

## **The German Trade Union Confederation's Position on the Platform Economy**

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### **Rules for work in the platform economy**

The German Trade Union Confederation (DGB) and its member unions see working and employment potential in forms of work that are organised, offered or placed via digital platforms (the platform economy), however, they also recognise that the platform economy requires considerable regulation in order to meet the criteria for good work. The problems and challenges described in the DGB's discussion paper on the platform economy published in October 2019 continue to be relevant, but remain unsolved on a political and legal level. Nevertheless, case law set a new, groundbreaking course in 2020. In addition, the German Federal Government established initial benchmarks for "fair work in the platform economy". In view of these new developments, the DGB proposes tangible political approaches to regulate the platform economy in this position paper.

Over the past few years, a digital underground labour market has become established and has achieved a high level of relevance, to the point that it can no longer be dismissed as a fringe phenomenon. The platform economy has become more significant worldwide. According to the latest studies, just under six percent of the working population in Germany alone draw between a quarter and half of their income from the platform economy (cf. Pesole et al. 2020). The crowd work monitor (2018) from the German Federal Ministry of Labour and Social Affairs shows a similar level of prevalence. The COVID-19 pandemic outbreak is expected to provide an additional impetus to the platform economy. The number of people working on platforms is also expected to increase significantly, as artificial intelligence systems are being developed for the sole purpose of processing training data in the field of click work.

The relevance of platform-based work and value creation is also evident in the heavily venture capital-funded, multi-billion dollar valuations of commercial work platforms such as Uber or Lieferando. These are new digital business models that fundamentally reorganize service work. At the same time, developments on the market indicate that work platforms have also gained significance for large temporary work agencies.

**The DGB and its member unions therefore call for a structural framework for the platform economy.** This includes the following elements:

**1. Enforcement of employees' rights for platform workers**

The business model of platform operators is largely based on the alleged self-employment of the workers, which often leads to precarious working conditions, bypassing employee rights and the obligation to pay social security contributions. In this context, operators of work platforms often invoke their general terms and conditions and also the fact that platform workers are free to decide whether or not to accept orders, along with other elements. These platforms portray themselves as passive intermediaries. However, the reality of the platform economy often paints a different picture: many of the platform workers are integrated into the work organisation created by the platform and are subject to the individual instructions that they are given. The platforms issue directives on the content, execution, time and, when the activity is location-based, the location of a task. Here, modern work and communication tools and strict forms of algorithmic management and monitoring replace organisational integration into fixed corporate work structures with personally issued instructions. Technical management and monitoring options replace individual instructions in the traditional sense, but fulfil the same function and are programmed according to the specifications of human entrepreneurial decisions. Compared to traditionally employed workers, the degree of monitoring and management of work via platforms often gives platform workers less scope for independent action, not more. Reputation and feedback processes also play an important role on digital platforms, as they determine work assignments and earning opportunities and lead to a high degree of dependency for platform workers. Accordingly, in December 2020, the German Federal Labour Court (BAG) applied the labour law definition of dependent work in Section 611a of the German Civil Code (BGB) currently in force to the platform economy and confirmed that platform workers are to be classified as employees if they are integrated into the organisational structures of the platform and work subject to instructions, irrespective of the contract designation (judgment of 1 December 2020, 9 AZR 102/20). The BAG has expressly recognised digital and algorithmic management tools as potential forms of instruction under labour law which support the classification of employment relationships on platforms as working relationships. European Union law also recognises that platform workers can be employees. Thus, the EU Directive 2019/1152 on working conditions also expressly applies to platform workers (Recital 8) if they are considered employees according to the criteria established by the European Court of Justice: execution of work subject to instructions in return for remuneration.

**Enforcement by shifting the burden of proof**

Although it is now recognised that platform workers perform work subject to instructions within the meaning of labour law and can therefore be employees, they do not generally have access to the necessary information to prove their dependent employment. The information gap between workers and employers is considerably larger in the platform economy than in analogue employment relationships. Those working on platforms generally have no information on how these platforms function beyond their own user interface and have no insight into the organisation of work, the processes or the awarding of contracts. They also have no knowledge of either the relationships between the platform and other people working there or those between the platform and its clients.

The mechanisms of control, management and evaluation of the platform economy are inaccessible to the workers, and the platforms generally do not provide physical contact persons for the workers. In short: platform workers usually lack proof in employment litigation. Under these conditions, it is almost impossible to prove dependent employment on the basis of facts that substantiate integration into the work organisation and the degree to which the employee is subject to instructions. Platform operators, on the other hand, control the entire process of work organisation and the workflow, both in a technical sense and, in this case, by means of data evaluation in particular, as well as by drawing up the terms of use. They are easily able to substantiate the contractual structure between the actors in the platform economy, the concrete contents of the contracts and also the execution of contracts in practice.

