelux Union not only has the ambition to be a "smart and learning region" but is, already today, among the absolute leaders in Europe in terms of digital infrastructure and training. During the COVID-19 crisis, for example, the Benelux countries rapidly switched to working digitally. In an increasingly interconnected world, the success of the Benelux Union within the European Union and vis-à-vis the rest of the world hinges on the development of a green network economy and the full exploitation of the infrastructure and human potential in the Benelux Union.<sup>80</sup>

Perhaps this collaboration on a smaller scale, i.e. within the Benelux, could be a nice measure of sustainable and socio-economic cooperation within the EU and of the effort to achieve more employment that is rewarded fairly and transparently.

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<sup>79</sup><https://www.benelux.int/nl/gemeenschappelijk-werkprogramma-2021-2024/competitieve-en-duurzaam/>, own translation

<sup>80</sup> <https://www.benelux.int/nl/gemeenschappelijk-werkprogramma-2021-2024/een-digitaal-benelux>, own translation.

## 5. Evaluation of Theme 3: Euregional cohesion

Whether the proposed Directive will impact Euroregional cohesion is difficult to answer succinctly. The variety in platform work obviously plays a role. For instance, platform work varies for workers in terms of financial importance (i.e. the share of income generated through platform work); in terms of time allocation (i.e. the share of work-related time); but also in terms of physical presence at a workplace (i.e. online or offline/on-site platform work), among other things. Despite the multiple variables involved in platform work, our sole focus is on the workplace of platform workers.

By definition, platform work that takes place online is not tied to an employer's physical workplace or a region. Therefore, we assume this to have little to no impact on Euroregional cohesion, unless cohesion were to include a 'digital connection to the other side of the Euroregion'. Platform work that is performed on location, on the other hand, is affected by national borders. Thus, Euroregional cohesion does play a role in on-site platform work, especially with the current coordinating regulations for social security and taxation in place. We elaborate on this in 5.1 and 5.2 using two objectives of this Directive.

### 5.1 Correct employment status

One of the main goals of the proposed Directive is to achieve clarity regarding the employment status of platform workers, as indicated in Article 4. This should prevent false self-employment, on the one hand, and strengthen the position of genuine employees (i.e. offering them more protection and clarity) and genuine self-employed workers (i.e. offering them more entrepreneurship and freedom) on the other. Also for the labour platforms, Article 4 would offer more clarity and legal certainty regarding the working relationship with their platform workers, albeit, of course, sometimes at a higher cost.

#### *Effects of legal presumption*

Once the correct employment status has been determined, using the criteria in Article 4, platform workers and labour platforms will be able to define their relationship as either an employee-employer relationship or not. In other words, the legal presumption of an employment contract does offer clarity as to the working relationship, which should be classified similarly across borders. From this perspective, determining the employment status as per Article 4 could benefit working in the Euregion.

However, we would also like to point to the territorial effect, as reflected in the proposal's impact assessment.<sup>81</sup> From a territorial perspective, the potential positive effect of determining the correct employment status will vary since platforms tend to establish themselves wherever there is sufficient patronage. Thus, Member States where platform work is more prevalent, especially in Western and Southern Europe, will be more affected by the Directive than other Member States. In addition, regional geography and demographics will also play a role within those member states: Because platforms will have to carry the additional costs (social protection) and administration for their workers – the costs of the re-qualification of workers are estimated at between EUR 1.87 billion and EUR 4.46 billion per year<sup>82</sup> – they will have to organise their business activities optimally. This means that they will avoid small outlets and focus on larger cities.

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<sup>81</sup> EC, 9 December 2021, SWD(2021) 396 final, p.33.

<sup>82</sup> EC, 9 December 2021, SWD(2021) 396 final, p.79. Again, we note that the range of estimates is very wide.

Whereas to date platforms have established themselves in the Member States most favourable to them and offering the most favourable working conditions (i.e. involving the lowest possible costs for employing their workers), different rules would apply after the introduction of the Directive. As Article 1 of the proposed Directive states, it would no longer be the seat of the platform that determines the applicable (social and fiscal) law; instead this Directive would apply to all platforms that organise their work in the EU. Moreover, if the legal presumption of an employment relationship applies in all Member States – i.e. if the conditions of Article 4 are met – labour platforms will have less flexibility to create the conditions that are ideal for them but are at the expense of protecting platform workers. Indeed, the frameworks within which platforms operate in different member states will then become increasingly similar. Article 4 will offer more protection to platform workers, prevent false self-employment and enable genuinely self-employed platform workers to rely on their entrepreneurial spirit and autonomy.

