National Executive Board of the German Confederation of Trade Unions

January 2022

Position of the German Confederation of Trade Unions (DGB)

on the Draft Directive of the EU Commission on Improving Working Conditions in Platform Work

General assessment

The DGB and its affiliates welcome the European Commission's initiative for an EU Directive to improve working conditions for persons who work via platforms. Platform work has become a highly relevant shadow labour market that is, however, largely unregulated to date. One basic problem is that platform operators deny the existence of employment relationships between them and the platform workers as a rule, even though many platform workers are in relationships in which they are superior or subordinate which are typical for employment. This is just one of the reasons why urgent action is necessary at this juncture. In this context, persons working on or via platforms are declared as solo self-employed people even if their personal and economic independence is significantly restricted. By denying their role as employer, operators of labour platforms largely circumvent their obligations under labour law and save on tax and social charges.

The DGB and its affiliates approve of the fact that the Commission recognises the distinct power and information imbalance between platforms and platform workers and generally proposes a rebuttable presumption under which a dependent relationship of employment with the platform is assumed, provided that certain conditions are fulfilled. In the event of doubt, the platform can seek a court decision on this rebuttable presumption. However, the platform must bear the burden of presentation and proof for this.

The DGB and its affiliates also welcome the comprehensive transparency obligations towards national authorities, platform workers and their representative bodies proposed by the EU Commission. This is an important step in gaining clarity on how algorithmic control regimes work. The EU Commission has proposed important instruments for enforcing workers' interests, such as trade unions having the right to approach the platform employees and the involvement of external expertise.

Definition /subject matter (Chapter I, Art. 1 ff.)

- The present draft Directive to regulate platform work is intended to apply to digital labour platforms (in a broader sense). It is appropriately based on Art. 153 TFEU. The draft Directive therefore includes purely online tasks as well as those performed on-site (crowd work and gig work). This definitional approach (cf. Article 2) is laudable. A rigid separation between location-based and location-independent platform work can no longer be maintained (in Germany), particularly since the ruling of the Federal Labour Court (BAG) on the case of a crowd worker of 1 December 2020 (case no. 9 AZR 102/20).

  By contrast, the exemption in Art. 2 (2) is not required, as platform operators could use it as a loophole to circumvent obligations. It is virtually impossible to separate the primary purpose of a platform business model from the human labour required to achieve that purpose. For example, platform operators could exempt the human labour required to achieve this purpose from the provisions of the Directive by invoking the 'primary purpose to share assets' (regulatory example in Art. 2 (2)). It would therefore be better to keep only the positive list in (1) and delete Art. 2 (2) of the Directive.

Employment status (Chapter II, Art. 3 ff.)

- The EU Commission suggests a rebuttable presumption 'in accordance with national legal and judicial systems' according to which platform workers are classified as dependent employees of the platform if the latter has a defined degree of control over the platform workers' job performance. Accordingly, a dependent employment relationship is presumed if at least two of the five control parameters listed under Article 4 (2) are fulfilled. These are:

1. Effectively determining, or setting upper limits for the level of remuneration

2. Requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work

3. Supervising the performance of work or verifying the quality of the results of the work including by electronic means

4. Effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes

5. Effectively restricting the possibility to build a client base or to perform work for any third party

The DGB and its affiliates welcome the Commission's chosen approach. The draft draws both on criteria that are used to determine the degree to which workers are subject to instruction under labour law and on criteria that determine independent economic operation on the market in more detail.

The DGB and its affiliates suggest that aspects that are recognisably used as instruments of other-directed employment and worker control should be given particular consideration, such as concrete specifications of the platform with regard to the content, execution, time and location of the task, pricing, controlling the awarding of contracts, disciplinary and control methods in the form of reputation or rating systems and strict monitoring of the work processes. The DGB and its affiliates are of the opinion that the criteria listed in the draft should be tightened accordingly.

- To ensure its implementation, the draft requires Member States (cf. Article 4 (3)) to

  a) Ensure that information on the application of the rebuttable presumption is made publicly available in clear, comprehensive and simple language,

  b) Develop guidelines for digital labour platforms, persons performing platform work and social partners to understand and implement the rebuttable presumption, including on the procedures for rebutting it,

  c) Develop guidelines for enforcement authorities to proactively pursue non-compliant digital labour platforms and

  d) Strengthen the controls conducted by labour inspectorates or the bodies responsible.

  According to Article 4 (4), any contractual relationships entered into before the implementation of the Directive are to be excluded from its application. This exception/cut-off date is extremely problematic, as it leads not only to various concurrent contractual relationships for the same work on a platform but to arbitrary unequal treatment in practice. This would also make little sense regarding the definition of 'employee' under works constitution law and the related questions and thresholds. We are concerned that it may trigger misguided incentives to encourage the conclusion of contracts or even terminations with regard to the cut-off date.

- Article 5 requires Member States to ensure, by establishing a framework, that one party is given the opportunity to rebut the legal presumption of employee status. The burden of presentation and proof then lies with the labour platform, which comes into play in court or administrative proceedings. The DGB is in favour of having the platform bear the burden of presentation and proof in this case, even if the platform workers do not categorise themselves as dependent employees. Thus, the power imbalance between platform and platform workers is taken into account.

