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Policies to support the selfemployed in the labour markets of the future

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Policies to support the self-employed in the labour markets of the future

Martin Gruber-Risak, Vassilis Hatzopoulos and Diane Mulcahy

Executive summary

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THE RISE OF independent work, self-employment and the growth of the gig economy are all disrupting the traditional model of full-time employees working one job with single employers. The pandemic further disrupted work by forcing the acceleration and acceptance of remote work, and, in many cases, supplying clear evidence that workers can be productive and successful outside of an office.

IN CONTRAST, EUROPEAN Union labour markets and regulations have been slow to change and adapt to the transformation of work. Labour markets are still structured around two types of workers: independent contractors and employees, leaving policymakers to figure out how to force many types of worker today (part-time, self-employed, on-demand, freelancer, side gigger) into the outdated two-tier, or in select cases, three-tier, classification system.

SIMILARLY, POLICYMAKERS HAVE chosen to continue to award employment rights, benefits and protections only to employees. Other workers are denied access to, for example, paid sick leave and other types of leave, equitable pensions and other social contributions, protection against discrimination and harassment, and the right to take collective action. If a labour market was being designed today, it's unlikely such benefits, protections and rights would be awarded only to employees.

WE REVIEW THE changes in the way we work and discuss the need to update worker classification. We explore the rationale and options for extending protection against discrimination and harassment, and the right to collective action, to more workers. We also discuss the special case of platform work.

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1 New work? New protections?

The social policies of European Union countries have, by and large, been designed for full-time employees working for a single employer. This traditional structure has been disrupted by technology, globalisation and changes in demography and in worker¹ and employer preferences for remote and flexible work. These changes have resulted in the rapid growth of self-employment² and independent work, and have exposed gaps in access to benefits, protections and rights that exist for independent and self-employed workers.

As a result, policymakers are now faced with the question of which labour benefits, rights, and protections to extend to the self-employed, and how to close possible gaps for those that work in atypical employment relationships. Should all the rights and protections awarded to full-time employees be extended to the self-employed? Or should the self-employed be treated differently in some areas? Put differently: who is protected, and why? (Risak and Dullinger, 2018; Kountouris, 2018; Mulcahy, 2018).

This paper focuses on solo self-employment, ie those working independently outside an employment contract without full-time employees. Solo self-employment has been on the rise in Europe for the past two decades and now represents 13 percent of the workforce³. Because those workers have chosen to be self-employed, or are not able to secure traditional employment, they are in higher-risk circumstances without access to the normal benefits and protections awarded to full-time employees.

As new models of organising work beyond the standard employment relationship become more common, fundamental questions arise. Should traditional full-time employees continue to be protected and favoured disproportionately compared to workers in other contractual arrangements, especially the solo self-employed? Should workers outside the traditional full-time employee model be penalised by reducing their access to adequate protections and benefits? And perhaps the most significant question: how should labour policies be updated to create labour markets that protect and support all workers adequately?

We explore the major policy challenges facing European governments as a result of the changes in the world of work. We start with the most obvious issue, namely the need to update worker classification and to adapt the scope of application for labour legislation, thereby increasing its coverage. We emphasise in particular protection against discrimination and harassment, as well as freedom of association, representation and collective bargaining. We also discuss whether a separate focus on platform workers is justified.

2 Updating the worker classification and the personal scope of labour legislation

In the EU, workers are classified as either employees or self-employed. Several countries have intermediate categories that extend at least some of the legislation protecting employees to the group of self-employed considered vulnerable (though how these vulnerable self-employed are defined differs across jurisdictions).

1 We use the notion of ‘employee’ for those working under an employment contract, and the wider notion of ‘worker’ for individuals that provide work in person, covering the solo self-employed and employees.

2 For the purposes of this paper, we define a self-employed person as an individual who provides services in person on a legal basis other than an employment contract. The solo self-employed are persons that do not employ employees.

3 See <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20211123-2>.

The persistent lack of objectivity and clarity around worker classification creates a confusing system

Some of the self-employed, especially those in the platform economy, are in a situation that resembles that of employees in terms of economic dependence and autonomy. However, they do not enjoy the same level of protection as employees, either because they are misclassified or because worker classification systems have not been updated accordingly. EU countries have followed different approaches, with some redefining the ‘employee’ status using criteria of economic dependence, and others creating a hybrid/intermediate status giving workers in this category some employee-like protection rights (Eurofound, 2017).