The European Committee of the Regions (COR) also believes that the social consequences of the digital labour market should be addressed at European level. This should come as no surprise. This body calls for a general framework for social protection and social rights for all workers, so as to create a level playing field for all companies.<sup>83</sup> Moreover, to prevent undeclared work, employment status should be determined on the basis of the facts rather than the qualifications of the parties involved.<sup>84</sup> The COR stresses that the regional and local dimensions are also important, alongside a European approach; the regional and local authorities are the ones expected to provide solutions. Some concrete measures that the COR proposes include: the positive discrimination of socially responsible platforms by local and regional authorities in government tenders; the specification of the social criteria on working conditions; and the development, by local and regional authorities, of sample employment contracts for other local employers to use.<sup>85</sup> While these elements are not explicitly mentioned in the proposal for a Directive, they may play a role in its elaboration. This is where the Euregions have a role to play, in collaboration with the COR.

It is estimated that cities of up to 100,000 inhabitants will be negatively impacted as platforms offering on-location platform work will be leaving these areas for major cities. At present, offline platforms appear to be located in only 3% of these smaller cities (of up to 100,000 inhabitants). This contrasts sharply with their presence in 39% of cities with more than 1 million inhabitants. The attractiveness of large cities for on-site platform work is also reflected in the availability of platform workers: 28% of platform workers live in cities of up to 100,000 inhabitants whereas 72% of these workers live in larger cities.<sup>86</sup>

Thus, due to the introduction of this Directive and the associated cost increase, platforms offering on-site services will be leaving Euregions that have no large cities (of more than 100,000 inhabitants) for larger outlets, rather than staying – or establishing themselves – there.

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<sup>83</sup> European Committee of the Regions, 'Opinion, Platform work - local and regional regulatory challenges', 4-5 December 2019, SEDEC-VI/051, p.4.

<sup>84</sup> European Committee of the Regions, 'Opinion, Platform work - local and regional regulatory challenges', 4-5 December 2019, SEDEC-VI/051, p.8.

<sup>85</sup> European Committee of the Regions, 'Opinion, Platform work - local and regional regulatory challenges', 4-5 December 2019, SEDEC-VI/051, p.9.

<sup>86</sup> EC, 9 December 2021, SWD(2021) 396 final, p.33.

### ***Point of contact: place of work***

What the Directive proposal and social-security coordination law have in common is that the decisive element for their territorial applicability is the place of work. In other words: where the platform work is performed is relevant, rather than where the labour platform is located or where the service is offered or provided.<sup>87</sup>

If labour platforms also operate in border regions and offer work there, platform workers may do similar work on both sides of the border (e.g. distributing meals). It is not the nature of the work – e.g. driving around delivering meals – that affects whether or not they are insured for social security (via coordination regulations 883/2004 & 987/2009), have labour-law protection or a tax status, but rather the territory where the work is carried out. Meal-delivery companies established in and working in the Maastricht area, for example, can, without much difficulty, also provide their services on the other side of the Meuse, in Belgium. For labour law, the rules of the national member state apply, along with the relevant EU acquis. Deliverers who spend more than 25% of their working time<sup>88</sup> delivering meals in Belgium might then be insured in Belgium as per the social security regulations. While this is indeed legally correct under the current rules, it does not dovetail with the objective of smooth Euregional cooperation.

As is well known, Articles 11 and 13 of the Coordination Regulation 883/2004 guide and determine the applicable law in cross-border work situations. The rigidity of these rules has been under discussion for some time. Indeed, the physical place of work is still decisive in determining the country of work (Article 11) or the principal country of work (Article 13) although the performance of work for an online or offline platform – but also for traditional businesses – is in fact not hindered by a national border.<sup>89</sup> Nevertheless, the present rules assessing work do take these national borders into account. As such, these social-security and tax rules appear to hamper rather than encourage or support cross-border work in today's digital world of work and telework.

In that sense, the temporary exemption granted by the authorities from those coordination rules during the COVID-19 pandemic was a very practical and quick response to facilitate the real world of work as it was at the time. This temporary exemption from the coordination rules was a boost for the Euregion – where borders are crossed daily for living and working – after it had initially, quite literally, bumped up against the national borders; they had been closed and could only be crossed with work passports. Right now, in autumn 2022, negotiations are still underway on the future application of the social-security and taxation rules to teleworking in border regions.

