

## **Alert** | Regulatory & Compliance



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### **EU Platform Work Package: What Does It Mean for Platform Businesses?**

**This GT Alert covers the following:**

- EU Platform Work Package proposal
- Harmonized measures to determine employment status of individuals working through digital labor platforms and new rights for both workers and self-employed persons regarding algorithmic management
- Costs, requirements, regulatory risk, and burden of the Package on digital labor platforms' supply chains

On Dec. 9, 2021, the European Commission (**Commission**) proposed the **Platform Work Package (PWF or Package)**. The PWF is a set of measures intended to improve the working conditions of persons working through “digital labor platforms”<sup>1</sup> in the EU and to support the sustainable growth of these platforms. The Package consists of three instruments, namely: (a) a Communication setting out the EU

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<sup>1</sup> A “digital labor platform” – as defined in the Proposed Directive – means any legal or natural person providing a commercial service, which: (a) is provided, at least in part, at a distance through electronic means (e.g., a website or a mobile app), (b) is provided at the request of a recipient of a service, and (c) involves, as a necessary and essential component, the organization of work performed by individuals.

approach and measures on “platform work”<sup>2</sup> (**Communication**), (b) a proposal for a Directive on improving working conditions in platform work (**Proposed Directive**), and (c) draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons (**Draft Guidelines**).

Among other things, the PWF introduces harmonized measures to determine the employment status of individuals working through digital labor platforms – workers (i.e., employees) *versus* solo self-employed persons (i.e., independent contractors) – and new material rights for both workers and self-employed persons regarding algorithmic – i.e., automated systems – management.

According to the Commission, conservative estimates suggest that there are more than 500 digital labor platforms active in the EU. Given the broad definition of digital labor platforms, they include, e.g., ride-hailing, food delivery, and domestic work businesses.

These businesses need to be – and remain – alert to the costs, requirements, regulatory risk, and burden of the Package on their supply chains, and start planning for compliance with the forthcoming PWF regulatory regime. Employing workers instead of hiring solo self-employed persons leads to a 24.5% increase in labor costs for businesses on average in the form of tax and social protection contributions.<sup>3</sup> Non-compliant businesses risk penalties for infringements of national provisions adopted pursuant to the Proposed Directive.

### **Background to the Package and Link with Existing EU Policy and Instruments**

According to the Commission, the digital platform economy is growing quickly. Between 2016 and 2020, revenues in relation to this sector grew from an estimated approx. € 3 billion to € 14 billion or more. Currently, more than 28 million people in the EU work through digital labor platforms, and this number is expected to reach 43 million in 2025.

In the Commission’s view, digital labor platforms create opportunities for businesses, workers, and self-employed persons, as well as improved access to services for consumers. At the same time, new ways of work come with new challenges. For example, the challenge of correctly classifying the employment status of persons could lead to inadequate labor rights and social protection. Additionally, the use of algorithms in platform work can raise questions of accountability and transparency.

In her agenda for Europe, Commission President Von der Leyen indicated that she will “look at ways of improving the [labor] conditions of platform workers”.<sup>4</sup> The **Commission Work Program 2021** (at p. 4) announced a legislative proposal on improving the working conditions of people providing services through platforms. The PWF is a key initiative of the Commission’s **European Pillar of Social Rights Action Plan**. In June 2020, the Commission launched an initiative to ensure that EU competition law does not stand in the way of improving working conditions for self-employed individuals through collective agreements. In February 2021, the Commission also launched a consultation on the possible direction of EU action in relation to platform work.

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<sup>2</sup> “Platform work” – within the meaning of the Proposed Directive – means any work organized through a digital labor platform and performed in the EU by an individual on the basis of a contractual relationship between the digital labor platform and the individual, irrespective of whether a contractual relationship exists between the individual and the recipient of the service.

<sup>3</sup> Communication, at p. 11

<sup>4</sup> **Political guidelines for the next European Commission 2019-2024**, “A Union that strives for more. My agenda for Europe”, at p. 10.

## The Communication

The Communication provides an overview of the method and tools at the EU level in relation to platform work. The Commission stresses that it will support and monitor the transposition of the Proposed Directive and will ensure proper application and enforcement by the EU Member States. Nevertheless, additional measures are needed to foster fairness in platform work, according to the Commission. Therefore, the Communication calls on EU Member States, digital labor platforms, and social partners to work together to further reinforce and complement the Proposed Directive and the Draft Guidelines.

The Communication (at pp. 11-12) notes that it is currently impossible to port rating/reputational systems between platforms, creating so-called “lock-in effects” and “superstar effects”,<sup>5</sup> and thwarting competition between platforms, as it disincentives individuals to work through newly established digital labor platforms. Against this background, the Commission will support setting up a so-called industry code of conduct, ensuring the portability of rating/reputational systems.

Moreover, the Communication sets out that the EU will work with its partners worldwide to promote better working conditions in platform work globally.