The DGB and its member unions therefore call for a shift in the burden of proof to establish an employment relationship, namely that it be incumbent upon the employer, particularly in the case of the platform economy. In the event of a judicial clarification of the status, a rebuttable presumption of a working relationship with the platform must be met with a concrete catalogue of circumstantial evidence. Circumstantial evidence should consist of aspects that, from the perspective of the workers, are recognisably used as instruments of other-directed employment, such as pricing, controlling the awarding of contracts, disciplinary methods in the form of reputation or rating systems, strict monitoring of the work process and concrete specifications of the platform with regard to the content, execution, time and location of the task. If the platform worker can present circumstantial evidence of the existence of a working relationship, the platform should bear the burden of proving that the worker is genuinely self-employed. Shifting the burden of proof makes up for the lack of information that exists to the detriment of the worker and allows disputes to be resolved on an equal footing by requiring disclosure of the framework conditions of the cooperation and of the platform's control of the provision of services.

## **2. Strengthening collective rights and enforcement mechanisms**

Improving individual enforcement mechanisms alone is not enough to help platform workers achieve better working conditions in the long term. Platform workers are often not in a position to sue for their rights, especially when they are in precarious work circumstances due to financial hurdles, but also due to the fear of losing their job. To make matters worse, due to their highly fragmented nature, their anonymity and the lack of company structures, workers in the platform economy are even less willing to "go it alone" against these platforms, which they perceive as unassailable, than workers in analogue workplaces. Strengthening collective rights and collective enforcement mechanisms is therefore indispensable to ensure good work on platforms.

### **Strengthening the binding effect of collective agreements**

In order to improve the working and contractual conditions for platform workers, the possibilities for concluding collective agreements must be expanded, with a focus on persons of similar status to employees and self-employed persons working alone. According to the current legal situation, the conclusion of collective agreements is possible for employees and, pursuant to Section 12a of the Collective Bargaining Agreements Act (TVG), also for persons of similar status to employees if they work predominantly for, or receive more than half of their remuneration from, one client.

Given the work reality of many platform workers, who often earn their living on several platforms, this threshold is too high and should be lowered. Section 12a TVG should be expanded to the effect that economic dependence on a platform is assumed if the platform represents a third of the remuneration earned, instead of the previously stipulated half. However, the prohibition of cartels under EU law is an obstacle to the conclusion of collective agreements for self-employed persons working alone (price agreements between companies constituting a cartel). Due to the typical market power of platform operators in the platform economy, associations of self-employed persons working alone on platforms cannot be compared to business cartels, because self-employed persons who perform their work on or receive job placements via platforms have hardly any bargaining power vis-à-vis the platforms. The legal regulatory framework for good work on platforms should therefore either contain an explicit authorisation of collective bargaining for self-employed persons working alone or clarify that they are excepted from the cartel prohibition by means of a derogation. This exception is intended to allow the parties concerned to form coalitions and to enable economically dependent self-employed persons working alone to conclude fee agreements, even if the requirements of Section 12a TVG are not met. This exception is made with the objective of preventing social dumping and thus of directly improving working conditions, which is a compelling reason in the public interest that justifies the restriction of the fundamental freedoms of European Union law. The DGB and its member unions therefore generally welcome the EU Commission's plans to remove existing cartel law barriers that prevent self-employed persons working alone from accessing and enforcing collective bargaining. Furthermore, it must be determined by law that the parties to a collective agreement have a statutory regulatory power with legal certainty, including self-employed persons working alone, with regard to contributions to and benefits provided by joint bodies, by extending the concept of employer to "establishments without employees" in Section 4 (2) TVG, cf. judgment of the Federal Labour Court of 31 January 2018, 10 AZR 279/16.

### **Strengthening co-determination within businesses**

By denying their role as employers and actively preventing works council elections, the platforms have so far evaded the instruments of co-determination within businesses. Most platforms only offer their workers very rudimentary and non-binding opportunities for co-determination, if at all. Legal obstacles exist, as works constitution law only applies to employees and home workers treated as such. Due to the variety of activities and tasks as well as the resulting varying degree of integration into a company, any uniform determination of status for the entirety of the workers on a platform can be questioned. Enabling a collective employee representative body to be built for the entirety of platform workers despite this requires, on the one hand, that the personal scope of application of the Works Constitution Act be extended to persons of similar status to employees. On the other hand, the concept of a business under works constitution law and the concept of a department under the law on staff employment representation must be adapted to the realities of digitally networked occupations. Under the conditions of digital networking, the spatial aspect must be considered and evaluated anew. Co-determination rights must be strengthened in companies where work is subcontracted and work and organisational units are outsourced, for example by outsourcing tasks to platforms (outsourcing, crowd work, subcontracting).