The current binary worker classification system still benefits traditional full-time employees. For the solo self-employed, how the status question is resolved depends on the courts. It takes time to wait for a clear judicial approach to new forms of employment to develop, yet an unclear situation is problematic for all parties, and for the economy as whole.

The persistent lack of objectivity and clarity around worker classification creates a confusing system and provides incentives for companies to misclassify employees as self-employed without labour protections. It also leaves workers on an unsure footing when negotiating their status, and has led to numerous lawsuits about worker classification in several EU countries, with platform work now being something like a test case. Interestingly, all such cases decided by the highest national courts have resulted in the reclassification of former self-employed platform workers as employees (Spain, Germany, France), or third-category workers with a limited number of employee rights (United Kingdom, Italy) (Hießl, 2021).

In this section we discuss three options for creating a worker classification system that reflects the changing ways that people work, while advancing both economic efficiency and equality among employees and the self-employed. The options we discuss are: 1) implementing a system with just one category of ‘worker’; 2) a presumptive classification of workers as employees while adding a third, hybrid category of worker such as ‘dependent contractor’. We start with some reflections on why worker classification still matters and how it affects the job market.

2.1 Why worker classification still matters

Worker classification matters because the classification system creates meaningful economic disparities between employees and the self-employed that distort the behaviour of both employers and workers. It draws a line between those with protections and benefits and those who do not enjoy them.

EU and national labour policies provide the maximum benefits and protections to employees. Employees receive benefits from their employers (eg paid holiday and sick leave, contributions to social security), and are covered by numerous labour protections, including protections against wrongful termination and excess working time, and against discrimination and harassment. Although some of the mentioned rights have been extended in some EU countries, most self-employed people are unable to access many of the benefits, subsidies and protections that are still only available to employees. In the light of the reflections above, it is questionable if this exclusion can still be justified.

2.2 How classification affects the job market

The current classification system doesn’t optimise the preferences of either buyers or sellers of labour. It provides incentives for employers, as buyers of labour, to reduce the supply of traditional employment contracts because employees can cost more than contractors on a fully loaded basis⁴, given the costs of benefits, including social insurance. Not unexpectedly, some employers actively arbitrage the cost disparity between the two types of workers by reducing

⁴ In the US, employees can cost 30 percent to 40 percent more than solo self-employed workers (Manyika *et al*, 2016).

The current classification system distorts the behaviour of companies and workers by introducing a phenomenon similar to what economists call a ‘kink’

their employee headcounts and increasing hiring of self-employed workers⁵. Even if companies would prefer more full-time, dedicated staff, the classification system to a certain extent provides incentives to hire more contract labour than they otherwise would.

The classification system also creates a two-tier workforce⁶ for workers. Those hired as traditional full-time employees enjoy full protections and benefits, while all other workers do not. Even if workers would prefer to work independently, the classification system encourages them to seek traditional jobs so they can access the full range of labour protections that are only available to employees.

The current classification system therefore distorts the behaviour of companies and workers by introducing a phenomenon similar to what economists call a ‘kink’⁷. A kink is an economic inflection point created by policies resulting in a problem that people try to game. Behavioural economists have found that people ‘bunch’, or cluster, at kinks in order to maximise their economic benefit (Mortenson and Whitten, 2019). The existing classification system thus introduces a kind of kink into the labour market between the two categories of worker. It causes both companies and workers to bunch around it to access the category that maximises their economic rewards, or to avoid the category that does not. Employers hire employees that they try to classify as self-employed; workers prefer employee status and even take legal action to become classified as such if they are hired as self-employed. A change in policy that removes this distinction that does not fit into the realities of digital work and life in the twenty-first century would eliminate the inefficiencies and distortions it causes in the labour market. How can this be done?

2.3 How to fix worker classification?

One way to fix the worker classification system would be to extend the personal scope of labour law to all workers, ie to everybody providing work regardless of the underlying contract. This option would eliminate the distinction between employee and self-employed entirely, and structure labour policies around a single category of worker. The fundamental belief underlying this solution is that the labour market and legal system should support all workers, not just traditional employees.