In some situations, an Article 16 agreement may be invoked.<sup>90</sup> In such cases, member states can agree to deviate from the main rules of Articles 11 and 13 of Coordination Regulation 883/2004 and then, in the interest of the worker, agree which national social-security law applies. This Article 16 option may well have a positive impact Euregionally, in that it forces the relevant national authorities to make contact and conclude agreements in the interest of the worker and tailored to the possibilities in that border region.

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<sup>87</sup> See Article 1 of the proposed Directive COM(2021) 762 final.

<sup>88</sup> See Article 13 EC Regulation 883/2004 in conjunction with Article 14(8) of EC Regulation 987/2009.

<sup>89</sup> On applicable social law, see also M. Houwerzijl, 'Arbeid en arbeidsrecht in de digitale platformsamenleving: transnationale dimensies en dilemma's', *TRA* 2017/59.

<sup>90</sup> Article 16 of EC Regulation 883/2004.

### **Benelux-Union**

The proposal for a Directive on improving working conditions in platform work does not include separate provisions for cross-border work but does occasionally refer to it.<sup>91</sup>

This makes it interesting to zoom in from the European perspective to another form of Euregional cooperation: the Benelux Union. This partnership between Belgium, the Netherlands and Luxembourg aims to promote the prosperity and well-being of its citizens.<sup>92</sup> The Joint Work Programme 2021-2024 reports that:<sup>93</sup>

'Borders should not be administrative, legal or fiscal barriers to the exchange of knowledge and skills within the Benelux Union's labour market.'

'Moreover, the recent crisis requires a fresh look at cross-border homeworking and its fiscal implications. Within the European Union, we want people to be able to study, live, shop, work and retire in any EU country ...'

'In addition, the Benelux Union wants to follow up on the European Commission's desire to remove obstacles in the internal market through small-scale projects.'

The Benelux Union also calls itself an "ally of regional cooperation towards European integration", declaring that:

'[i]n order to fulfil its role as a testing ground for Europe in a concrete way, it is important for the Benelux Union to be well informed about the initiatives at the European level.'<sup>94</sup>

This is in line with the qualification the Benelux Union gives itself as a 'smart Benelux that connects citizens and businesses.' In doing so, the Benelux Union speaks of being an 'EU role model for promoting the digital single market'; '[e]nsuring cross-border access to digital goods and services' and '[c]reating a favourable environment for companies to develop digital services.'<sup>95</sup>  
Also:<sup>96</sup>

'The Benelux Union is a bridge-builder between border regions, other international organisations and the European Union. Over the years, the Benelux Union has become a centre of excellence for cross-border and inter-territorial cooperation, establishing numerous geographical and thematic partnerships.'

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<sup>91</sup> See, for example: recitals 9 and 41 and Article 1 of the proposal for a Directive.

<sup>92</sup> [www.benelux.int/nl/](https://www.benelux.int/nl/) This partnership dates back to 1944. Recently, it has also been joined by certain regions of France and Germany.

<sup>93</sup> <https://www.benelux.int/nl/gemeenschappelijk-werkprogramma-2021-2024/competitieve-en-duurzaam>, own translations.

<sup>94</sup> <https://www.benelux.int/nl/gemeenschappelijk-werkprogramma-2021-2024/een-open-benelux>, own translation.

<sup>95</sup> [https://www.benelux.int/files/7816/1493/8537/GWP\\_onepager\\_EN.pdf](https://www.benelux.int/files/7816/1493/8537/GWP_onepager_EN.pdf)

<sup>96</sup> Zie Gemeenschappelijk werkprogramma 2021-2024: <https://www.benelux.int/nl/gemeenschappelijk-werkprogramma-2021-2024/een-open-benelux/>



In its current Work Programme, the Benelux Union does not yet refer to the effects of the proposed Directive, but it can be inferred from its ambitions and plans that digital work in the border regions will also receive attention.

## **5.2 Transparency of platform rules and enforcement**

Measures related to the third specific objective – transparency, traceability of platform rules and enforcement of the applicable rules (from the Directive and national legislation) – should encourage the platform economy. This is the idea of the proposal. The quality of services provided to customers is expected to increase, and with it the prosperity and belief in the new economic world of platforms. This, in turn, will also have a positive effect on the trust that platforms receive from public administrations, platform workers and customers.<sup>97</sup>

A platform economy that is organised transparently and is monitored by governments benefits the entire labour market and society. If, on the basis of the Directive, the organisation of platform work is indeed transparent and traceable, and enforcement is a real option, this will also promote working within the Euregion as the rules will not be applied and enforced vastly differently across Member States. This reduces the risk of abuse and unfair competition between, on the one hand, platforms that work with false self-employed workers and, on the other hand, platforms that work with employees and the traditional companies that do not (yet) work online.

