

Bird & Bird

EU Employment Law Report

*Keeping you up-to-date on the most significant developments of
employment law at EU level*

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Legislative developments



New EU platform work package proposal

Abstract

On 9 December 2021, the European Commission proposed a draft Directive, a communication and draft guidelines to improve working conditions for platform work. The measures aim to ensure that jobs performed through digital platforms are granted the legal employment status and the level of social protection that corresponds to the actual work arrangements.

Background and presentation of the platform work package

According to the Commission, around 5.5 million platform workers across the EU are irregularly classified as self-employed individuals. Such workers currently perform their services through more than 500 digital labour platforms. More than 28 million people in the EU work through digital labour platforms, and this number is expected to reach 43 million in 2025. The Commission adds that the digital platform economy is growing quickly. Between 2016 and 2020, revenues generated by this sector grew from an estimated €3 billion to €14 billion or more. This package was announced in 2019, when the then-new European Commission took reign under the leadership of Ms von der Leyen, with Mr N Schmitt as responsible Commissioner for Work.

The Commission's set of measures consists of:

- a [communication](#) setting out the EU approach and measures on “platform work”, in which the Commission calls on Member States, social partners and digital platforms to work together to strengthen the Directive and foster fairness in platform work,
- [draft guidelines](#) on the application of EU competition law to the collective agreements concluded between self-employed individuals regarding their working conditions. While the ECJ excludes employees from Article 101 TFEU which prohibits agreements between undertakings that restrict competition, genuine self-employed workers are regarded as “undertakings” under EU competition law. Hence, the Collective Labour Agreements these undertakings conclude are likely to infringe Article 101 TFEU. The draft Guidelines further clarify the Commission's position on when collective bargaining is permissible to ensure that competition rules do not stand in the way of any such initiative. We already warned on this issue [here](#), and
- a [proposal for a Directive](#) with the aim of improving working conditions in platform work. This includes measures to correctly determine the employment status of people working through digital labour platforms and new rights for both workers and self-employed people regarding algorithmic management. The personal and material scopes of the draft Directive are analysed below.

Personal scope of the draft Directive: digital labour platforms

The *digital labour platforms* that fall under the scope of the draft Directive are – according to the latter – any legal or natural person providing a commercial service: (a) at least in part, at a distance through electronic means (e.g., a website or a mobile app), (b) at the request of a recipient of a service, and (c) involving, as a necessary and essential component, the organisation of work performed by individuals.

All digital matchmaking platforms offering services performed by individuals are thus potentially in the draft Directive's scope.

Material scope of the draft directive: legal presumption of situations of employment, algorithmic transparency and management

First, the Directive sets a *legal presumption* of the existence of an employment relationship between parties where the platform is considered as an ‘employer’, and the platform worker as an ‘employee’, with all associated labour law and social protection applied, if certain criteria are met. For the platform to be deemed to be the platform worker’s employer, at least two of the following five criteria must be met:

- 1 The platform effectively determines – or sets ceilings to – the salary of the platform worker;
- 2 The performance of work is supervised by – or the quality of the work results is assessed by – the platform, including by electronic means;
- 3 The platform effectively limits the platform workers’ freedom to choose their working hours or absences, their ability to accept or refuse tasks, or to use subcontractors or replacements;
- 4 The platform effectively requires platform workers to respect specific binding rules with regard to appearance, conduct towards the beneficiary of the service or performance of the work;
- 5 The platform effectively restricts the platform worker’s capacity to build a clientele or perform work for third parties.

Provided that at least two of these criteria are cumulatively met, the platform is deemed to be the employer of the platform worker. Being (re-)classified as a worker means having the rights deriving from the status of employee in terms of domestic labour law (minimum wage – where such right exists under domestic law – collective bargaining, working time and health protection, paid holidays, protection against work hazards), and social protection (unemployment and sickness benefits, old age pension).

When the presumption operates, the platform can rebut it by duly evidencing that the contractual relationship chosen between parties is not an employment agreement. Furthermore, the legal presumption will not have any retroactive effect.

Second, the draft Directive aims at granting *greater transparency in the use of algorithms* by digital work platforms through human monitoring of working conditions compliance; and a right to challenge automated decisions, both for employees, and for genuine self-employed platform workers.