Here, works councils need a right of co-determination to ensure that minimum terms and conditions are met in the event that work is subcontracted, and at the very least they must be given an enforceable right to agree rules of procedure with the employer for such matters. In addition, every instance of outsourcing and every transfer of operations must be qualified by law as a change to an enterprise. This allows the works council to reach an understanding before a decision is made on the sale or award, thus enabling a balance of interests.

### **Introduction of the right to take legal action for associations**

As an effective enforcement tool to protect the minimum rights of workers on platforms, the DGB and its member unions call for an effective right of legal action by an association for trade unions. There is an urgent need for the introduction of a right of legal action by an association for breaches of statutory and collective agreement provisions in appropriate areas where it is in the interest of trade unions to enforce the law over and above individual involvement, e.g. protection of employee data or prohibition of discrimination. This right serves the effective enforcement of the law.

### **3. Digital access rights for employee representative bodies and trade unions**

As a prerequisite for strengthening collective rights, employee representative bodies' access to platform workers must be made possible. In the platform economy, the work of works councils or trade unions, which is based on physical encounters, is made considerably more difficult. Exchange and contact between platform workers among themselves and between the workers and the operators of the platform take place mainly or exclusively through digital forms of communication. Accordingly, digital communication channels must, in principle, also be made accessible to trade unions and statutory employee representative bodies such as works councils by means of guaranteed rights, and these channels must make communication possible. The communication channels and means vary from platform to platform. It must additionally be ensured that communication between trade unions, employee representative bodies and platform workers is not monitored in any way.

### **4. Transparency and protection against arbitrary decisions on platforms** **Transparency of digital evaluation systems**

Good work on platforms requires sufficient transparency about how work organised via platforms functions with algorithmic management, ranking and reputation systems and pricing. The DGB and its member unions demand that workers, regardless of their status, be given the right to receive information from platforms regarding their management and monitoring mechanisms, in particular with regard to which data is collected, the extent of worker monitoring and the type of information being collected on work processes and results, and that transparency be established regarding all rankings, ratings, categorisations, prioritisations, etc. It is necessary to clarify that all rankings, ratings, categorisations and reputation systems constitute personal data within the meaning of the GDPR which must be disclosed to platform workers and that such disclosure may not be refused by invoking trade secrets.

### **Notice periods**

In order to create transparency and to prevent arbitrary decisions, the platforms should be obligated to give reasons for blocking, restricting or deleting a user's account, and this should be supplemented with corresponding rights of appeal. Reasonable notice periods are necessary for the termination of cooperation with self-employed persons, and these must take into account the duration of the activity on a platform.

### **Portability of evaluations and job references**

In addition to a right to fair and transparent evaluation systems, platform workers need a right to a certificate of activity ("CV") regarding work completed on the platform. In general, platform workers do not yet have the option of taking their acquired reputations, which have the same significance as job references, with them when they change platforms. Thus, reputations must be rebuilt when switching platforms. In order to counter this lock-in effect, the portability of acquired reputations must be ensured in the event of a change of platform.

### **Simplifying reviews of general terms and conditions on platforms**

The working conditions on platforms are regulated on the basis of contractual conditions which are unilaterally stipulated by the platforms, the general terms and conditions. Self-employed persons who want to work on platforms have no room for negotiation in this respect. These general terms and conditions often contain ineffective clauses that unilaterally disadvantage workers, such as extensive confidentiality requirements. It is therefore necessary to simplify the judicial review of general terms and conditions clauses that are unilaterally detrimental to platform workers. Platform workers must be classified as consumers. This prevents a foreign place of jurisdiction from being effectively agreed. Platform workers residing in Germany would thus be able to assert their rights in Germany.

In addition, the general terms and conditions must be designed in such a way that contractors are given the opportunity to subsequently correct their services, provided that the order type permits this. In the event that contractors are unable to perform their services through no fault of their own, e.g. if the place where the order is to be carried out is not accessible or does not exist, but also if third parties prevent them from performing their engagement, the contractors should not suffer any disadvantages as a result.

### **Preventing discrimination and harassment**

Transparency in awarding contracts and (customer) evaluation can also help to uncover direct and indirect discrimination on the grounds of gender, age and ethnic origin. An extension should be taken into consideration to the effect that the provisions of the General Equal Treatment Act (AGG), in particular Section 12 AGG, are to be applied accordingly to the operators of platforms. This would obligate platform operators to take effective measures to protect platform workers from discrimination. The risk of sexual harassment and gender-based violence is high in the context of the platform economy (Third Equality Report of the German Federal Government 2020). According to the obligation of the platform operators, criminal harassment by third parties must be prosecuted and penalised. To this end, it must be stipulated in principle that (non-self-employed and self-employed) platform workers are covered by the scope of application of the General Equal Treatment Act (AGG).

