

## Poor Lawmaking Creates Exponential Legislative Failures the Case of Platform Work Regulation

### Policy briefing note

The Directive on regulating platform work (the Directive)<sup>1</sup>, first proposed by the European Commission (the EC) in December 2021<sup>2</sup>, introduces a legal presumption of employment for potentially misclassified self-employed gig workers. Suppose an economic relationship between two parties meets the criteria set in the Directive. In that case, the worker must be forced into a labor contract and abide by labor regulations, regardless of their will.

Deliberations in the European Parliament (the EP) have been going on for over a year; however, the Directive has yet to be enacted. With Romania and Germany abstaining, there is a blocking minority, and negotiations are at a standstill<sup>3</sup>. But the European Union (the EU) remains anxious because of its commitment that “we must do something.”

This policy briefing explores the critical concerns raised by both platforms and platform workers during the Directive’s pan-European and national deliberations and suggests possible ways to move forward.

### **How many platform workers are too many?**

One of the key arguments that the Directive is built on is the growth of the platform work sector. The EU estimates that over 28 million people in the EU work through one (or more) digital labor platforms. In 2025, their number is expected to reach 43 million<sup>4</sup>. According to the EC, up to 5,5 million platform workers in the EU, or roughly 1 out of 5 platform workers, could be misclassified<sup>5</sup>.

However, the impact assessment of the proposed regulation raises questions as there are no ways to calculate how many platform workers are misclassified<sup>6</sup>.

Rules are in place on classifying workers at the EU and national levels<sup>7</sup> through a ban on illegal work<sup>8</sup>. Therefore, there is not enough justification to substantiate an EU-wide intervention in the personal economic activity of its residents. This means that existing cases of potentially illegal work (i.e., misclassification of workers) might be preconditioned not by a lack of rules but by the

<sup>1</sup> European Commission, “Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work”, 2021. Available online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A762%3AFIN>> (accessed 29 Dec 2022).

<sup>2</sup> Yet the whole debate on regulating platform work was initiated back in 2020 with the European Commissions study on the working conditions of platform work, which formed the basis of the directive proposal. European Commission. New study looks at the challenges faced by platform workers. Available online: <<https://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&langId=en&newsId=9582>> (accessed 30 Dec 2022).

<sup>3</sup> Bourgery-Gonse, T. “EU Commissioner: Council should revert to platform workers’ directive original text”, 2022. Available online: <<https://www.euractiv.com/section/gig-economy/interview/eu-commissioner-council-should-revert-to-platform-workers-directive-original-text/>> (accessed 29 Dec, 2022).

<sup>4</sup> European Council, “EU rules on platform work” (2022). Available online: <<https://www.consilium.europa.eu/en/policies/platform-work-eu/>> (accessed 30 Dec 2022).

<sup>5</sup> Ibid. Misclassification refers to a situation where a person is *de facto* in an employment relationship and meets certain criteria (e.g. subordination in terms of time and duration of function, the employer bears the costs of the services etc.), but is *de jure* operating under another agreement, e.g. under a service provision agreement.

<sup>6</sup> See, e.g., Mickute, K., Einoris, E., Bakula, R. “How Looking Back Can Help the EU Move Forward”, 2022. Available online: <[http://4liberty.eu/wp-content/files/KAROLINA\\_MICKUT\\_ERNESTAS\\_EINORIS\\_ROBERTAS\\_BAKULA\\_HOW\\_LOOKING\\_BACK\\_CAN\\_HELP.pdf](http://4liberty.eu/wp-content/files/KAROLINA_MICKUT_ERNESTAS_EINORIS_ROBERTAS_BAKULA_HOW_LOOKING_BACK_CAN_HELP.pdf)> (accessed 29 Dec, 2022).

<sup>7</sup> See, e.g., definition of illegal work and sanctions for it in Art. 56 of the Republic of Lithuania Law on Employment, available online: <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/5f0be3809c2011e68adcda1bb2f432d1?jfwid=9qlcjr8zs>> (accessed 30 Dec, 2022).

See also the normative definition of what work is implying that a social relationship that meets said criteria is considered and employment relationship in Art. 33 and 34 of the Labor Code of the Republic of Lithuania, available online: <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/fa99ee70289d11ea8f0dfdc2b5879561?jfwid=9qlcjr99i>> (accessed 30 Dec, 2022).