Recital 9 of the proposed Directive alludes to a number of ambiguities in cross-border situations. When platforms operate in different Member States or across borders, it is often unclear where and by whom the platform work is performed. Also, national authorities find it difficult to enforce labour law and social protection rules because they lack easy access to data on digital labour platforms (e.g. on the number of workers, their employment status and working conditions).<sup>98</sup> The European Economic and Social Committee (EESC) is also critical of this issue and wants a platform register to be opened in every member state.<sup>99</sup>

If the rules on platform work are indeed clear and uniformly applied in the various member states, this will make platform work across borders – i.e. in Euregions – more feasible and traceable than is currently the case.

## **6. Fiscal analysis of the Directive proposal**

### **6.1 Difficult qualification of labour relationship**

In this section, the potential fiscal implications of the Directive proposal are considered separately. The proposal pays little to no attention to the tax aspects of platform work and seems to make a strict separation between social security and taxation, after which it focuses mainly on social protection through labour law and social security. Nevertheless, we have included the fiscal aspect of platform

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<sup>97</sup> EC, 9 December 2021, SWD(2021) 396 final, p.39-40.

<sup>98</sup> See recital 9 in EC, 9 December 2021, COM(2021) 762 final.

<sup>99</sup> EESC, Opinion on Working conditions package - platform work, SOC/709 at para 3.2.

work in this dossier because the matter of whether a payment should be considered a premium or a tax is often historically determined.<sup>100</sup>

As mentioned earlier, one of the objectives of the proposal is to ensure that people working through a platform are given the right employment status. This objective can be achieved by establishing a comprehensive framework to prevent misclassification, which will lead to greater certainty for those involved. As a result, the proposal expects Member States' revenues ultimately to increase in the form of higher tax and social-security contributions.<sup>101</sup> Exactly how this increase will take place is not explained in detail however.

Dutch policymakers have been wrestling with the regulations on these new forms of employment for some time. A brief overview: the situation in employment qualification has not been stable since the Declaration of Independent Contractor Status (*Verklaring Arbeidsrelatie – VAR*)<sup>102</sup> was replaced on 1 May 2016 by the Deregulation of the Assessment of Employment Relationships Act (*Wet deregulerende beoordeling arbeidsrelaties – DBA Act*)<sup>103</sup>. The DBA Act has been under fire ever since its introduction and has failed to create sufficient clarity. New means are being sought to correctly qualify forms of employment as part of an attempt by the third Rutte administration to prevent false self-employment and improper competition.<sup>104</sup> The coalition agreement of the fourth Rutte administration advocates the creation of a disability insurance for the self-employed, designed in such a way that unfair competition and excessive income risks for individuals are prevented.<sup>105</sup> The fourth Rutte administration seeks to combat false self-employment by better enforcing public law in the event of a suspected employment relationship. How to achieve this has yet to become clear.<sup>106</sup> An example of how to deal with a changed labour market is the Letter from the Minister of Social Affairs and Employment dated 22 June 2018, no 2018-0000108371, V-N 2018/41.4 on platform work whereby employees are assigned jobs through an internet platform.<sup>107</sup>

Until 1 January 2025, the DBA Act will be subject to an enforcement moratorium on combating false self-employment.<sup>108</sup> Exceptions are the so-called malevolent, for whom enforcement will not be postponed. A malevolent party is a party that deliberately creates or maintains a situation of obvious false self-employment while actually being engaged in an employment relationship.<sup>109</sup> The government follows three policy lines in taking measures to make working with and as a self-employed worker more future proof:

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<sup>100</sup> H. Vording, In: B. Peeters (ed.), *The Concept of Tax*, EATLTP Congress, Naples 2005, pp. 46-47.

<sup>101</sup> See Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM(2021) 762 final.

<sup>102</sup> There were four types of VAR declarations, awarded according to employment status: VAR-director and majority shareholder, VAR-wage earner, VAR-business profits, and VAR-income from other activities.

<sup>103</sup> Stb. 2016, 45.

