

Position Paper

Preserving flexibility and autonomy in platform work

Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work

14 September 2021

Summary

Bitkom endorses the general objectives of the planned EU initiative. In our view it is vital to preserve advantages of platform work and not to hinder work creation as well as the development of innovative business models by unbalanced regulation. To avoid fragmentation of the single market by diverging national legislation, administrative or judicial decisions and to ensure legal certainty, it is necessary to provide EU wide coherent guidelines and establish a level playing field for platform mediated services.

Against this background we would like to highlight the following:

- It is important that EU action or measures at national level do not discriminate between the digital economy and traditional sectors, and that platform contractors have the same rights and obligations as self-employed in the offline world.
- EU-initiatives and measures should take into account the digital transformation in the world of work and the desire of working people for more flexibility.
- When considering measures to facilitate the correct classification of people working through platforms, the diversity of digital labour platforms needs to be acknowledged.
- Bitkom strongly opposes the concept of a rebuttable presumption of employment and the proposed shift in the burden of proof in judicial procedures. In our view a rebuttable presumption would not fix the issues related to the misclassification in employment status. It would retain the outdated concepts of employment and self-employment without directly clarifying the employment status itself and thus maintain legal uncertainty. For these reasons the concept does not constitute a sustainable approach. Parties would still need to litigate before a court, which implies lengthy procedures and substantial costs.

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Position Paper Preserving flexibility and autonomy in platform work

Page 2|14

- In addition, Bitkom believes that the policy options set out by the European Commission do not sufficiently address the goal of improving the working conditions of platform workers in particular. The focus of any upcoming proposal should be on tangible measures improving platform work, beyond a facilitated access to litigation.
- Studies show that for the overwhelming majority of people working through platforms earnings through digital labour platforms represent a supplementary source of income. Bitkom is thus of the view that the employment status should only be subject to measures addressing misclassification if certain stability in the contractual relationship of the digital labour platform and the person working through the platform exists.
- The criteria that are defined at EU level to facilitate the correct classification of employment status in platform work on an individual basis in certification or in subsequent judicial procedures should be indicative and non-exhaustive.
- New rights for platform workers with respect to algorithmic management should be introduced by way of self-regulatory commitments. They may include i.a. rules on explaining in a clear and understandable language the effects of algorithmic management as well as providing an internal complaint handling system and access to neutral out of court settlement for disputes through a mediator.
- Furthermore, to avoid contradicting and/or multiple obligations, provisions of existing and ongoing legislative procedures, notably GDPR and AI Act, should be given priority.

1 General Comments

Bitkom welcomes the European Commission's second consultation on the challenges related to working conditions of platform work. The consultation enables a substantiated dialogue and exchange of arguments in a transparent manner.

However, neither digital labour platforms, nor self-employed platform workers are represented by the social partners invited to participate in the consultation under Article 154 TFEU. The outcome thereof might hence be distorted and would not reflect market realities or the interests of the involved parties in the platform economy.

We therefore call on the Commission to take into account stakeholder positions from the digital platform economy as well as from users of digital labour platforms (workers/contractors and clients).

2 Specific comments to the questions put on consultation

2.1 Objectives of possible EU action (Question 1)

Bitkom endorses the general objectives of the planned EU initiative. These aim to ensure that people working through platforms have decent working conditions, while supporting the sustainable growth of digital labour platforms in the EU.

In our view it is vital to preserve advantages of platform work and not to hinder work creation as well as the development of innovative business models by unbalanced regulation.

To avoid fragmentation of the single market by diverging national legislation, administrative or judicial decisions and to ensure legal certainty, it is necessary to provide EU wide coherent guidelines and establish a level playing field for platform mediated services. This will boost the platform economy and contribute to the internal market's competitiveness and value creation.

It is equally important that EU action or measures at national level do not discriminate between the digital economy and traditional sectors, and that platform contractors have the same rights and obligations as self-employed persons in the offline world.

2.2 Possible avenues for EU action (Question 2)

Bitkom would like to underline that any regulatory intervention should target a clearly identified problem and should rely on thorough and evidence based analysis. At the same time, it should avoid disproportionate measures and undesirable side-effects that could hinder innovation and growth potential of platform-based businesses as well as limit access to the low barrier labour market facilitated through platforms. EU action should thus focus on creating the best possible conditions for all participants of the platform-based service economy and allow them to benefit from the immense potential that platform based work entails.