While a wholesale restructuring of the labour market would be an enormous undertaking, creating a single category of worker would remove the inefficiencies of the current ‘kink’ and extend most existing benefits and protections to all workers on either a pro-rata or universal basis. It would improve equality between traditional employees and self-employed workers when they are in comparable situations, increasing economic efficiency by avoiding distortionary behaviour.

A variation of this proposal would be to formally preserve the current two-category structure, but change its implementation to automatically classify all workers as employees. In the end this would also result in all workers being covered by labour law.

The second proposal of a presumption of an employee employment relationship does not change the binary nature of worker classification but relies on litigation to establish the correct legal status of the worker. The idea is that successful litigation would lead to a reduction in misclassification and bogus self-employment, as it would no longer make sense economically for hiring entities to operate with bogus self-employed workers. These circumstances and the widespread practice of self-employment in some sectors, such as platform work that is likely to be bogus self-employment, justify special enforcement measures that make it easier to establish the employee status for the workers concerned. This approach is not new

5 Diane Mulcahy, ‘Google’s Shadow Workforce Shines a Light on Labor Market Disparities’, 5 June 2019, *Forbes*, <https://www.forbes.com/sites/dianemulcahy/2019/06/05/googles-shadow-workforce-shines-the-light-on-labor-market-disparities/?sh=39bc4f02374e>.

6 Mark Bergen and Josh Eidelson, ‘Inside Google’s shadow workforce’, 25 July 2018, *Bloomberg News*, <https://www.bloomberg.com/news/articles/2018-07-25/inside-google-s-shadow-workforce>.

7 The concept of a ‘classification kink’ in the labor market was first introduced by Mulcahy (2016). There is wide-ranging literature on bunching at the kinks including Kleven (2016), Saez (2020), Bastani (2014) and Einav (2017).

as a number of examples (Belgium and France, and Austria for temporary agency work) show where such mechanisms have been already introduced to counter circumventions of employment law.

Presumptive employment has been tested extensively in the US. For example, a law passed in California in 2019, the so called Assembly Bill 5 (AB 5)⁸, assumes that workers are employees and requires employers to use a three-part 'ABC test' to determine if a worker is self-employed (an 'independent contractor'). Technically this is a legal presumption that can be rebutted by the hiring entity but only on three grounds⁹. This provision does not apply to the majority of workers in the platform economy though. App-based transportation and delivery drivers are defined as independent contractors and employee status is not available to them. These details are still subject to legal challenges¹⁰. The protracted legal and political battle over workers status in California shows how difficult and disputed updating worker classification can be in practice. It also shows how the current laws and tests around legal presumption are sometimes unclear, difficult to implement and enforce, and reliant on long legal processes to resolve.

A third proposal to fix worker classification is to add a third, hybrid category of workers between employees and self-employed. Workers in such a hybrid category would get more benefits than the self-employed, but fewer than those offered to employees. Many European countries have introduced such intermediate categories, such as the 'employee-like person' (*arbeitnehmerähnliche Person*) in Germany and Austria, 'workers' in the UK, 'TRADE' in Spain, and 'self-employment organised by the employer' (*lavoro eteroorganizzato*) in Italy.

The experience with this intermediate category is mixed. While its introduction does not, at first glance, appear to change anything to the disadvantage of traditional employees, it has been pointed out that in Italy, workers who would qualify for full protection as employees under the traditional legal tests would likely become deprived of many rights if they were crammed into an 'intermediate bucket' (De Stefano, 2016). Regulating dependent self-employment as a distinct group is no panacea for addressing the changes in business and work organisation driven by the disintegration of vertical firms.

On the other hand, the lack of any intermediate status effectively provides greater incentives for employers to reclassify their workers as self-employed, and an intermediate category may provide them with those rights they actually need (Lobel, 2016). Current proposals are often flawed however, insofar as they do not even recognise the full set of 'basic' employment rights, including the right to organise and to bargain collectively, as well as the application of minimum wage legislation, and as they would lead to additional clarity or faster dispute resolution.

