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Platform work in Germany: How to improve working conditions and social protection?

Peer Review on "Platform work"

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Written by Olaf Deinert and Christoph Freudenberg, in collaboration with ICF

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Unit A1

Contact: Kathrin Jewert

E-mail: EMPL-A1-UNIT@ec.europa.eu

Web site: http://ec.europa.eu/social/mlp

European Commission

B-1049 Brussels

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Table of Contents

Executive summary 1
1 Platform work in Germany........ 3
1.1 Definition, size and development of platform work........ 3
1.2 Socio-economic characteristics of platform workers 4
2 Challenges of rising platform work 5
2.1 Legal status........ 5
2.2 Unfair treatment and limited representation 8
2.3 Social protection 9
2.4 Reliable data for policy makers 11
3 Implemented and planned policies and initiatives........12
3.1 Governmental initiatives 12
3.2 Non-governmental initiatives 13
4 Considerations for future policies and initiatives........15
4.1 Improving data quality on platform work........15
4.2 Applicable labour law for cross-border platform work 15
4.3 Changing labour law 16
4.4 Enabling collective agreements 18
4.5 Adapting social protection 19
5 Bibliography 22
Annex 1: Size and scope of platform work 27
Annex 2: Risks of growing platform work for financing adequate social protection 30
Annex 3: The private international law status of platform workers 31
Annex 4: Social security law status of platform workers 32

Executive summary

Over the past years a rise in platform work has been observed in Germany and other countries. This new work form creates new job opportunities and thus may also contribute to economic growth and prosperity. At the same time, concerns are raised that work in the platform economy is carried out under precarious working conditions, without sufficient social protection. A goal of the EU Council Presidency of Germany starting in July 2020 is, therefore, to evaluate the need for regulations in the field of platform work.

The aim of this paper is to contribute to this discussion and from the perspective of Germany elaborate on:

- the main challenges of rising platform work for working conditions and social protection; and
- current and prospective initiatives to cope with the identified challenges.

The main conclusions

Platform workers are, according to German substantive law, in most cases self-employed because they are mostly free to reject a job offer and, if they accept, to choose when, how and where to perform it. This self-employed status is associated with limited legal and social protection. Thus, it is worth considering, for the German legislator, the introduction of a broader concept of employee, including people whose work is determined by the virtual environment of a platform, or at least considering a broader concept of employee-like persons. Furthermore, the law could set out a presumption of dependent employment with a set of criteria that indicate dependence.

Platform companies dictate legal conditions of work, often not having the best interest of the platform worker. Some initiatives from trade unions, such as the FairCrowdWork.org project or the Crowdsourcing Code of Conduct, aim to address resulting problems of unfair treatment. They improve transparency of working conditions in the platform economy and introduce guidelines for a decent treatment of platform workers. The coverage of these non-governmental initiatives is, however, limited. Regulation – at national or EU level - on platform work could, therefore, define unfair business terms, even for contracts with self-employed platform workers.

According to private international law, employed platform workers will normally be protected by their domestic law. Only if they are self-employed the parties can choose the applicable law without restrictions. Restrictions to prorogation and choice of law clauses could be regulated in order to protect platform workers. The social security law statute depends on the place of work according to Article 11 para (3) of the Regulation (EC) 883/2004[1].

Social protection of self-employed platform workers is limited in Germany. A first step to bridge the legal coverage gap is the new planned pension insurance obligation for self-employed. With this measure roughly three out of four million self-employed will be newly covered by mandatory pension insurance. However, further measures may be required to close the legal coverage gaps for income of a secondary self-employed job. In fact, the majority of platform workers earn only a supplemental income from this new form of work, which is often not covered by social insurance so far. This could be resolved by covering also supplemental income mandatorily (or by applying low income exemption thresholds). Moreover, the administrative burden should be lowered to increase the effective coverage. For this purpose, income should be reported 'once only' to public authorities. Along this line reporting of income data by the platforms should be envisaged like in some other European countries.

[1] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

Data about the scope and characteristics of platform work is still insufficient. Therefore, improved survey information as well as a data exchange with platforms could be envisaged to foster evidence-based policy making.

It is advisable to involve all relevant stakeholders to find adequate policy measures for platform work. Consequently, the German Federal Ministry of Labour and Social Affairs has conducted various discussion formats with platform workers, providers and interdisciplinary experts.