However, Bitkom would like to highlight that simply facilitating litigation on the self-employed status does not ensure that people working through platforms have decent working conditions. It narrows the topic to the question of employment status classification which does little to materially address the working conditions of self-employed platform workers. In addition, countries already have definitions of the concept of "worker"/"employee" and procedures to challenge the self-employed status. Any changes to these procedures in the form of a rebuttable presumption of employment and a shift in the burden of proof are therefore ineffective to go to the heart of the issue and unnecessary. This would force platforms to operate with even greater legal uncertainty, greater legal costs and greater exposure to legal risks.

Bitkom believes that any upcoming proposal should enable governments and platforms to adopt concrete measures to improve the working conditions of platform workers by focusing on social protection for the self-employed, health and safety, as well as transparency. **Additionally, a sustainable and impactful improvement of the working conditions will ultimately require a bold modernisation of existing employment categories to account for the multi-faceted platform economy.**

Addressing misclassification in employment status

Bitkom wishes to stress that entrepreneurship is a key pillar of a well-functioning market economy. Self-employment, both in the digital and the traditional economy must therefore be promoted, especially in economically difficult times.

Challenges inherent to the employment status of self-employed platform workers concerning their inadequate social protection and access to collective rights apply to

Position Paper Preserving flexibility and autonomy in platform work

Page 7|14

Especially for students or pensioners, platform work offers a convenient and flexible way to earn additional income. Complementary to their main job, employees may also engage in platform work at the weekend or after work.

According to the COLLEEM Survey, the majority of platform workers provide more than one type of service, and are active on two or more platforms⁴. This suggests that an economic dependence from a particular digital labour platform does not seem to be an issue for the large majority of workers.

Against this background Bitkom is of the view that the **employment status should only be subject to measures addressing misclassification if certain stability in the contractual relationship of the digital labour platform and the person working through the platform exists. The requirement of stability would not be fulfilled if the volumes of tasks or the earning through platform work do not exceed a certain threshold or if the period of work through a platform is limited to a certain number of days per year.**

The criteria that are defined at EU level to facilitate the correct classification of employment status in platform work on an individual basis in certification or in subsequent judicial procedures should be indicative and non-exhaustive. This would enable to respect national concepts of employment status and duly take into account the diversity of digital labour platforms.

In our view in particular the following criteria would speak for self-employed status:

- Discretion to accept or to refuse carrying out a task offered by the platform
- Flexibility in terms of hours of work

BMAS Forschungsbericht 462: Befragung zum sozioökonomischen Hintergrund und zu den Motiven von Crowdworkern (2016); <https://www.zew.de/publikationen/befragung-zum-soziooekonomischen-hintergrund-und-zu-den-motiven-von-crowdworkern>

Plattformarbeit in Deutschland, Freie und flexible Arbeit ohne soziale Sicherheit, Bertelsmann Stiftung (2019); https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/Plattform_07lay.pdf

⁴ [Platform Workers in Europe Evidence from the COLLEEM Survey | EU Science Hub \(europa.eu\)](#)

Position Paper Preserving flexibility and autonomy in platform work

Page 8|14

- Flexibility in terms of place of work
- Freedom to provide services to any third party, including direct competitors of the platform
- Economic activity via multiple digital labour platforms at the same time (“multiapping”)
- Entry in a trade/business register
- Possibility to use subcontractors or substitutes⁵
- Genuine entrepreneurial independence (person working through platform bears the economic risk of the enterprise, has opportunities to further develop its business)
- Ownership of equipment and infrastructure necessary for the service provision
- Elements of gamification⁶ do not have a direct effect on access to new tasks or working conditions

Following criteria would in particular speak for an employment status of a worker:

- Obligation to accept a task
- Setting requirements for minimum working time by the platform
- Subordination in form of concrete instructions given by the platform with high degree of detail on how to perform services⁷

⁵ In some cases, subcontracting is not possible due to the nature of the task, e.g. in case of market research participants or in the field of content creation when it comes to granting of rights of use.