A consultation document on platform work issued by the European Commission in February 2021 (European Commission, 2021a) noted in a similar vein that, where it has been implemented, the third category option has simply created a three-tier workforce instead of the current two-tier workforce. In an impact assessment accompanying the December 2021 proposal for a directive on improving working conditions in platform work, the European Commission therefore explicitly stated that the introduction of an intermediary third category is not intended (European Commission, 2021b).

⁸ See https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5.

⁹ "For purposes of the provisions of this code and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission, a person providing labour or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied: ...". The conditions are: A) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; B) The worker performs work that is outside the usual course of the hiring entity's business; and C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

¹⁰ See [https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labour_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labour_Policies_Initiative_(2020)).

3 Extending protection against discrimination and harassment

As proposals for extending benefits, rights, and protections to all workers are considered, it is helpful to consider specific examples. Below we explore the rationale and possibility to extending employee protections against discrimination and harassment to all workers.

3.1 The rationale for anti-discrimination legislation

Employees are generally protected against discrimination and harassment on the basis of sex, racial or ethnic origin, religion or beliefs, disability, age, and sexual orientation, while self-employed workers are generally not fully covered by the protections against discrimination and harassment by their employers or clients, and therefore remain vulnerable to both.

The International Labour Organisation (ILO) considers the elimination of discrimination at work a core obligation of its member states¹¹. In numerous instances, EU documents refer to the commitment to equality and non-discrimination at work¹². Thus, it is illegal across the EU to be treated less favourably than others because of characteristics that are not related to the inherent requirements of the job. This understanding is based on the principle that it is essential for employees to be able to choose their employment freely, to develop their potential to the full, and to be rewarded based on merit. These protections against discrimination also extend to job-seekers.

On the other hand, anti-discrimination protections can limit the contractual freedom of employers, especially when selecting their contractual partners, or in terms of the managerial prerogative and the termination of employment contracts. Thus, anti-discrimination provisions have been introduced only after heated political discussions and are often still under attack. This negative response arises from the fact that in Europe, the market is usually trusted to organise the relationships of its participants by way of a contract. Therefore, a clear justification as to why contractual freedom has to be limited is expected, especially when it comes to employment relationships. In the context of worker protection against harassment and discrimination, an employer's freedom to discriminate and harass can be limited for two main reasons:

- Employees work in person and therefore their personal rights and dignity have to be respected in the workplace. This includes the protection against harassment in any form from employers, colleagues and customers that they might be exposed to due to their physical presence in the workplace.
- The employment relationship is characterised by unequal bargaining power. Employees depend on the income from the work to sustain themselves financially, and to fulfil social and psychological needs. This dependency could potentially force employees to agree to unfair and discriminatory terms of employment. Employees need protections against discrimination and harassment to set boundaries on employer behaviour since employees are often not in positions of sufficient power to do so themselves.

3.2 The need to extend anti-discrimination beyond the employment relationship

In the past, protection against harassment and discrimination was only granted to traditional employees, as only they were considered to be in an especially vulnerable condition. But in a changing world of work in which self-employment is growing rapidly, and where remote,

¹¹ ILO Declaration on Fundamental Principles and Rights at Work (1998), <https://www.ilo.org/declaration/lang--en/index.htm>.

¹² Article 2 et seq. Treaty on European Union, Art. 10 Treaty on the Functioning of EU.

Workers outside traditional employee relationships can have unequal bargaining powers and the stronger party may abuse this situation

virtual work is increasingly common, a growing number of workers find themselves subject to discrimination or harassment but without traditional protections extended to them.

The self-employed can be subject to the same discrimination or harassment as employees. Similarly, virtual and remote workers can experience digital harassment or discrimination through online (email, chat, video) channels. Protection is needed in all these contexts. Every worker deserves to be protected equally regardless of the classification of their employment relationship, or whether they are interacting in person or digitally.

It is also clear that workers outside traditional employee relationships can still have unequal bargaining powers and the stronger party may abuse this situation for discriminatory reasons. An agreement to discriminatory terms and conditions may be grounded in structural discrimination. Persons from disadvantaged groups may feel that they have to do it 'cheaper' to get the job and therefore consent to unfavourable conditions. All persons in situations of unequal bargaining power therefore need protection against discrimination and harassment regardless of their employment status.