1 Platform work in Germany

1.1 Definition, size and development of platform work

1.1.1 Definition

Work mediated via digital platforms is widely debated in the media and academia with different labels being used, such as *gig work, platform work, work-on-demand via apps* or *crowd work.* A commonly agreed definition of this new labour phenomenon is still missing. In this study we apply the less normatively biased term *platform work(er)* (Pesole et al., 2018, 7) which is defined as follows:

*A **platform worker** is a person selected online from a pool of workers through the intermediation of a platform to perform personally on-demand tasks (platform work) for different individuals or companies in exchange for a remuneration.*[2]

With this definition we exclude 1) persons providing non-paid services (e.g. entries into Wikipedia), as well as 2) persons selling goods or providing access to the latter. Moreover, accommodation services provided through online platforms are not regarded as platform work in this study. *Gig work* is occasionally used in the paper as a synonym of platform work.

For the following discussions it is important to make a distinction between two forms of platform work, namely:

- **Online platform work** where both the work and its organisation are carried out digitally (Huws, 2017). This work can be provided from all over the world and users and providers, usually, do not interact face-to-face.
- **Local platform work** which, generally, involves physical tasks, such as food delivery, household or transport services. This work can only be provided in a given location (country).

1.1.2 Size and growth prospects

Platform work is not (yet) a very widespread phenomenon on the German labour market. Only about 1-2% of the adult population are active in platform work according to national surveys (see Table 1, in Annex 1). International studies (Urzi Brancati et al., 2020 and Huws et al., 2019) report a higher prevalence of platform work for Germany of up to 9% of the working age population (equivalent to more than 5 million people)[3]. These international estimates are, however, likely to overestimate this new labour market phenomenon.[4]

Given the dynamic nature of platform work, the lack of up-to-date survey data and the discrepancy of study results, the overall size of the platform economy in Germany is still uncertain but most likely very small. Nevertheless, the platform economy should still be an issue for policy makers due to its absolute size. Even if only 1% of the adult population is active in platform work, this translates into more than half a million people in Germany. Moreover, the platform economy should be a policy issue due to its high growth and disruption potential. Various factors indicate a further rise of the platform economy, such as the need for platform work to train evolving artificial intelligence (AI) applications.[5] Still, the future of the platform economy is difficult to predict. This

[2] The definition follows the concept of Schoukens et al. (2019). Platforms are understood as digital networks coordinating transactions in an algorithmic way (Fernández-Macías, 2017).

[3] This absolute number represents an own estimate based on the population aged 16-74.

[4] An overestimation is likely because survey respondents often misinterpret themselves as gig workers. After a correction of such cases the prevalence of platform work can drop significantly: in the study of Bonin and Rinne (2017) to only 31% of the initial estimate. The fact that only internet users have been surveyed may lead to overestimation, too. Differences in results are also caused by study design: Some survey the working population, others the adult population.

[5] Freudenberg (2019) 4 et seq.

uncertainty has been further emphasised during the Covid-19 pandemic. For example, there is uncertainty around how the Covid-19 pandemic will affect these new digital labour markets. Platform work may well compensate some job losses in the traditional labour market. As a result, the platform economy could increase further. Overall, it remains important to prepare for a further possible rise of the platform economy.

1.2 Socio-economic characteristics of platform workers

Platform workers are slightly younger and (partly as a consequence) more educated than the general adult population in Germany.[6] Still, it is a myth that mostly students are active in new forms of work forms, such as platform work.[7]

To date, most platform workers earn only a supplemental income in the gig economy. Only about a third receive their main income from platform work.[8] In other words, a large proportion of platform workers also have a job outside of the gig economy. As a result, many platform workers may benefit (partially) from social and labour protection in their (main) job outside the platform economy.

Platform work income is very heterogenous. Some earn thousands of euros per week, while others obtain only 'pocket money' from platform work. There are no robust results regarding the income distribution. While Leimeister et al. (2016) and Baethge et al. (2019) report very low earnings (mostly far below the threshold of EUR 400-500 per month), Serfling (2019) estimates that nearly two-thirds (61%) earn above EUR 500 per week (or around EUR 2,000 per month). He calculates a median gross hourly income of EUR 29 – more than three times the German minimum wage. Based on this limited data (see also Annex 1), it is not possible to test the hypothesis that platform work creates a new digital precariat with mainly low paid jobs in Germany.

A significant share of gig workers derive income via foreign platforms. No figures are available on the magnitude of such cross-border platform work. Based on own initial calculations (see Annex 1) it is estimated that between 25-50% of gig workers are active on foreign platforms, mostly located outside the European Union.

[6] See e.g. Bertschek et al. (2016) or Bonin and Rinne (2017).
[7] The share of students among platform workers is not much different than among the overall adult population. See Huws et al. (2017) or Serfling (2018).
[8] Serfling (2018) 41. Huws et al. (2017) and Pesole et al. (2018) provide similar estimates for EU countries.