⁶ Using game-design-elements and gaming principles to enhance motivation and engagement of workers.

Position Paper

Preserving flexibility and autonomy in platform work

Page 9|14

- High degree of control by the platform over the organisation of work
- High degree of organisational integration into the platform's business model
- Absence of genuine entrepreneurial independence (person working through platform does not bear the economic risk of the enterprise, has no opportunities to further develop its business e.g. via other platforms)
- Incentives by the platform for the person working through the platform to work longer hours

With regard to the criteria applied to facilitate the correct classification of employment status in platform work Bitkom would like to add following comments:

The consultation document refers to the fact, that the **level of remuneration** is determined by the platform as an indication for an employment relationship. However, determining the level of remuneration by platforms serves in many cases as protection of people working through platforms by preventing "race to the bottom" pricing. With a view to achieve fair working conditions for people working through platforms, voluntary commitments of platforms to apply fair remuneration should be incentivised.

The consultation document also suggests that **unilateral imposition of terms and conditions** regarding the assignment and payment should be seen as indication for an employment relationship. The use of this criterion does not seem appropriate regarding the assessment of the employment status in the context of platform work. It is inherent in the logic of the platform based economy that terms and conditions as well as payment options are defined by the platform.

A further aspect relates to the communication between persons working through platforms and customers. **Direct communication** between these parties is often not necessary, for instance in case of micro-tasks.

The use of **gamification elements** by the platform can enhance motivation and engagement of people working through platforms. In case gamification elements have no direct effects on access to new tasks or working conditions, it is likely to result in

⁷ It has to be noted, that also self-employed contractors may need to be given technical specifications in order to properly complete an assignment.

Position Paper Preserving flexibility and autonomy in platform work

Page 10|14

higher average income for less active platform workers and lower average income for more active platform workers.

Whereas digital labour platforms have a strong interest and willingness to **offer voluntary benefits to the self-employed workers they partner with**, they are hesitant to do so, because such benefits might be deemed by authorities and courts as an indication for the contractor being an employee of the platform. Member States should hence allow voluntary commitments of platforms to support their contractors with benefits, without risking that self-employed contractors accepting such benefits are classified as employees of the platform. Such benefits could enable contractors to participate - on their own account - in (voluntary) social protection schemes for example in the fields of accident insurance or old-age benefits. **To this end the Commission could issue guidance to Member States regarding the type of benefits and rewards that platforms are allowed to grant to self-employed persons they partner with.**

Regarding social protection and benefits in general, Member States should adapt their social protection systems to the digital age and respond to disruptive elements and people's desire for more flexibility in their professional lives. Working persons nowadays may combine or change jobs multiple times during their professional career; they may change from a worker status to a self-employed status or vice versa. They may at the same time have different jobs classified in different employment status categories. This requires first and foremost the preservation, accumulation and/or transferability of rights across social protection schemes.

Therefore EU action should build on monitoring and implementing the Council Recommendation on access to social protection for workers and the self-employed (2019/C 387/01)⁸. Accordingly, Member States should ensure access and effective coverage of social protection schemes in all branches of the Recommendation⁹ to all workers and self-employed persons. The digital sector and thus digital labour platforms should not be discriminated against traditional sectors. **Access to social protection should thus be available to all workers and self-employed persons – off and online.**

⁸ [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019H1115\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019H1115(01)&from=EN)

⁹ (1) Unemployment benefits, (2) Sickness and healthcare benefits, (3) Maternity and equivalent paternity benefits, (4) Invalidity benefits, (5) Old-age benefits and survivors' benefits, (6) Benefits in respect of accidents at work and occupational diseases.

Introducing new rights related to algorithmic management

New rights for platform workers with respect to algorithmic management should be introduced by way of self-regulatory commitments. Putting in place, testing and continuous adjustments of systems enabling the use of rights imply efforts and expenses to digital labour platforms that should be proportionate.