In the event that an automated decision has a significant effect on individuals’ working conditions, the platform must provide them with access to a person who has the necessary knowledge, skills and authority to discuss and clarify the facts, circumstances and reasons that led to the decision. The platform must inform individuals in writing of the grounds that led to the automated decision to restrict, suspend or delete their account. If the platform workers are not satisfied with the explanations obtained or considers that the decision breaches their rights, they may request that the platform review its decision, and the latter has one week to reply.

Platforms must finally not use automated monitoring and decision-making systems that could (i) put pressure on platform workers, or (ii) put their physical and/or mental health at risk.

Third, the proposed Directive requires more transparency from platforms that must make essential information about their activities available to the relevant national authorities, i.e. regular disclosure and updates on (i) the number of platform workers that they use (both employees and self-employed individuals), and (ii) general terms and conditions applicable to those contracts.

Next steps

The proposed Directive must now be examined and discussed by the European Parliament and the Council and may further be amended, either slightly or materially, before it is adopted.

The draft guidelines on the application of EU competition law will undergo an eight-week public consultation to gather feedback from stakeholders, after which they will be adopted by the Commission. The guidelines bind the Commission in its subsequent interpretation and enforcement of EU competition rules.

This initiative of the European Commission has been highly criticised: on the one hand, the legal basis invoked by the Commission to justify a European legislative action in this area (i.e., a very wide and open reading of article 153 (1)(b) of the TFEU) is fragile and questionable. On the other hand, most of the five criteria put forth by the Commission to assess the existence of an employment relationship are of an economic nature, while legal dependence between parties is often the key concept used by EU Member States' national legislations. This may lead to platform workers rapidly becoming employees under EU law, without mentioning any potential impact on self-employed individuals performing services in other sectors. The Commission has taken a rather bold stance against certain practices of digital platforms, and given the impact it could have on the whole employment market, some aspects of the proposal are likely to be (substantially) modified.

It is also possible that this proposal will never be forged into a directive, if the Council and the Parliament do not manage to adopt a text with the required majorities.

Be that as it may, if and once it is adopted (which we do not anticipate to happen soon), the draft Directive allows for a two-year transposition period for Member States to implement it in their national laws.

Entry into force of the EU whistleblowing directive

Abstract

Most Member States missed the 17 December 2021 deadline for the transposition of the EU Whistleblowing Directive.

More details

The deadline for transposition into their national legislation by Member States of Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law was 17 December 2021. By this date, the Whistleblowing Directive required Member States to implement legislation obliging all companies with 50 or more workers to: (i) put in place appropriate reporting channels to enable those workers to report breaches of EU law; and (ii) ensure that those making whistleblowing reports are legally protected against retaliation for having done so.

Most Member States missed the transposition deadline and are even far from doing so (see our implementation tracker [here](#) which we try to regularly update, our short summary on what impact it may have on your business [here](#), and our more detailed analysis of the Directive [here](#)).

While it does not appear to directly impose obligations on private companies (no direct effect), many European groups are already taking preparatory steps to comply with its minimum requirements to avoid big changes imposed by future domestic legislations. Yet, many loose ends left by the Directive remain unanswered e.g., whether corporate groups will be able to stick with one centralised group-level reporting channel rather than introduce local-level reporting channels in every member state where the group operates (the Commission is against this approach), whether Member States will extend the whistle-blowers' protection to anonymous reporting, or whether they will make use of the possibility offered by the Directive to delay until 17 December 2023 the obligation to introduce internal reporting channels insofar medium-sized companies are concerned.

The deadlines for companies affected by such implementing legislations to comply and the penalties for non-compliance are also capital attention points to bear in mind.

The implementation of this Directive is definitely a subject to be closely followed up during the first months of 2022.

Case law

Foreign companies' joint and several liability for employment related debts

ECJ 22 October 2021, B. v. O. e.a. (C 691/20)

Abstract

EU law does not preclude national legislation from excluding the application of its national principle of the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries, to parent companies having their seat in the territory of another Member State. The decision is available [here](#) (only available in French or Portuguese).

Facts

A former employee brought proceedings against his former employer before one of the District Labour tribunals of Porto for back-pay claims. As the employer was a bankrupt Portuguese company, he sought to hold the other companies within the group of the bankrupt company jointly and severally liable for these amounts.