2 Challenges of rising platform work

There are many challenges associated with the increasing prevalence of platform work. Such challenges particularly relate to the legal status of platform workers, unfair treatment and limited representation, lack of social protection and the absence of reliable data for policy makers. Each of these challenges are discussed in the subsections below.

2.1 Legal status

Limited case law exists concerning platform work in Germany. There are only two decisions of Appeal Courts. In both cases (one relating to online platform work and the other local platform work) employee status was denied.[9][10] The parties in both cases are allowed to appeal to the Federal Labour Court (*Bundesarbeitsgericht*, *BAG*). The following subsections explore the legal status of platform workers with respect to case law in other fields and from the legal discourse.

2.1.1. Applicable (contract) law

Contracts of platform workers who perform tasks in Germany are governed by German substantive law according to the place-of-work principle in Articles 3, 8 of the Regulation (EC) 593/2008 (Rome I Regulation). Choice of law is possible to the advantage of the employee if it is a labour contract or even a contract of an employee-like person. For a further discussion see Annex 3. It is worth mentioning that the Rome I Regulation is, according to Article 2, a *'loi uniforme'* which is applicable also in cases with relations to non-EU Member States.[11]

Also in the cases of an applicable foreign law the labour standards indicated in the posting of workers Directive 96/71/EC will apply because – this is a peculiarity of the German law – the law for posted workers applies in all cases of dependent work carried out by employees in Germany as overriding mandatory rules (sections 2, 3 and 8 of the Posted Workers Act).

These rules of the Rome I Regulation apply in essence also in the case of platform workers who work outside Germany for a German platform. As a result, they are protected under the domestic labour and social security law. A choice of law clause, which normally would prefer German law, cannot deviate from the protection under national law, unless it is, as perhaps in a majority of cases, a service contract of a self-employed person who cannot be qualified as employee-like. German overriding mandatory rules in the sense of Article 9 Rome I Regulation will normally not apply if the work is carried out outside the territory. This legislation, e.g. working time limitations or equality law, could, nevertheless, be applicable as part of the labour contract statute. Additionally, overriding mandatory legislation at the foreign place of work are applicable.

Concerning social security protection, platform work are subject to the legislation of the Member State where they perform their activity (c.f. Annex 3).

2.1.2. Legal status in substantive national labour law

The employee status is the entry to full labour law protection under German law. An employee enjoys the right to minimum wages, holidays, severance payment, dismissal protection and limited liability.

Sometimes enterprises provide internal platform work, i.e. the employer recruits the workforce through a platform from their own staff or the staff of the group. In these cases, platform workers are employees.

[9] Landesarbeitsgericht München from 4 December 2019, Case 8 Sa 146/19.
[10] Landesarbeitsgericht Hessen from 14 February 2019 – 10 Ta 350/18, Neue Zeitschrift für Arbeitsrecht- Rechtsprechungsreport, Munich 2019, p. 505.
[11] Deinert (2013), § 2 no. 9.

In the case of external platform work where the enterprise recruits the workforce from outside the company it may be highly disputable if a worker is an employee according to national law. Since 2017 national labour law contains a definition of the term 'employee' in section 611a of the Civil Code (*Bürgerliches Gesetzbuch – BGB*). This definition follows from the earlier case law of the BAG according to which an employee is someone who carries out work under civil law in personal dependence. The dependence will find its manifestation in the direction right of the employer and in the integration of the worker in the workplace entity (plant).[12] The new definition does not refer expressly to the aspect of integration. Still it seems to be a dominant opinion that this component is an unwritten part of the definition.[13] Section 611a para (1) 6 BGB states that the contractual indication is not relevant if it follows from the facts of performance that the contract is – in truth – a labour contract. An alternative concept focuses much more on economic dependence.[14] The latter viewpoint has, however, not been adopted by the Parliament.

Platform work can be carried out under the direction of the platform (indirect platform work) or the client (direct platform work). However, it is important to check if someone is – in truth – under the direction of the platform (or the client),[15] irrespective of the formal words of the contract. In many cases platform workers could be qualified as self-employed since they are, as foreseen in many platforms' standard terms and conditions,[16] able to reject job offers.[17] Although they may be under monetary pressure to accept the offer, this is only a question of economic dependence[18].