Self-regulatory obligations should apply to all digital labour platforms and may include the followings:

- Online platforms should engage in **explaining in a clear and understandable language the effects of algorithmic management** concerning the assignment of tasks, rankings and performance appraisal. Platforms should, however, under no circumstances be required to disclose the source code of algorithms, which constitute trade secrets.
- Platforms should **ensure that algorithmic decisions are not discriminatory**, and that sensitive personal data of people working through platforms are not used for such decisions.
- Online platforms should provide a **notice period** and a **statement of reasons** to their users (being contractors or clients) in case they are affected by restrictions or deactivation of the accounts on the platform.
- Digital labour platforms should provide an **internal complaint handling system and access to neutral out of court settlement for disputes through a mediator**, which offer platform workers the opportunity to clarify circumstances and facts in relation to a dispute.

Furthermore the **ongoing legislative process concerning AI Act includes rules with regard to human oversight and transparency. To avoid contradicting and/or multiple obligations, provisions of the AI Act should be given priority.** Additional requirements for digital labour platforms should be put on hold until the AI legislative procedure has been finalised at EU level.

Position Paper Preserving flexibility and autonomy in platform work

Page 12|14

Whereas **ratings** have an important role in providing additional information to platforms and their users on performance and quality of service, ratings should not have a direct effect on access to tasks, working conditions and should not lead to discrimination.

Rating portability may interfere with the autonomy of digital labour platforms that are required to include ratings of other platforms into their own system. **Regarding the technical implementation of portability of ratings several issues need to be clarified:**

- A distinction must be made between appraisal for the service of the platform as a whole and appraisal given solely for the performance of the person working through the platform. Portability rules should logically only apply to the latter. In some industries, however, it could be almost impossible to make such a distinction. For example, customers in the food delivery sector might focus their ratings on the food or the restaurant, but not just on the riders' services.
- Non-transfer of ratings to another digital labour platform should not result in negative effects for the person working through the platforms in question.
- It could also be reasonable to focus portability rights on horizontal aspects that could apply to different types of platforms, such as professional competence, accuracy, punctuality, friendliness.

Tackling cross-border challenges

Bitkom is of the view that digital labour platforms operating in a cross-border context should engage in ensuring **transparency** to their platform users on applicable law and jurisdiction.

Furthermore some basic **reporting obligations** towards competent authorities could apply to all labour platforms to gather reliable statistical evidence on the number of users and incomes generated through them. **Such data should of course be treated as trade secrets and kept strictly confidential, since disclosure would distort competition in the platform sector.**

Position Paper Preserving flexibility and autonomy in platform work

Page 13|14

Should platforms be subject to reporting and statistics obligations, they should not be put in a more disadvantaged position in comparison to undertakings in the traditional economy. We welcome that the Commission intends to keep administrative burden in particular on SMEs to a minimum in this context.

We consider that **EU-Guidance for people working through platforms** in a cross-border context could be helpful.

2.3 Possible legal instruments (Question 3)

Taking into account EU and national competences in the field of employment and social policy as well as the heterogeneity of platform work **a combination of different legal instruments** seems most appropriate to pursue the identified policy objectives.

Existing and ongoing legislative procedures, notably GDPR and AI Act, should be given priority regarding rules for algorithmic management.

In particular with respect to the correct classification of employment status a **Council recommendation could best set policy guidance and a common policy framework at EU level**. This instrument would allow respecting national concepts of employment status.

The modernisation of social protection systems should in line with Article 153 TFEU be ensured at Member States level. EU action should build on monitoring and implementing the Council Recommendation on access to social protection for workers and the self-employed.

In addition, self-regulatory initiatives such as codes of conduct and voluntary commitments should assume a key role among the planned EU initiatives so that the diversity of platforms can appropriately be taken into account. Several digital labour platforms have undertaken efforts for years to prevent negative side effects of

Position Paper Preserving flexibility and autonomy in platform work

Page 14|14

platform work. They do so by voluntary commitments¹⁰ and by joining self-regulatory frameworks¹¹.

2.4 Dialogue under Article 155 TFEU (Question 4)

As neither digital labour platforms, nor self-employed working through them are generally represented by social partners, a dialogue pursuant to Article 155 TFEU does not seem to be appropriate to establish rules for platform work.

Bitkom represents more than 2,700 companies of the digital economy, including 2,000 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.

¹⁰ E.g. The European Purpose Project, [European Purpose – European Purpose](#)

¹¹ E.g.: [Codes of Conduct for Paid Crowdsourcing in Germany](#)