Finally, discrimination is emerging as a result of technological changes. Algorithmic forms of discrimination can appear in hidden ways, especially when a policy applies in the same way for everybody but disadvantages a group of people who share a protected characteristic. For example, the allocation of jobs by a platform based on customer ratings could be inherently discriminatory (eg persons of colour are disproportionately given lower satisfaction rates, or facial recognition for confirming the platform workers' identity does not work well for them). With the increasing prevalence of data-driven business models and management by algorithm, it is especially hard for affected people to prove discrimination as they lack the necessary data and access to the criteria used for automated decision-making processes. Therefore, transparency about what data is processed and how algorithms work is important to combat discrimination by algorithm.

3.3 Policy options for extending protection against discrimination and harassment

Policymakers can consider two main approaches to improve protection against discrimination and harassment:

The simplest and most obvious solution is to extend protection against harassment and discrimination to all workers, regardless of employment status or location. This approach has been taken in a number of countries where economically dependent self-employed people have been included in the scope of anti-harassment and discrimination regulations. Some examples include Austria's Equal Treatment Act¹³, Germany's General Equal Treatment Act¹⁴ and the Portuguese Labour Code. In other countries, the self-employed are explicitly included, as in Greece, Cyprus and Romania. The UK Equal Treatment Act 2010¹⁵ includes provisions for contract workers. These examples show, on the one hand, that many legal systems consider an extension of these protections beyond traditional employment relationships necessary. On the other hand, it also becomes clear that there is not yet a universal understanding across the EU of how far these protections should be extended.

The second potential solution is to improve the transparency of algorithms to limit the discriminatory effects of automated decision making on groups with protected characteristics. The European Commission has introduced a number of legislative initiatives that address discrimination by algorithm, namely a proposal for a Digital Services Act and an AI Act, and the proposal for a directive on improving working conditions in platform work¹⁶. Such discrimination would be counteracted by improved information on the way algorithms work and by risk assessment obligations. In Spain, the so-called Riders' Law, provides for works coun-

13 See <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20003395>.

14 See <https://www.buzer.de/gesetz/7323/a144507.htm>.

15 See https://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf.

16 See Art. 10 in European Commission (2021c).

cils, not only in the platform economy but in all enterprises, to be informed of “*parameters, rules and instructions*” that determine work by algorithm¹⁷. The mentioned proposal for an EU directive on improving working conditions in platform work would extend the safeguards in relation to algorithmic management to people performing platform work who do not have an employment contract or employment relationship¹⁸.

As these initiatives suggest, there have already been recognition of, and initial efforts to, extend protections against discrimination and harassment to all workers. Broader and faster implementation of these policies is needed.

4. Freedom of association, collective bargaining and collective action

We next consider the example of extending to the self-employed the right to collective bargaining and action.

4.1 The rationale for collective bargaining

Many of the issues addressed in labour law are based on the idea of the existence of an imbalance in bargaining power when negotiating pay and other conditions of work (Freedland and Davies, 1983). This includes the right to organise, to bargain collectively and to take collective action as recognised (eg see the ILO Conventions No. 87 and 98¹⁹, as well as in Article 28 of the EU Charter of Fundamental Rights). The justification for collective bargaining is to counter the lack of individual bargaining power and to strengthen the unequal and therefore vulnerable position of an individual supplier of labour. Traditionally, only employees were granted such rights of collective representation and action. The self-employed were not since under EU competition law – Article 101 of the Treaty on the Functioning of EU – these may constitute ‘cartels’. On the other hand, the mentioned ILO instruments apply to all workers without distinction, as the responsible ILO supervisory bodies regularly recall (ILO, 2018). This conflict inherent in collective bargaining for the self-employed has to be resolved.

4.2 Policy options for the extension of collective bargaining rights to all workers

Already in some countries outside the EU, workers falling into the third or intermediate category explicitly enjoy the freedom of association and collective bargaining rights (workers in the UK, TRADE in Spain, dependent contractors in Ontario, Canada). These could serve as a model for European policymakers. In Ontario, the (State) Labour Relations Act recognises the category of “*dependent contractors*” and extends all rights under this Act to them, including collective bargaining²⁰. This led to granting collective bargaining rights to food delivery riders (Foodora) under this category²¹ and then to Foodora pulling out of the Canadian market. In the United Kingdom, workers in the intermediate category²² enjoy freedom of association and collective bargaining. Even so, the UK Court of Appeal denied

17 See <https://www.boe.es/boe/dias/2021/05/12/pdfs/BOE-A-2021-7840.pdf>.

18 See Art. 10 in European Commission (2021c).

19 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87); Right to Organise and Collective Bargaining Convention, 1949 (No 98).