### **Transparency in work content and work planning**

Transparency must also be ensured with regard to tasks and the associated health risks. In particular, workers on platforms must be informed in advance of the content of the task and need to be protected when carrying out work that is harmful to health, such as the classification or screening of pornographic content or content that glorifies violence. For work on platforms and jobs received via platforms, it must be ensured that the occupational health and safety applicable to workers, including risk assessment, is fully complied with. Self-employed workers must also be protected from risks. At the very least, they need to be given the right to information, prior to the conclusion of a work order, on the purpose of the tasks, relevant customer information and possible psychological hazards and dangers. The requirements of the EU Directive on transparent and predictable working conditions concerning information on the content of work and the planning of working hours also apply in principle to workers on platforms and must be implemented by 2022 at the latest.

### **5. Employee data protection**

The DGB and its member unions also call for legislators to meet the challenges of the modern digital working environment with an independent employee data protection act. The EU General Data Protection Regulation contains important improvements with regard to the specification clause for the employment context (Article 88 GDPR), data portability, the right to erasure of (personally identifiable) data, rights to access, sanctions and the prohibition of coupling (use of services is made dependent on the granting of consent). However, digital surveillance tools which can be used to monitor and evaluate employees in the performance of their work are increasingly appearing on the market. These systems are also used in the platform economy, e.g. in the form of "work diaries" that use, for example, screenshots of the platform worker's desktop. An additional, defining regulation which explicitly prohibits such interventions must be added either to the General Data Protection Regulation, its national amendment act, the BDSG (the German Federal Data Protection Act), or to an independent employee data protection act yet to be created. Finally, defining regulations must be added concerning data protection rights to information, for example about gender, with the aim of preventing discrimination in the allocation of tasks based on algorithms. There is also a need for a legal clarification in Section 46 No. 7 BDSG stating that the works council is merely part of the responsible body. It should be noted here that, in line with previous case law, the company data protection officer still cannot monitor or exert control over the works council.

In addition, a general right of co-determination and initiative of the works council regarding the processing of personal and personally identifiable data must be specified under works constitution law, in order to protect platform workers of similar status to employees as a minimum, and if necessary also collectively. Finally, within the framework of the existing right of co-determination pursuant to Section 87 (1) No. 6 of the Works Constitution Act (BetrVG), the works council must also be allowed to take the initiative with regard to the introduction and application of such technical systems of behaviour and performance control, which is why it must be legally clarified that this right of co-determination also includes – contrary to the current case law of the Federal Labour Court – a right of initiative of the works council.

## 6. Social protection of self-employed persons working alone

The DGB and its member unions demand that a statutory minimum level of protection in terms of working conditions and social security also be guaranteed for self-employed persons working alone in order to minimise the risks of precarity. This is particularly important for women in low-wage jobs, who have thus far had only very limited success in securing their own livelihoods, especially in the long term.

### **Expansion of social security**

The necessary minimum protection of self-employed persons working alone on platforms includes adequate social security in the event of illness, disability, unemployment, accidents and old age. Protection against the consequences of illness is largely covered by statutory compulsory insurance in Germany. The basis for assessment of the minimum contribution to statutory health insurance for the self-employed has been significantly reduced in the current legislative period. In the case of provisions for old age and disability and in the event that rehabilitation is required, statutory pension insurance must also be expanded to an insurance for all those in employment with financial contributions by the clients and platform operators. Contributions to collectively agreed supplementary occupational retirement schemes must be formulated with legal certainty by expanding the definition of employer in the case of joint bodies of the parties to collective agreements in order to guarantee adequate retirement provisions for the self-employed. Statutory accident insurance cover must be further developed. As a first step, compulsory insurance financed by the clients must be introduced in the Seventh Book of the Social Security Code (SGB VII) for particularly hazardous activities, such as in the craft trades and in delivery services.

### **Minimum wage guarantee**

Even for self-employed persons working alone, a living wage is the basic prerequisite for decent working conditions. While employees benefit from the statutory minimum wage, there is currently no general minimum wage protection for the self-employed. Therefore, the absolute baseline needs to consist of minimum wage conditions for self-employed persons working alone and improved legal possibilities for them to conclude collective agreements in order to achieve sector-specific minimum safeguards. This would particularly benefit women in the low-wage sector. Whether self-employed persons working alone should also be included in other employee protection rights must be examined.