

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON DIGITAL PLATFORM WORKERS



Proposal of directive from Mrs Leïla Chaibi
Member of employment
and social affairs committee

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FOREWORD



On December 12, 2019, dozens of bicycle couriers, VTC drivers and taxis from all over Europe gathered in the European Parliament as part of the Transnational Forum of Alternatives to Uberization that I co-organized. In front of Members of the Parliament and representatives of the European Commission, they testified to the urgency of having social protection as well as decent and supervised working conditions.

Recruited as self-employed by digital platforms, these chain gang labourers are in fact subject to the subordination of employers who bypass labour law, and exempt themselves from any social, civil and penal responsibilities by taking advantage of a fragile and tenuous workforce. This has been demonstrated on numerous occasions by European courts which have had to rule on the status of these gig workers. There is an urgent need for the European Union to catch up on the case law of Member states, by allowing workers of digital platforms to enjoy the same rights as any regular worker.

It is the purpose of this directive proposal, drafted with the contribution of experts of the platform economy, to be taken up by the European Commission.

Because time is running out.

Leïla Chaïbi

EXPLANATORY STATEMENT



1. BACKGROUND TO THE PROPOSAL

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1. BACKGROUND TO THE PROPOSAL

Justification for, and objectives of, the proposal

The aim of this proposal is to guarantee the labour and social rights of digital platform workers.

In its resolution of 10 October 2019 on employment and social policies of the euro area (2019/2111(INI), Parliament called for 'a coordinated EU initiative to ensure that platform workers have access to social protection and are guaranteed all their social and labour rights, regardless of their employment status, and to extend collective agreement coverage to platform workers'.

In her Political Guidelines for the European Commission 2019-2024, Ursula von der Leyen stated that she wanted to look at ways of 'improving the labour conditions of platform workers'. In their mission statements, Commissioners Schmit and Vestager were given the task of looking at 'ways to improve the labour conditions of platform workers'.

Consistency with existing provisions in the field of action

This Directive is consistent with the 1989 Community Charter of Fundamental Social Rights of Workers, pursuant to which 'every worker of the European Community shall have a right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed, enjoy an adequate level of social security benefits'.

This Directive is also in line with the European Pillar of Social Rights. It implements the fifth principle thereof, which states, 'regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training. Everyone has the right to transfer social protection and training entitlements during professional transitions [...] Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts'.

Consistency with other Union policies

Improving working conditions and access to social protection is a key principle which is in line with both the ambition to have an economy that works for the people and that of promoting the European way of life, based in particular on social equality. These objectives also have a positive impact on economic development and are fundamental to promoting the fight against unfair competition.

Thus, as platform companies are based on individuals providing services to other individuals, who are often regular clients, as opposed to ad hoc transactions, it is essential to provide appropriate training and career development for workers in such structures, in order to attract and retain the best talent.

Otherwise, failure to act in this field runs the risk of unfair competition with undertakings which provide similar services through business models which comply with the regulatory standards in force, irrespective of the size and type of those companies. An increase in precarious work also leads to losses for traditional entrepreneurs, to a loss of expertise and to a loss of earnings for social security systems.

The objectives of the proposal are in line with the fundamental rights set out in the Charter of Fundamental Rights of the European Union¹, in particular in Articles 8 (Protection of personal data), 12 (Freedom of assembly and of association), 27 (Workers' right to information and consultation within the undertaking), 28 (Right of collective bargaining and action), 30 (Protection in the event of unjustified dismissal), 31 (Fair and just working conditions), 32 (Prohibition of child labour and protection of young people at work), 33 (Family and professional life), 34 (Social security and social assistance) and Article 35 (Health care).

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

Legal basis

In accordance with Article 153(2)(b) TFEU, Parliament and the Council 'may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States'.

The objective of this proposal is to improve the working conditions of digital platform workers in accordance with Article 153(1)(b) TFEU, by establishing minimum labour and social security standards in the digital platform economy. Accordingly, Article 153(2)(b) TFEU constitutes the appropriate legal basis for the Commission's proposal.

In accordance with Article 153(2) TFEU, improving working conditions, in particular, is an area of social policy for which the Union shares competence with the Member States.

¹. Available at: <http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=celex:12016P/TXT>

/// The aim of this proposal is to guarantee the labour and social rights of digital platform workers. ///

As the problems faced by platform workers, in terms of recognition of their rights, are broadly similar across the EU, the Union has a clear role to play in helping Member States to tackle them.