<sup>104</sup> According to the Minister of Social Affairs and Employment, the judgment of whether an employment relationship exists is ultimately at the discretion of the courts. See Letter from the Minister of Social Affairs and Employment dated 11 July 2018, no 2018-0000111821 V-N 2018/41.6.

<sup>105</sup> 'Omzien naar elkaar, vooruitkijken naar de toekomst', V-N 2021/55.3.

<sup>106</sup> 'Omzien naar elkaar, vooruitkijken naar de toekomst', V-N 2021/55.3.

<sup>107</sup> Letter from the Minister of Social Affairs and Employment dated 8 July 2020, No 2020-0000063216, V-N 2020/35.10. And see e.g. The Hague Court of Appeal, 2 February 2021, no BK-20/0067, ECLI:NL:GHDHA:2021:156, V-N 2021/20.25.10, ruling that **an Uber driver's earnings qualify as** 'income from other activities' rather than 'business profits'.

<sup>108</sup> Letter from the State Secretary of Finance dated 24 June 2022, 2022-0000177660, V-N 2022/34.7

<sup>109</sup> See Letter dated 8 December 2016, no 2016-0000222061, V-N 2016/66.18.

1. committing to creating a more level playing field for all contract forms in terms of labour law, social security and taxation;
2. achieving increased clarity on employment (i.e. as an employee) or self-employment (i.e. outside of an employment relationship) including support for workers in claiming the proper legal status; and
3. improving the monitoring and enforcement of measures against false self-employment.<sup>110</sup>

In other words, further regulations addressing platform work will follow.

## 6.2 Qualifying social security contributions and taxes

In this section, we outline how the financing of social security through taxation can create separate problems.

Preventing double taxation has a different dynamic from preventing double or no insurance. Double taxation is prevented through bilateral tax treaties, while the insurance obligation or the obligation to pay contributions is shaped at European level by Regulation (EC) No 883/2004. This makes it important whether a payment is qualified as a tax or as a contribution.<sup>111</sup> However, social security can be financed in different ways, for instance through social security contributions or through taxation.<sup>112</sup> We elaborate on this second way of financing.

Particularly in the Nordic countries, social security is financed through taxation. Much of social security in Denmark and Sweden, for instance, is financed by tax revenues. A problem arises, however, when the right to tax is assigned to Denmark or Sweden and the insurance obligation to a state other than Denmark or Sweden. This makes the frontier workers in question feel that they are paying social security contributions twice. In the past, the EC has questioned Denmark and Sweden about some specific levies. In the case of Denmark, this concerned the so-called labour-market contribution (8%). One of the EC's questions was why the income tax was not raised if this contribution should be considered a tax? Denmark replied that a general increase in income tax would have had negative effects on low incomes in particular and on the labour market. Social-security benefits are set at amounts that are not subject to the labour-market contribution, so the levy should be seen as a tax rather than a social-security contribution.<sup>113</sup>

According to Verschueren, the different methods of financing lead to incomprehension, dissatisfaction and frustration among frontier workers. Frontier workers find it important to see a direct link between paying contributions and being entitled to social-security benefits, and solutions should be sought to strengthen this link.<sup>114</sup> Verschueren provides the following options: adaptation of the Regulation,

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<sup>110</sup> Letter from the State Secretary of Finance dated 24 June 2022, no 2022-0000177660, V-N 2022/34.7. Incidentally, this letter refers to the proposed directive.

<sup>111</sup> See e.g. the Derouin judgment, CJEU 3 April 2008, No C-103/06, ECR 2008, p. I-01853 which addressed how to qualify certain contributions to the French social security system.

<sup>112</sup> Grenswerkers in Europa, een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken, Geschriften van de Vereniging voor Belastingwetenschap, no 157, Kluwer Deventer 2017, para 1.4.

<sup>113</sup> Memorandum, File No 2012-339-0029, 16 May 2012.

<sup>114</sup> H. Verschueren, Financing Social Security and Regulation (EEC) 1408/71, European Journal of Social Security 2001, pp. 7-24.

better alignment of social security and tax conflict rules and ad-hoc solutions, such as Article 17 Regulation 1408/71.<sup>115</sup>

Another solution could be to ask member states that fund their social security through taxation to determine which proportion of social security is funded through taxes and also provide tax relief for the corresponding amount.<sup>116</sup>

The report Social Security and Tax Law in Cross-Border Cases also addresses the problem of financing social security through taxation. Recommendation 4 in this report concerns further defining social security contributions and their basis for assessment. Such an attempt has the advantage that it could clarify the boundaries of social-security contributions and benefits under Regulation 883/2004 and clarify the different approaches in member states contingent on their national tax systems. This could help ensure that all levies intended to directly or indirectly finance social security are coordinated under Regulation (EC) No 883/2004. It could also help ensure that tax benefits linked to one of the risks covered by that Regulation (e.g. family relief) are all coordinated under Regulation (EC) No 883/2004, so as to achieve synchronised coordination for similar benefits.