Algorithmic management (Chapter III, Art. 6 ff.)

- The draft Directive stipulates comprehensive transparency obligations for the platforms as regards automated monitoring and decision-making systems. This is very welcome, but does not go far enough. Rather, transparency obligations must cover both algorithmic and human-driven monitoring and decision-making systems, as these are often intertwined in practice. For example, decision-making approaches and recommendations made on the basis of algorithms are often subject to human review, so both components feed into the decision-making process and should therefore be subject to the same transparency obligations. Specifically, the information obligations under Art. 6 should apply generally and not only to automated monitoring systems. In addition, it is crucial for platforms to provide sufficiently competent staff to guarantee the accessibility of transparent information about the control of and decision-making processes of algorithmic management systems with regard to the requirements of persons working on the platform.

- The draft stipulates that labour platforms be obligated to provide the information about algorithmic management systems in an electronic document (Art. 6 (4)).
  The information shall be made available to the national authorities and to the representatives of platform workers upon request. This obligation is laudable, but it is not sufficient. The DGB and its affiliates are of the opinion that the trade unions should be explicitly named as representatives for persons working on platforms. To this end, they propose a general obligation that the information be provided to the relevant trade union without this being requested.

- Article 6 (5) describes the requirements for the processing of personal data and clarifies, among other elements, that only personal data directly related to carrying out work activities may be processed. The DGB applauds the stipulation that data from exchanges with employee representative bodies may not be processed (see Article 6 (5) c).

- Consequentially (cf. Art. 22 GDPR), automated decisions are to be placed under human supervision. In addition, it is necessary for the platform to provide sufficient staff with appropriate competences and authority to furnish information regarding algorithmic and automated decisions which affect the persons working on the platform.

- The information and consultation rights formulated in Article 9 ensure that employees and their representative bodies have access to external expertise at their own discretion in order to reach qualified decisions. This right is limited to platforms that employ more than 500 platform workers in a Member State. This threshold value makes no sense. The DGB and its affiliates call for such a restriction to be eliminated.

Transparency on platforms (Chapter IV, Art. 11 ff.)

- In addition to the content of the relevant data to be transmitted to the national authorities and the employee representative bodies, time limits and updating intervals for the transmission are also specified (Article 12). The information to be transmitted must include

  a) The number of persons performing platform work through the digital labour platform concerned on a regular basis and their contractual or employment status;

  b) The general terms and conditions applicable to those contractual relationships, provided that these terms and conditions are unilaterally determined by the digital labour platform and apply to a large number of contractual relationships.

These requirements must be defined in more detail in two respects: On the one hand, the point at which platform work becomes 'regular platform work' must be determined and, on the other hand, the range – 'a large number' – above which information on the general terms and conditions must be provided also needs to be set. In this context, the DGB and its affiliates propose that the fact alone that the platform defines these conditions unilaterally and that they also apply to several contractual relationships shall suffice.

Remedies and enforcement (Chapter V, Art. 13 ff.)

- The Directive requires Member States to ensure that platform workers have access to effective and impartial dispute resolution and a right to remedies, including adequate compensation, in the event of a breach of their rights under this Directive (Art. 13). This provision, especially the concrete naming of the right to compensation, is laudable.

- The Directive obliges Member States to grant organisations the right to act on behalf of or in support of one or more platform workers (Art. 14). This provision must be fleshed out in such a manner that trade unions are explicitly mentioned as organisations which are primarily entitled to exercise the rights of persons working on platforms. The DGB and its affiliates demand that trade unions be granted the right to legal action for associations. This does not follow from Art. 14, a fact which the DGB condemns. However, Member States are free to provide for or introduce a right to legal action for associations. The enforcement of this right can also be improved by obliging the Member States to introduce collective proceedings, which could be designed along the lines of consumer law model proceedings.

- The specifications for the communication channels for persons working on platforms (Art. 15) are to be supplemented by specifications for their employee representative bodies, particularly trade unions in this case. Trade unions must be guaranteed a right of access to the platform's digital infrastructure so that they can organise and communicate with workers. Here, it must be ensured that the communication between the employee representative bodies and the workers is not controlled and monitored.

- In the event of legal action regarding the lawful determination of employment status, the platform must make all relevant data which is necessary to determine the status available to the competent courts (Art. 16). This explicit obligation, which would have to be implemented in the form of a rule facilitating the burden of proof, is laudable.

- The DGB also expressly welcomes the provisions on protection from discrimination against persons working on platforms (Art. 17) and their protection against unfair dismissal (Art. 18). The DGB considers it only proper that, in the case of a termination suspected to be due to the exercising of rights established in the Directive, the platform operators must state the reasons for termination (Art. 18 (2)) and, moreover, if there are indications suggesting unlawful termination, that the burden of proof shifts to the platform (Art. 17 (3)). This is the only way to redress the information imbalance that exists between workers and platforms.