One of these solvent companies, i.e., the mother company of the bankrupt employer, had its registered office in a Member State other than Portugal. The Portuguese Companies Code, however, excludes foreign EU-based companies from such joint and several liability for employment-related debts. The employee contends that this domestic legislation leads to discrimination contrary to Article 18 of the consolidated Treaty on the functioning of the European Union ("TFEU"), as the status of employees' claims differs depending on the Member State in which the company controlling their employer is based.

The defendant challenges this argument by stating that, among others, this question is only a matter of national law and has nothing to do with EU legislation. In these circumstances, the tribunal decided to stay the proceedings and refer the matter to the European Court of Justice ("ECJ").

Legal context

Article 18, first paragraph, TFEU provides: "*Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.*"

Article 49 TFEU provides: "*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State.*"

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

Decision

The court first ruled out the application of Article 18 TFEU. This provision is intended to apply autonomously only in situations governed by EU law for which the Treaties do not provide specific non-discrimination

rules. Since Article 49 TFEU does contain a specific rule prohibiting nationality-based discriminations around freedom of establishment, the court cannot evaluate the disputed Portuguese legislation under Article 18 TFEU.

The court then recalled its well-settled case-law ([ECJ 20 June 2013, *Impacto Azul* \(C 186/12\)](#)) according to which Article 49 TFEU:

- 1 precludes any national measure which, even if applicable without discrimination on the grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment that is guaranteed by the Treaty; but
- 2 does not preclude Member States from legitimately improving the treatment of the debts of group companies present in its territory, and consequently
- 3 the court held that the Portuguese exclusion of parent companies having their registered office in a Member State other than Portugal from the rule on joint and several liability of parent companies for the debts of their Portuguese subsidiaries, is not such as to make it less attractive for those companies to exercise their freedom of establishment guaranteed by Article 49 TFEU.

The court therefore logically concludes, in line with its settled case-law, that Article 49 TFEU does not preclude national legislation from excluding the application of the principle of the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries to parent companies having their seat in the territory of another Member State.



Untaken accrued holidays paid in lieu at exit

ECJ 25 November 2011, *WD v. Job Medium GmbH* (C-233/20)

Abstract

In this case, the ECJ ruled that an allowance in lieu of paid annual leave is due to employees leaving their employer, regardless of the reason of their exit and even where they unilaterally terminated the employment relationship early without cause. The decision is available [here](#).

Facts

An Austrian employee terminated her employment relationship with job-medium by premature unjustified withdrawal and still had an untaken paid leave entitlement of 3.33 days. His employer refused to pay him those remaining days in the form of an allowance instead of paid leave, relying on Article 10(2) of the Austrian Act on annual leave which deprives employees who prematurely terminate their employment without cause of any such indemnity.

Claiming that such denial is contrary to EU law, the employee challenged this decision in court, and the case ended up before the Austrian Supreme Court. The Supreme Court stayed the proceedings and referred questions to the ECJ for a preliminary ruling to know if a provision of national law under which no allowance in lieu of paid annual leave is payable to employees who unilaterally terminate (“withdraws from”) the employment relationship early without cause, is compatible with EU law.

Legal context

Article 7 of the EU “Working time” Directive no. 2003/88EC, entitled ‘Annual leave’, is worded as follows: “1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.”

Article 23 of that directive, entitled ‘Level of Protection’, further states that: “Without prejudice to the right of Member States to develop, in the light of changing circumstances, different legislative, regulatory or contractual provisions in the field of working time, as long as the minimum requirements provided for in this Directive are complied with, implementation of this Directive shall not constitute valid grounds for reducing the general level of protection afforded to workers.”

Decision

After having ruled that the questions referred were admissible, the court logically held that a national law that deprives employees who resign without cause from the allowance corresponding to the untaken annual leave entitlements they accrue during their employment is not permitted under the aforementioned EU legal provisions. The court further insisted that it is clear from the terms of directive and its case-law (e.g., ECJ C-762/18 and C-37/19 dd. 25-6-2020) that member states must not make the very existence of that right subject to any preconditions whatsoever, which also specifically includes a right to an allowance in lieu of annual leave not taken upon termination of the employment relationship. For all these reasons, employee entitlement to such an allowance for remaining leave upon their exit exists irrespective of the reason for which the employment relationship ended.