A drawback is that it might be difficult to work out a clear, sufficiently abstract definition that simultaneously reflects ECJ jurisprudence. Some member states may be reluctant to accept such a definition for fear that it would broaden the scope of Regulation 883/2004 compared to the present situation.<sup>117</sup> Although the definitions are sufficiently abstract, they may not address all problems arising from new schemes or benefits introduced in member states. Further problems may arise because member states have thus far been using different approaches. One example is tax benefits, which are only treated under the double taxation convention even though they were linked to a social risk.<sup>118</sup>

Thus, when considering the impact of the proposal for a Directive, it should be taken into account that social security may have been financed through taxation. The potential impact of the proposed Directive on cross-border activities should be taken into consideration.

### 6.3 Possible (tax) issues

The Explanatory Memorandum to the proposed Directive shows that digital labour platforms are often based in one country and employ people living in other countries. Authorities often do not know which digital labour platforms operate in their country, how many people work through them and what their employment status is.<sup>119</sup> Measures are targeted at addressing the cross-border challenges of platform

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<sup>115</sup> Currently: Article 16 Regulation 883/2004. H. Verschueren, Financing Social Security and Regulation (EEC) 1408/71, European Journal of Social Security 2001, p. 7-24. Regulation No 1408/71 is mentioned, but in our opinion, the same can be said for Regulation No 883/2004.

<sup>116</sup> Denmark has in the past granted a one-time offset. This is based on a letter from Ministry Health Prevention dated 17 June 2008.

<sup>117</sup> This was the case with the new definition of 'long-term care benefits' as part of the impending reform of Regulations 883/2004 and 987/2009. B. Spiegel (ed.), Report Social Security and Tax Law in Cross-Border Cases, MoveS 2022, p. 74.

<sup>118</sup> B. Spiegel (ed.), Report Social Security and Tax Law in Cross-Border Cases, MoveS 2022, pp. 73-74.

<sup>119</sup> 59% of all people working through platforms in the EU deal with clients in another country. See Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM(2021) 762 final.

work. In doing so, the Memorandum argues, those measures – especially those regarding the lack of data to enable better enforcement of the rules – are best taken at EU level.

If transparency and traceability of platform work were improved, including in cross-border situations, this would benefit the enforcement of existing labour and tax rules as well as the collection of taxes and social security contributions. Annually, member states could collect an additional EUR 4 billion in tax and social security contributions, according to the proposed Directive.<sup>120</sup> However, the Directive's Explanatory Memorandum lacks further explanation as to how collection should be fleshed out.

In addition to the issues raised by financing social security through taxation, as described in section 6.2, potential problems that might arise with regard to taxation include:

a. Withholding obligation

In the following, we will assume that the activities of the person performing work for a platform qualify as those of an employee. For employees, there is the option to withhold wage tax, for which the employer is usually liable. The Dutch regulations on the withholding obligation make a distinction between withholding agents (employers) residing in the Netherlands and those residing or established abroad. Employers residing or established in the Netherlands are liable for withholding taxes for employees working in the Netherlands pursuant to Section 6(1) of the 1964 Payroll Tax Act (*Wet LB*). However, digital labour platforms can also be based abroad. Employers established or residing abroad are only subject to the withholding obligation in the Netherlands if they:

- a. have a permanent establishment or permanent representative in the Netherlands; or
- b. have reported to the Tax Authority, take care of the payroll administration of the employee(s) concerned and the employee's wages are subject to income tax.<sup>121</sup>

It is also still possible for foreign employers to have a notional permanent establishment if they provide labour in the Netherlands.<sup>122</sup> A problem is that, with a tax treaty in place, this establishment will only be effective if the Netherlands has the right to levy taxes, for example when foreign workers have been employed in the Netherlands for more than 183 days.<sup>123</sup> If no tax treaty applies, the provision can be invoked without further ado. A withholding obligation in the Netherlands is also important for holding the (Dutch) hirer of the workers liable if relevant.<sup>124</sup> In this event, it could serve as a guarantee for the Dutch tax authorities to collect the wage tax due.