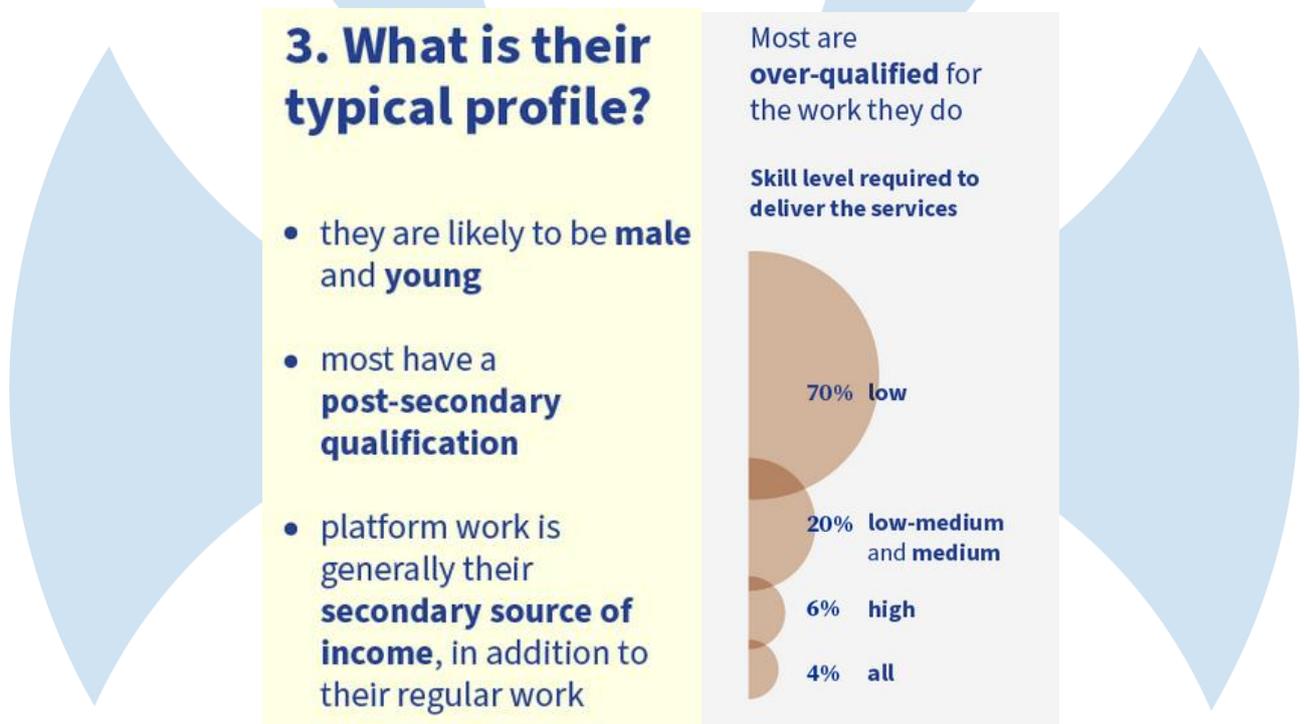
<sup>8</sup> See, e.g. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

inability of the member states and EU institutions to enforce regulations that are already in place. So even if the directive is enacted, there is a risk that it will not be duly implemented, and legislative patchwork will be necessary.

### ***Does the EU decide what you do with your education?***

Another concern is that the EU builds its intervention on the average platform worker profile. According to the data of the European Council, a typical gig worker is likely to be male, young, and educated (most commonly with post-secondary qualifications). However, the EU deems it a problem (Fig. 1).

Fig 1. The profile of an average platform worker and the skill level required to perform platform work.



Source: Author's compilation based on the infographics of the European Council, <https://www.consilium.europa.eu/en/infographics/digital-platform-workers/>.

The EC states that platform work generally requires a low skill set. However, the majority of platform workers have post-secondary education. So, according to the EC, the average platform worker is overqualified (Fig. 1). According to the EC, this poses a problem that a qualified platform worker gets a different remuneration than a low-skill laborer does under an employment contract. Therefore, such a situation is unjust and calls for intervention. Furthermore, this narrative of unjustly forcing persons into somewhat redundant<sup>9</sup> labor relations may be an infringement of a person's right to freely choose their model of work and economic activity as protected by both

<sup>9</sup> A clear indicator that people are opting out of labor regulations and are keener to earn a living through the digital market is the growth of gig work and the provision of services. The European Commission estimated that the digital labor platform economy in the EU estimated to have grown by around 500% in the last five years. For more on how the digital economy ensures more liberty for people to earn their income: Lithuanian Free Market Institute, "Maintaining the status quo and fostering competition among platforms would better serve the platform workers and consumers", 2022. Available online <bit.ly/3Gqksp8> (accessed 30 Dec 2022).

national<sup>10</sup> and EU laws (in cases where gig workers enter contracts with a platform in another EU member state)<sup>11</sup>.