Working time and stand-by duty

ECJ 11 November 2021, *MG v. Dublin City Council* (C-214/20)

Abstract

In this case, the ECJ ruled that whether stand-by time in a permanent stand-by system qualifies as ‘working time’ must be determined by an overall assessment of all the facts, with a focus on the constraints imposed on the worker. Stand-by duty during which workers are permitted to conduct their own personal activity but must, in the event of an emergency call, reach their assigned fire station within 10 minutes, does consequently not automatically constitute ‘working time’ within the meaning of EU law. The decision is available [here](#).

Facts

A part-time firefighter employed by the Dublin City Council was allowed to work as a self-employed taxi driver during stand-by duty or work for another employer for up to 48 hours per week. He can refuse a quarter of the calls but must otherwise be at the fire station within 10 minutes. He is on call 24 hours a day, seven days a week, outside holiday periods and other periods approved by his employer. The firefighter claimed that such time spent on stand-by for his employer was to be regarded as working time within the meaning of the Irish legislation on the organisation of working time and Directive 2003/88 and compensated as such. MG filed a claim to that effect before the Workplace Relations Commission (Ireland). Following the rejection of his claim, he lodged an appeal before the Labour Court (Ireland) who referred the question to the ECJ for a preliminary ruling.

The employee maintains that he must at all times be in a position to respond rapidly to an emergency call, which prevents him from freely devoting himself to his family and social activities as well as to his employment as a taxi driver. By imposing stand-by seven days per week, 24 hours per day and by refusing to acknowledge that stand-by hours constitute working time, the Dublin City Council is in breach of the rules on daily and weekly rest and maximum weekly working time

Legal context

Under Article 2 of the EU Directive 2003/88:

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

- 1. ‘working time’ means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;*
- 2. ‘rest period’ means any period which is not working time; (...)”*

Decision

For the ECJ, the possibility afforded to this firefighter of engaging in another professional activity while on duty for his employer is an important indication that the specific rules of the on-call duty system at stake do not impose on that employee extended obligations having a heavy impact on the management of his personal time. The question to be answered by the national court to assess the fate of the time spent on duty is whether the average frequency of emergency calls and the average duration of interventions prevent the effective exercise of another professional activity. An overall assessment of the facts in this case concluded that the constraints imposed upon the worker are not of such a nature as to constrain, objectively and very significantly, his ability to manage, during the said period, the time during which his or her services as a retained firefighter are not required.

EU policy developments

Political agreement of the EU Parliament and Council on modernised rules on social security coordination – technical text to follow

Updating the social security coordination regulations no. 883/2004 and no. 987/2009 has long been a priority for the EU institutions. The modernisation was already underway in 2017 under the Juncker Commission. After lengthy negotiations, the EU Parliament and the EU governments finally reached a provisional political agreement in December 2021 on new rules. According to lead MEP Gabriele Bischoff, these new measures will have a significant impact on European cross-border workers.

The new rules aim at ensuring and facilitating access to social security for EU workers who have moved to a different EU country, while fairly distributing obligations among Member States. The focus was put on facilitating labour mobility within the EU, while safeguarding workers' social rights in cross-border situations. In its [press release](#), the EU Parliament adds that Member States should cooperate better using the notification system to guarantee that these workers have social security (the A1 declaration). Employers should be able to access information and complete relevant documents online. Finally, the single digital gateway, as well as the Electronic Exchange of Social Security Information (EESSI), should be used for relevant procedures.

The three EU institutions finalised a text (not available yet) at the end of December. Consequently, the informally agreed text will have to be confirmed by the European Parliament in a plenary vote in the coming months.



Pieter De Koster

Partner

Tel: +32 2 282 60 81

pieter.dekoster@twobirds.com

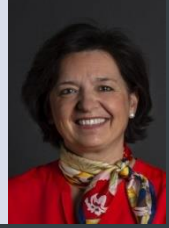


Cecilia Lahaye

Counsel

Tel: +32 2 282 60 84

cecilia.lahaye@twobirds.com



Anton Aerts

Counsel

Tel: +32 2 282 60 83

anton.aerts@twobirds.com



Jehan de Wasseige

Senior associate

Tel: +32 2 282 60 29

jehan.dewasseige@twobirds.com



Guillaume Nolens

Associate

Tel: +32 2 282 60 31

guillaume.nolens@twobirds.com



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