In addition, it is important to mention here that a bill on the implementation of the EU Directive on data exchange in the digital platform economy (*Wet implementatie EU-richtlijn gegevensuitwisseling digitale platformeconomie* – DAC7) has recently been submitted to the House of Representatives.<sup>125</sup> Pursuant to this bill, digital platforms will have to provide annual information to the Tax Authorities as of 1 January 2023 concerning the amounts that sellers earn through these platforms, whereby 'seller' can be understood to mean 'a user of a platform, either a natural person or an entity, who, at any time

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<sup>120</sup> 59% of all people working through platforms in the EU deal with clients in another country. See Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM(2021) 762 final.

<sup>121</sup> Art. 6(2), Payroll Tax Act 1964.

<sup>122</sup> Section 6(3)(c) Payroll Tax Act 1964.

<sup>123</sup> See Article 15(2), OECD Model Convention.

<sup>124</sup> See art. 34 Collection Act (*Invorderingswet*). See also Decree of 12 January 2010, no DGB2010/267M, *Staatscourant* 2010, 788, on substantive employer status, under item 7.

<sup>125</sup> Amendment to the International Tax Assistance Act to implement Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJEU 2021, L 104.

during the reporting period, was registered on the platform and carried out a relevant activity'.<sup>126</sup> They include, for example, landlords of properties or providers of a personal service. Relevant activities are not meant to include activities performed by a seller 'in the capacity of an employee of the platform operator or an employee of an entity related to the platform operator',<sup>127</sup> whereby 'employee' means an employee as intended in the 1964 Payroll Tax Act. In this event, the remuneration would already be subject to wage tax,<sup>128</sup> leaving no need to report on employees.<sup>129</sup>

There is also an automated exchange with the tax authorities in other European member states.<sup>130</sup>

The bill is based on Directive 2011/16/EU,<sup>131</sup> which contains rules on administrative cooperation between EU member states to enforce EU member states' national laws regarding (certain) taxes. The relevant taxes are 'any form of taxation imposed by or on behalf of an EU Member State, including its local authorities, with the exception of VAT, customs duties, excise duties, compulsory social-security contributions and (handling) fees'.<sup>132</sup> Note that social-security contributions are excluded.<sup>133</sup> Given that some countries may finance social security through taxation – as described earlier – it is advisable that policymakers from the relevant jurisdictions (social security law and tax law) cooperate more closely.

#### b. Tax compliance

International organisations/companies and their employees face many rules from different countries and must act in accordance with these rules. It is important for regulatory effectiveness that these rules are transparent, so that taxes are imposed correctly. It is questionable, however, to what extent this is ensured for platform employees, given that the rules are not yet mature and uniformity is not yet guaranteed.

## 7. Conclusions and recommendations from a Euregional perspective

### 7.1 Substantive conclusions

Digital labour platforms allow millions of people to work flexibly and often independent of time and location. But platform work also has its challenges and risks, including issues such as employment status (i.e. the qualification of the employment relationship), working conditions, social security, tax regulations, safety and well-being at work, etc.

More than 90% of digital labour platforms in the EU classify their workers as self-employed. This can be explained by the flexibility, low costs and minimal obligations pursued by these platforms, as well as the fierce competition among them. This practice sets them apart from traditional businesses,

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<sup>126</sup> Kamerstukken II 2021/22, 30 063, no. 3, p. 29, own translation.

<sup>127</sup> Kamerstukken II 2021/22, 30 063, no. 3, p. 31, own translation.

<sup>128</sup> Kamerstukken II 2021/22, 30 063, no. 3, p. 31.

<sup>129</sup> Kamerstukken II 2021/22, 30 063, no 6.

<sup>130</sup> Kamerstukken II 2021/2022, 36 063, no 3.

<sup>131</sup> Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJEU 2021, L 104.

<sup>132</sup> Parliamentary Papers II 2021/2022, 36 063, no. 3, p. 6, own translation.