### ***Legalizing cartel agreements or an escape hatch for workers?***

The political standstill regarding the adoption of the Directive did not end the EU's initiatives to achieve its goal of protecting platform workers. The EC published new guidelines to allow collective bargaining for solo self-employed people under EU competition rules (the Guidelines)<sup>12</sup>.

EU competition law forbids agreements between undertakings that restrict competition, e.g., price-fixing. Before the enactment of the Guidelines, gig workers had been considered undertakings like any other company, so this rule also applied to them. However, the EC views this as interfering with gig workers' alleged right to organize as workers without being considered a cartel under EU competition law. Thus, under the Guidelines, the EC will no longer apply competition law to solo self-employed people in a situation comparable to workers.

This may be seen as an attempt to outmaneuver the standstill regarding the enactment of the Directive. Yet, its essence and effects remain the same. Say a group of gig workers assemble to negotiate their contracts with the platform (regarding the algorithm, fees, etc.). It will automatically trigger employment presumptions because the Guidelines state that such negotiations are not cartel agreements only when a gig worker is in a similar position as a laborer under an employment contract. As mentioned before, EU and national laws already define what is considered a labor-like relationship and, in turn, what is illegal work. To apply the Guidelines, gig workers will be forced into an employment contract as laborers. If they are not – EU competition law applies, and negotiated agreements would become null and void. Therefore, the Guidelines do not act as an escape hatch – its purpose is quite similar to the Directive's, which is to reclassify gig workers to employees in the traditional sense.

### ***The inconsistency of data regarding the state of gig work assumes the necessity to ensure the status quo.***

The EC notes that the average gig worker uses platforms to earn additional income<sup>13</sup>, i.e., it is not their primary source of income. In its guidelines, the EC denotes that “[S]olo self-employed persons who provide their services exclusively or predominantly to one counterparty are likely to be in a situation of economic dependence vis-à-vis that counterparty.”<sup>14</sup> However, this applies to the minority if any cases of gig work. Due to a lack of data and its inconsistency, it might be most prudent to maintain the status quo and to foster competition between platforms so that they are more inclined to attract gig workers by, e.g., offering such contract conditions that gig workers would have more options to choose from<sup>15</sup>.

<sup>10</sup> See, e.g., Art. 46 of the Constitution of the Republic of Lithuania: “Lithuania’s economy shall be based on the right of private ownership, freedom of individual economic activity and initiative” and Art. 48 stating that “Each human being may freely choose a job or business, and shall have the right to have proper, safe and healthy conditions at work, to receive fair pay for work and social security in the event of unemployment.” Available online: <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.21892>> (accessed 30 Dec 2022).

<sup>11</sup> Treaty on European Union and the Treaty on the Functioning of the European Union, Art. 56, 57. Available online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>> (accessed 30 Dec 2022).

<sup>12</sup> European Commission, „Communication from the commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons 2022/C 374/02”, 2022. Available online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022XC0930%2802%29>> (accessed 30 Dec 2022).

<sup>13</sup> European Council, <https://www.consilium.europa.eu/en/infographics/digital-platform-workers/>.

<sup>14</sup> European Commission, „Communication from the commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons 2022/C 374/02”, 2022. Available online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022XC0930%2802%29>> (accessed 30 Dec 2022).

<sup>15</sup> More on this see: Lithuanian Free Market Institute, “Maintaining the status quo and fostering competition among platforms would better serve the platform workers and consumers”, 2022. Available online <[bit.ly/3Gqksp8](https://bit.ly/3Gqksp8)> (accessed 30 Dec 2022).

Forcing gig workers into labor relations will raise the costs for the platforms, which facilitate the service exchange between the platform workers and the client. Thus, the platforms may reduce the demand for new gig workers. In turn, this may lead to a massive chunk of gig workers losing their source of income and their freedom to choose when, what, how, and where to provide their services. Since the gig economy is just getting up to speed it would be most prudent to avoid *ultima ratio* interventions that would stop the development of this new economic activity. Instead providing information to platform workers about their rights and allowing the gig workers to decide on their own may prove to be most beneficial.



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