^{2.} List: <https://ignasibeltran.com/2018/12/09/employment-status-of-platform-workers-national-courts-decisions-overview-australia-brazil-chile-france-italy-united-kingdom-united-states-spain/#fra1>

Subsidiarity (for non-exclusive competences)

As the problems faced by platform workers, in terms of recognition of their rights, are broadly similar across the EU, the Union has a clear role to play in helping Member States to tackle them.

Data collected during the preparatory work lays bare significant differences between Member States as regards their regulatory approach to digital platforms.

Germany and Denmark, for example, have chosen to ban a transport platform – a renowned licensed-driver passenger transport platform – from operating in their territories, as the company did not comply with the rules on passenger transport. Other Member States have banned only certain services of the same platform, while others are yet to establish any limits.

In addition, in recent years, legal actions concerning misclassification of platform workers as ‘independent subcontractors’ as opposed to ‘employees’ have become commonplace in the Union, not just before national courts and tribunals but also before the Court of Justice of the European Union². The result of this is legal uncertainty which requires legislative clarification.

In such circumstances, action by Member States alone cannot guarantee that all workers in the Union and in all Member States will have their rights respected and enjoy decent working conditions.

Diverging levels of protection may also provide an incentive for companies to locate their production facilities in Member States with lower standards.

In addition, this proposal will promote the development of cross-border employment by providing reassurances to workers: whichever Member State they work in, they will benefit from a bundle of minimum requirements and levels of protection when it comes to their working conditions.

It follows that action at EU level to achieve the objectives of this proposal is both necessary and in line with Article 5(3) of the Treaty on European Union (TEU).

Proportionality

This proposal contributes to the achievement of the objectives set with a view to improving the living and working conditions of digital platform workers.

In accordance with Article 153(4) TFEU, the provisions of this proposal do not prevent Member States from maintaining or introducing more stringent protective measures compatible with the Treaties.

In accordance with the principle of proportionality, laid down in Article 5(4) TEU, this proposal does not go beyond what is necessary to achieve these objectives.

In addition, in recent years, legal actions concerning misclassification of platform workers as ‘independent subcontractors’ as opposed to ‘employees’ have become commonplace in the Union, not just before national courts and tribunals but also before the Court of Justice of the European Union². The result of this is legal uncertainty which requires legislative clarification.

Choice of instrument

Article 153(2)(b) TFEU allows for the adoption of minimum requirements in the field of working conditions only ‘by means of directives’.

3. BUDGETARY IMPACT

The proposal does not call for additional budgetary or human resources from the EU budget or those of the bodies established by the Union.

4. OTHER INFORMATION

Explanatory documents

Member States must send the Commission the text of national provisions transposing the Directive and a table setting out the correlation between the national provisions and those of the Directive. Unambiguous information on the transposition of the new provisions is needed to ensure compliance with the minimum requirements set out in the proposal. The estimated administrative burden associated with the submission of explanatory documents is not disproportionate. The Member States are better placed to draft such explanatory documents more efficiently.

In view of the foregoing, it is proposed that Member States undertake to notify the Commission of their transposition measures by providing one or more documents explaining which parts of the Directive have been transposed by which national instruments.

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL



THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

having regard to the Treaty on the Functioning of the European Union, and in particular Article 153(2)(b), in conjunction with Article 153(1)(b) thereof,

having regard to the proposal from the European Commission,

after sending the draft legislative act to the national parliaments,

having regard to the opinion of the European Economic and Social Committee,

after consulting the Committee of the Regions,

acting in accordance with the ordinary legislative procedure,

whereas:



Without employment contracts, platform workers cannot avail of the rights and benefits enshrined in employment law. [...] in so far as they may encounter insurmountable difficulties in exercising such rights.



[...] online requests generated by algorithms. This is a source of arbitrariness [...].



(1)

This Directive respects the fundamental rights and principles recognised in particular by the Charter of Fundamental Rights of the European Union. It is designed especially to ensure full compliance with Article 31 of the Charter, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

(2)

The Community Charter of the Fundamental Social Rights of Workers provides, in point 7, inter alia, that the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community; this process must result from an approximation of these conditions while the improvement is being maintained. Point 5 of the European Pillar of Social Rights provides that, regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training.