20 Para 1 (1) Ontario Labour Relations Act 1995, explicitly states in its definitions that ‘employee’ also includes a dependent contractor.

21 Ontario Labour Relations Board of 25.2.2020, Canadian Union of Postal Workers v. Foodora Inc., Case No. 1346-19-R.

22 The so called limb (b) workers under the 1992 Trade Union and Labour Relations (Consolidation) Act.

bicycle delivery riders (Deliveroo) collective bargaining rights²³. Thus the existence of a third category of worker did not guarantee their right to unionisation and collective bargaining.

Providing the rights to organise, bargain collectively and take collective action could counter the bargaining power imbalances experienced by some workers and their clients and intermediaries like labour platforms. However, policymakers must address the concern that competition law is a potential obstacle to extending these rights. The European Commission started a process to ensure that EU competition rules do not stand in the way of collective bargaining for those solo self-employed who need it²⁴. This resulted in the announcement of draft guidelines on the application of EU competition law to collective agreements for solo self-employed persons (European Commission, 2021d).

Finally, rather than relying on worker classification to establish the right to collective bargaining and action, the European Commission has considered the approach of awarding the right to certain self-employed workers deemed to have lower bargaining power. Their draft guidelines on the application of EU competition law allow that collective bargaining shall be possible for three groups of solo self-employed: the economically dependent, the ones working “side-by-side” with employees and those working through digital labour platforms (European Commission, 2021d).

5 Platform work as a starting point for a new approach to digital work?

The ongoing discussion in Europe about the regulation of platform work can be considered a test case on how to deal with new forms of organising work, and how to deal with the self-employed, who make up the major share of platform workers. An additional aspect is whether platform workers can be considered to be covered by the analysis on the self-employed in general in this paper, or whether they merit attention on their own. In December 2021, the Commission proposed a directive on improving working conditions in platform work (European Commission, 2021c). It was published alongside a communication on the digitalisation of work (European Commission, 2021e) and draft guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons (European Commission, 2021d).

According to the Commission, EU intervention in platform work would be justified to secure a level playing field for platforms (as part of the EU Digital Agenda)²⁵ and to ensure decent working conditions and social protection for EU workers (as part of the European Pillar of Social Rights²⁶ and the subsequent Action Plan²⁷). The Commission acknowledges that many of the challenges platform workers face are not specific to platform work, but are

23 UK Court of Appeal of 24 June 2021, Case No: C1/2018/3104.

24 “The objective of the initiative is to ensure that EU competition law does not stand in the way of initiatives to improve working conditions through collective agreements for solo self-employed where they choose to conclude such agreements, while guaranteeing that consumers and SMEs continue to benefit from competitive prices and innovative business models”; European Commission, Consultation on Collective bargaining agreements for self-employed – scope of application EU competition rules, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12483-Collective-bargaining-agreements-for-self-employed-scope-of-application-EU-competition-rules/public-consultation_en.

25 See <https://www.europarl.europa.eu/factsheets/en/sheet/64/digital-agenda-for-europe>.

26 See https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights_en.

27 See https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-action-plan_en.

the same or similar to those faced by workers in other types of non-standard employment. If these issues are tackled, new legislation could achieve broader impact and equity by widening the scope of the intervention on platform work to include all workers in alternative employment arrangements, including the self-employed.

5.1 The peculiarities of platform work that justify special legislation

In some aspects the platform economy has distinct features that could justify special regulation.

1. Labour platforms can dominate and entirely transform the markets they enter (eg personal transportation, food and grocery delivery).
2. Information asymmetries exist between platforms manipulating big data from thousands or even millions of users on the one hand, and the individual person working through the platform on the other.
3. Contrary to typical employment relationships, working through platforms typically involves at least three parties, making it hard to allocate employer obligations.
4. Worker surveillance and algorithmic management by platforms are without any precedent, as are the risks for privacy, data protection and protection against discrimination.