## The Proposed Directive

The Proposed Directive’s purpose is to improve the working conditions of persons performing platform work by: (a) ensuring correct determination of their employment status, (b) promoting transparency, fairness, and accountability in algorithmic management in platform work, and (c) improving transparency in platform work, including in cross-border situations, while supporting the conditions for the sustainable growth of digital labor platforms in the EU.

First, the Proposed Directive creates a rebuttable legal presumption – with the burden of proof on the platform – that the contractual relationship between a digital labor platform that “controls the performance of work” and a person performing platform work through that platform is deemed an employment relationship. “Controlling the performance of work” is understood as fulfilling at least two of the following criteria (Article 4(2) of the Proposed Directive):

- a) Effectively determining, or setting upper limits for the level of remuneration;
- b) 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;
- c) Supervising the performance of work or verifying the quality of the results of the work including by electronic means;
- d) Effectively restricting the freedom, including through sanctions, to organize 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; and
- e) Effectively restricting the possibility to build a client base or to perform work for any third party.

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<sup>5</sup> “Lock-in effects” prevent individuals from switching to other platforms for fear of losing their online reputation through clients’ ratings. “Superstar effects” means that individuals who are newcomers on a platform have a hard time challenging the established position of their competitors, since the former cannot bring with them references gained elsewhere.

The legal presumption will not have retroactive effect and will apply as of two years after adoption of the Proposed Directive. Being (re-)classified as a worker means – where applicable – e.g., the right to a minimum wage, unemployment and sickness benefits, and contributory old-age pensions. In the Netherlands, such worker could as a direct result of his status, if applicable, claim additional rights derived from a generally binding collective labor agreement or mandatory pension fund connected to the industry in which the platform is active.

Second, the Proposed Directive sets out (in Articles 6-10) that algorithmic management is subject to the procedural framework for the enforcement of the [EU General Data Protection Regulation](#) rules, including as regards monitoring, and administrative fines. The Proposed Directive also requires EU Member States to provide for effective, proportionate, and dissuasive penalties for breaches of the obligations under the Proposed Directive, and to make sure that the penalties are applied.

Third, the Proposed Directive increases transparency of platform work. The Proposed Directive clarifies that platforms must declare work – whether cross-border or not – performed by platform workers to the competent labor and social protection authorities of the EU Member State in which the work is performed and to share relevant data with those authorities, in accordance with national rules and procedures. Moreover, platforms must make the following information available to these authorities (Article 12(1)):

- a) The number of persons performing platform work through the digital labor platform concerned on a regular basis and their contractual or employment status; and
- b) The general terms and conditions applicable to those contractual relationships, provided that those terms and conditions are unilaterally determined by the digital labor platform and apply to a large number of contractual relationships.

### **The Draft Guidelines**

Article 101 of the Treaty on the Functioning of the European Union (**TFEU**) prohibits agreements between businesses that restrict competition. The EU Court of Justice has recognized that collective bargaining between workers – including “false” self-employed persons – on the one hand and employers on the other falls outside the scope of the cartel prohibition provision of Article 101 TFEU. However, genuine self-employed persons are considered “undertakings” under EU competition law, and agreements they collectively conclude – e.g., collective bargaining agreements – risk infringing Article 101 TFEU.

The Draft Guidelines intend to confirm that antitrust/competition law does not stand in the way of collective agreements improving the working conditions of solo self-employed persons. The Draft Guidelines pursue this objective by clarifying the applicability of EU competition law to collective bargaining by certain solo self-employed persons, including: (a) economically dependent solo self-employed persons, (b) solo self-employed persons working “side-by-side” with workers, and (c) solo self-employed persons working through digital labor platforms. The Draft Guidelines also set out the Commission’s antitrust/competition enforcement priorities in this regard and indicate that the Commission will not intervene in relation to collective agreements aimed at correcting a clear imbalance in the bargaining power of solo self-employed persons relative to their counterparts.

## Conclusion

The PWF imposes costs and a significant burden on platform businesses.

The Communication calls on national authorities, social partners, and other relevant stakeholders for new measures to achieve better working conditions for those who work through digital labor platforms. It remains to be seen what new measures, if any, will be brought forward in this regard.

As stated above, the Proposed Directive concerns a proposal. The Proposed Directive is therefore still subject to discussion and review within the EU, and the final version may differ either slightly or materially. If the Proposed Directive is adopted without change, EU Member States will have two years to transpose the Proposed Directive into national law. Once transposed, businesses will have to comply with all national law requirements resulting from implementation of the Proposed Directive.

The Draft Guidelines are undergoing a public consultation – from Dec. 9, 2021 to Feb. 24, 2022 – to gather feedback from stakeholders, after which the Draft Guidelines will be adopted by the Commission. The final guidelines will be binding on the Commission in its subsequent interpretation and enforcement of EU competition rules.

Platforms should understand the potential impact of the costs of the PWF – and the Proposed Directive in particular – on their business process. It is furthermore essential to make sure the correct formalities are considered to ensure compliance with the Proposed Directive and subsequently avoid potential penalties.

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