(3)

The platform economy gives rise to questions concerning the application of existing legal frameworks, in that it blurs the boundaries between professional and non-professional service provision, and between employed and self-employed workers. Accordingly, it gives rise to a degree of uncertainty as to the applicable rules, in particular when taken together with the regulatory fragmentation resulting from divergent approaches at national or local level in that respect. Digital platforms argue that individuals are seeking autonomy at work and freedom in choosing their working hours and days to justify offering them only commercial contracts as opposed to employment contracts.

(4)

Without employment contracts, platform workers cannot avail of the rights and benefits enshrined in employment law. This is the case for both their individual rights, in particular rules on remuneration, working time, leave and training, to name but a few, and their collective rights, such as freedom of association, the right to collective bargaining and the right to take collective action, in so far as they may encounter insurmountable difficulties in exercising such rights.

(5)

Similarly, neither do they benefit from access to the traditional types of social protection enjoyed by salaried employees, in particular when it comes to accidents at work, occupational diseases and unemployment.

(6)

Platform workers are also exposed to problems which are specific to their working tool, which is based on online requests generated by algorithms. This is a source of arbitrariness on a daily basis and poses risks for the protection of their personal data and respect for their right to a balance between their private and professional lives.



[...] the platform model has established itself as a method of managing a contingent workforce, called upon on an ad hoc basis to meet increases in demand, and which passes the impact of market fluctuations onto workers.



(7)

However, the current practice of regarding them as self-employed workers would appear difficult to justify, or fictional even, since it is, at best, highly debatable whether they actually work for themselves. This issue has given rise to considerable litigation. It would appear, rather, that the platform model has established itself as a method of managing a contingent workforce, called upon on an ad hoc basis to meet increases in demand, and which passes the impact of market fluctuations onto workers.

(8)

This phenomenon is becoming a reality in more and more industrial sectors and, in today's economy, work is increasingly precarious, outsourced and divided, with workers being managed by and via data, and paid by the job. The halo effect generated by platforms thus goes well beyond just the workers concerned, by bringing about economic and social insecurity.

(9)

Consequently, this Directive establishes a protective framework for digital platform workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and relations between the social partners.

(10)

To achieve this, Article 1 establishes, first, the purpose of the Directive and recalls the limits put in place by the principle of subsidiarity.

(11)

Article 2 defines the concept of 'worker', which will determine the status of digital platform workers. The same article also sets out the definition of 'digital platform', it being made explicit that the linking of customers and workers is not the purpose of a platform's activity, but the way in which the service is accessed and rendered.

(12)

Where a platform determines the characteristics of the service rendered or the goods sold and fixes the price, it has a social responsibility towards the workers concerned. Article 3 sets out the obligations owed by platforms to workers, in particular as regards the entering into and termination of employment contracts, remuneration, working time, access to collective representation and social protection. As regards the working tool more specifically, Article 4 states that it shall be the responsibility of platforms to make the workings of their algorithms intelligible for workers and their representatives. Article 5 strengthens the protection of personal data of platform workers.

(13)

Since the objective of this Directive, namely to establish a protection framework for platform workers which is harmonised at Union level, cannot be achieved sufficiently by Member States and can therefore, by reason of the scale and effects of the proposed action, be better achieved at Union level, by introducing minimum requirements applicable throughout the Union, the Union may adopt measures in accordance with the principle of subsidiarity, as laid down in Article 5 TEU. In accordance with the principle of proportionality as set out in that article, this Directive does not go beyond what is necessary in order to achieve that objective.



Consequently, this Directive establishes a protective framework for digital platform workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and relations between the social partners



HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I GENERAL PROVISIONS

Article 1 Aim and subject matter

1. This Directive ensures the protection of digital platform workers by aligning their labour and social rights with those of all other workers.
2. This Directive is entirely without prejudice to the exercise of the fundamental rights recognised in Member States and at Union level, including the right or freedom to strike or to take other forms of employment-related action specific to the Member States, in accordance with national law and/or practices. It is also without prejudice to the right to negotiate, conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practices.

Article 2 Definitions and scope

For the purposes of this Directive, the following definitions shall apply:

- 'Digital platform' means a service company organised offline, operative in particular in the licensed-driver passenger transport and meal-delivery sectors, whose purpose is to offer its customers a workforce, electronically and by means of algorithms, which it organises with a view to performing the service which it offers them. It establishes or influences to a significant degree the conditions and remuneration for the exchange.
- 'worker' means any person who enters into a contract with a digital platform concerning the hiring of his or her labour, whether of an intellectual or manual nature, with a view to rendering a service offered and organised by the platform, in return for remuneration.