It is important to point out though that platform workers are, like other workers, not homogenous at all. This may necessitate further distinctions when designing rules. The type of work organised through platforms can be on-site or online, with the latter subject to global competition and often cross-border. Platform workers may depend on this work to a greater or lesser extent depending whether it is a side job or not. Some platform workers may have invested heavily in their work (eg ride-share drivers who buy and/or upgrade their cars) and need to recoup their investment, while other types of platform work have no such sunk costs. Some platform jobs may require high skills and creativity, while others may be more routine-based and low-skilled. The challenge for policymakers is whether to choose global, horizontal, all-encompassing regulation that apply to all workers, or more incremental actions that emphasise the diversity of situations covered by platform work and the need not to stifle innovation.

5.2 European regulation of platforms as a starting point?

European regulations of platforms and platform workers are still in the early stage. The legal status and classification of platform workers is not consistent and remains a challenge and litigation is ongoing. Nonetheless, the most developed aim of the directive is to ensure that platform workers have – or can obtain – the correct legal employment status in light of their relationship with the platform, and can gain access to associated labour and social protection rights. The Commission points out that facilitating the correct classification would address many of the identified challenges related to access to decent working conditions and social protection. Therefore, tools have to be developed to help to establish the correct classification, taking into account the imbalance of power between the platforms and platform workers. The chosen option in the proposed directive is to presume an employment relationship between the worker and the platform. To counter the presumption, the burden is on the platforms to establish in a legal procedure before a court that the person is in fact self-employed (European Commission, 2021f).

Although the Commission still stresses explicitly that there is no intention to create a ‘third’ employment status at EU level (European Commission, 2021f), the proposed directive extends most of its substantive rights, including those concerning algorithmic management, also to persons working through platforms without an employment contract/relationship. It therefore goes beyond the traditional structure of employment and embraces the new challenges to the way we work to a certain extent. Clearly, it has been realised that

there is a need for the protection of workers beyond the employment relationship, at least in the platform economy.

The Commission's initiative on platform workers can be expected to have wider, spillover effects into the rest of the new forms of labour that have evolved during the last wave of digitalisation. Solutions developed in the context of platform work may influence changes in general labour law over time.

6 Conclusions

The growth of self-employment marks a fundamental change in the labour market. It is further accelerated by the development and widespread adoption of digital business models. There is a need for a labour market structure and a legal framework that reflects and supports those changes. Although still working well for employees, who remain the core of the workforce, the current labour laws fail to include other types of workers such as the self-employed.

Worker classification is therefore in need of reform to create a more economically efficient labour market and eliminate the inequity and ambiguity of existing two- or three-tier systems. It is obvious that distinctions and graduations in protection will be necessary. What regulations should extend to the self-employed or a group of them very much depends on the rationale of the protective legislation, which differs from sub-group to sub-group. We have illustrated this approach in relation to the protection against harassment and discrimination, and the freedom of association and collective bargaining.

When supporting protection for all workers against discrimination and harassment, the most simple and obvious solution is to extend protection against harassment and discrimination to all workers, regardless of employment status or location. Another solution would be to improve the transparency of algorithms to limit the discriminatory effects of automated decision-making on groups with protected characteristics.

When it comes to countering the imbalance in bargaining power between self-employed workers and their hiring entities, and intermediaries such as digital labour platforms on which workers are price takers, an extension of the right to organise, to bargain collectively and to take collective action may be considered. As competition law might be an obstacle, it should be made clear that competition rules do not obstruct collective bargaining for those self-employed workers who need it.

The peculiarities of platform work justify legislation to deal with the issues connected with the special way work is organised through digital labour platforms. It is to be expected that solutions developed in the context of platform work may influence the development of general labour law and may even be applied generally. Examples include fighting bogus self-employment and facilitating the enforcement of the correct legal status. An extension of the scope of protection to all workers, which we consider central for ensuring that labour law stays fit for purpose in the twenty-first century, is now included in the proposal for a platform work directive to a certain extent. It should serve as an example in future EU legislative initiatives.

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