<sup>133</sup> With regard to social security, reference can be made to Art. 72 jo. Art. 78-79 Regulation No 883/2004 regarding data exchange. See also Chapter II Regulation No 987/2009.



however, and creates an uneven playing field. An estimated 5.5 million of the current 28 million platform workers in the EU risk having been wrongly qualified as either employees or self-employed workers. In most cases, this misclassification concerns workers who have been classified as self-employed workers but who are not in reality. As false self-employed workers, they consequently *do not* enjoy the rights and protection that national and European legislation offers to employees; on the other hand, they also *lack* the autonomy and strong labour-market position of many truly self-employed workers.<sup>134</sup> Since national legislations provide little to no legal framework for organising platform work, questions or conflicts regarding qualification are often referred to the courts,<sup>135</sup> which have issued more than 100 rulings and 15 administrative decisions across the EU. Most of these rulings and decisions have held that platform workers must be qualified as employees and labour platforms as employers.<sup>136</sup>

In response, the EC initiated a proposal for a Directive in December 2021, with the overall objective of improving the working conditions of platform workers, while also promoting the conditions for the sustainable growth of digital labour platforms.<sup>137</sup> The proposed Directive has a strong focus on clarity of employment status, transparency of algorithmic management, awareness of the applicable rules regarding platform work and their enforcement.

The analysis in this dossier has been mainly focussed on social protection through *labour law* and *social security*, based on the Directive's objectives of achieving the 'correct employment status' and 'transparent platform rules'. Though the *fiscal* aspects of the employment relationship in platform work remain (virtually) unaddressed in the proposal for a Directive, we have included the potential fiscal implications of the proposed Directive. The simple justification for doing so is that every employment relationship has both labour, social-security and tax-legal characteristics. The tax component has been included separately in this dossier and discussed separately from the three research themes: European Integration, Sustainable Development and Euregional Cohesion.

As a general conclusion, we find that all member states struggle with the legislative aspects surrounding platform work. This gap is presently filled by judges, who often label platform workers as employees that deserve more protection and social rights than are provided to them by digital labour platforms. The proposed Directive aims to provide additional security to both platform workers and platforms, while also involving national authorities. Nevertheless, the Directive still raises many questions. Certain concepts are unclear and certain choices – such as the five criteria for the legal presumption of an employment relationship – do not dovetail with the dynamic and rapid development of the digital labour market; also, it is impossible to assess how Member States will respond to the leeway in implementation that the Directive still offers.<sup>138</sup>

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<sup>134</sup> EC, 9 December 2021, SWD(2021) 397 final.

<sup>135</sup> EC Impact Assessment Report, 9 December 2021, SWD(2021) 396 final

<sup>136</sup> EC, 9 December 2021, SWD(2021) 396 final, Annex 10 provides an overview of the decisions of national courts or administrative bodies on employment status. Annex 9 provides an overview of the initiatives at national level regarding platform work.

<sup>137</sup> EC, 9 December 2021, COM(2021) 762 final.

<sup>138</sup> There is no mention of any penalties in the proposed Directive.

## 7.2 Prospects

In addition to the uncertainty it introduces regarding the elaboration and interpretation of certain concepts and processes, the proposed Directive also appears to be based on broad, uncertain estimates of the number of workers affected, the size and number of platforms involved, the financial/economic value of platform work and its impact on the labour market. Indeed, in a single sentence about halfway through its impact assessment report, the European Commission expresses strong reservations about its own analysis, given the uncertainty and the assumptions on which the report's expectations and forecasts are based.<sup>139</sup>

The real-world effects of this proposed Directive are therefore difficult to predict. We will have to wait and see if and how the proposal for a Directive is adopted and what the subsequent actions of Member States will be.

From the perspective of social protection and focusing on the 'correct employment status' and 'transparent platform rules', we have the following recommendations for the European legislator:

1. Take into account the strong dynamics of the digital labour market.
2. Involve digital labour platforms as well as traditional companies.
3. Ensure that the legal presumption remains a workable concept that provides certainty for platform workers, labour platforms and national authorities alike.
4. Take into account legislative initiatives at member-state level.
5. Keep an open attitude towards fundamental reforms appropriate to the modern labour market, such as training, security, transparency, basic security, etc.
6. Ensure basic protection for all workers.

From a fiscal perspective, we recommend the following to the European legislator:

7. Fiscal aspects should be included as doing so will improve the effectiveness of the proposed Directive. Particularly in cross-border settings, the financing of social security through taxes may carry implications.

After reading many reports and initiatives, we conclude this dossier by expressing the hope that the creation of a legislative framework for platform work will this time be used as an opportunity to jointly address tax-legal and social-security aspects. Time will tell.

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<sup>139</sup> See EC, 9 December 2021, SWD(2021) 396 final, p.33 and Annex 5.1.