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CHAPTER II EMPLOYMENT AND WORKING CONDITIONS

Article 3 General Principles

Member States shall ensure that digital platforms within the meaning of Article 2 guarantee digital platform workers that the terms and conditions of employment governing the fields set out below are laid down in collective agreements, contracts or arbitration awards which have been declared to be universally applicable:

- a) arrangements for the entering into and termination of employment contracts;
- b) maximum periods of work, minimum rest periods, and minimum period of paid annual leave;
- c) remuneration, including overtime rates;
- d) conditions for the hiring-out of workers, in particular by temporary-work agencies;
- f) the functioning of algorithms, the processing of personal data and guarantees of the right to disconnect;
- g) the health, safety and well-being of workers at work;
- h) arrangements for representation, negotiation and collective action;
- i) arrangements for access to social protection.

Article 4 Algorithms

1. It shall be the responsibility of platforms to make the workings of their algorithms intelligible for workers and their representatives.
2. Platforms shall indicate the main parameters which, either individually or collectively, are the most important for determining the allocation of teams, the distribution of job offers and places of work, the assessment of work carried out, the arrangements for waiting time and for determining remuneration, as well as the relative importance of these main parameters, by providing a description which is easily and publically accessible and set out in clear and comprehensible language. Platforms shall keep this description up to date.
3. The *acquis communautaire* in the area of anti-discrimination shall apply to algorithms.

Article 5 Personal data

1. The personal data of digital platform workers shall be processed in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.
2. Any form of data processing seeking to establish mechanisms to rate workers and any planned changes to an algorithm shall be made subject to collective bargaining between digital platforms and workers' representatives.

It shall be the responsibility of platforms to make the workings of their algorithms intelligible for workers and their representatives.



CHAPITRE III FINAL PROVISIONS

Article 6

1. This Directive shall be without prejudice to the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to encourage or permit the application of collective agreements or agreements concluded between social partners which are more favourable to workers.
2. The implementation of this Directive shall in no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by it. Measures adopted to implement this Directive shall be without prejudice to the rights of Member States and/or social partners to adopt, in the light of changing circumstances, different legislative, regulatory or contractual provisions to those prevailing at the time of adoption of this Directive, provided that the minimum requirements laid down herein are respected.

Article 7 Penalties

1. Member States shall provide for appropriate measures for the event that digital platforms fail to comply with this Directive. In particular, they shall ensure that adequate administrative or legal procedures are in place to enable enforcement of the obligations deriving from this Directive.
2. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify said provisions to the Commission by *day month year* at the latest. Member States shall notify to the Commission any subsequent amendments to those provisions without delay. They shall, in particular, ensure that adequate means of enforcing the obligations laid down in this Directive are available to workers or their representatives.

Article 8 Implementation

1. Member States shall adopt and publish, by *day month year* at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive, or shall ensure that the social partners introduce the necessary provisions by way of agreement, and the Member States shall take all the necessary steps to enable them at any time to be in a position to meet the objectives laid down in this Directive. They shall immediately inform the Commission thereof.
2. When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Member States [...] shall ensure that adequate administrative or legal procedures are in place to enable enforcement of the obligations deriving from this Directive.



Article 9 Review by the Commission

By *day month year* at the latest, the Commission shall, in consultation with Member States and the social partners at Union level, review the application of this Directive with a view to proposing, where appropriate, the necessary amendments.

Article 10 Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 11 Addressees

This Directive is addressed to the Member States.

Done at Strasbourg,

For the European Parliament
The President

For the Council
The President



This European directive is the result of a collective work initiated by Leïla Chaïbi as part of her mandate as MEP.

This directive would not have been possible without the participation and the work of many people:

Anne Dufresne, researcher at Gresea

Barbara Gomes, Doctor in private law

Silvia Borelli, research director,
lecturer in public international law

Odile Chagny, economist, researcher
at the Institute for Economic and Social Research

Christophe Degryse, researcher
at the European Trade Union Institute

Auriane Lamine, doctor in private law

Edouard Bernasse, Secretary General of CLAP,
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Ludovic Voet, Confederal Secretary
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