However, this does not mean that the worker is automatically self-employed if they agree to perform a task. They may be a dependent employee during the operation, depending on the subject of work as well as on the commitments of the parties.[19] Often platform workers will, nevertheless, be self-employed because they will be able to design the circumstances of their work.[20] However, the BAG ruled that in the case of very simple tasks the contract may be qualified as a labour contract irrespective of the absence of any directions of the employers (e.g. a newspaper deliverer).[21] In such instances, the instructions follow ultimately from the duties. Especially in the case of online platform workers this case law may be applicable.[22]

Access to social security is also based on dependent employment according to Section 7 of the Social Code book IV (*Sozialgesetzbuch IV – SGB IV*). However, the Federal

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[12] BAG from 23 April 1980, case 5 AZR 426/79, *Arbeitsrechtliche Praxis*, Munich, BGB § 611 Abhängigkeit no. 34. BAG from 21 May 2019, case 9 AZR 295/18, Neue Zeitschrift für Arbeitsrecht, Munich 2019, p. 1411, focuses much more on the instruction right.

[13] Müller-Glöge/Preis/Schmidt (2019) § 611a BGB no. 41; Deinert/Heuschmid/Zwanziger (2019) § 3 no. 47.

[14] Wank (1988); for a combination of former case law and the economic approach, especially focussing on crowdwork: Schneider-Dörr (2019) 73 et seq.

[15] It is another challenge that labour law mostly sets standards for binary relations while crowdwork relations are often triangular relations (cf. *Stöhr*, Kleine Unternehmen, pp. 421-422) that are neither covered by the laws on temporary agency work. Cf. for the concept of joint employers *Waas*, in: Waas/Liebman/Lyubarsky/Kezuka, Crowdwork, A comparative Law Perspective, pp. 157-158.

[16] Preis/Brose (2016) 16-17.

[17] Landesarbeitsgericht München from 4 December 2019, Case 8 Sa 146/19; Schubert (2019) 364 et seq.; Lingemann/Otte, (2015) 1042 et seq.

[18] Landesarbeitsgericht München from 4 December 2019, Case 8 Sa 146/19; Schubert (2019) 369, 370 et seq.

[19] Deinert (2015) no. 23-24.

[20] Klebe/Neugebauer (2014) 5; Giesen/Kersten (2017) 109-110; Waas/Liebman/Lyubarsky/Kezuka (2017) 153-154; Hanau (2016) 2615; Walzer (2019) 139 et seq.; Wank (2018) 83; Wisskirchen/Schwindling (2017) 320 et seq.; Deinert (2017a) 68; Deinert (2018) 363.

[21] BAG from 16.7.1997, case 5 AZR 312/96, Neue Zeitschrift für Arbeitsrecht, Munich 1998, p. 368.

[22] Cf. Däubler (2016) 36.

Social Court (*Bundessozialgericht*, *BSG*) seems to be more likely to qualify someone as an employee if they have to subordinate to the framework of the organisation of their client. For details c.f. Annex 4.

If someone is not an employee, they will be self-employed. This may be an independent contractor who enjoys protection only under civil and commercial law. The social protection under these rules falls short.[23] However, German legislation introduced a further category between employees and totally independent persons: the persons with employee-like status (*Arbeitnehmerähnliche*). Employee-like persons enjoy specific labour law rights, including annual leave, paid sick leave, maternity protection and data protection. It should, however, be stressed that employee-like persons do not enjoy the right to minimum wages, nor do they enjoy dismissal protection or protection in the case of transfer of undertaking. The BAG introduced a test that assesses whether someone is economically dependent mainly from one undertaking and, therefore, needs social protection.[24] This may be the case, depending on the facts, if someone works predominantly for one platform.[25] Since the platforms often do not only open the market but also dominate the market as 'demander' this may occur in cases of platforms that ask for indirect platform work. In cases of direct platform work the result of the test depends on the direct relationship between the client and the platform worker.

A special type of employee-like persons are homeworkers. They enjoy protection under several labour law acts to a higher degree than employee-like persons. For example, homeworkers who work predominantly for one establishment are covered by the works constitution. Additionally, there exists a special legislation for homeworkers (*Heimarbeitsgesetz* (*HAG*, Homeworkers Act)). This act leads to the possibility to conclude collective agreements for homeworkers. In the case of absence of collective agreements, special committees for homeworkers may create minimum pay rates. The BAG has decided that also high-skilled workers like IT specialists could be homeworkers, the concept of homework is not restricted to simpler tasks.[26] But the HAG will only apply if the work is done for an economic purpose which excludes occasional work.[27]

2.1.3. Enforcement of workers' rights

2.1.3.1. Proof of employment

The platform worker must, if they claim employee rights, prove that they are an employee. They bear the burden of proof. This is not easy because, as we have shown above, the test if someone is an employee depends on all the circumstances of the specific case. It is not trivial to prove that someone carries out work under personal dependence if the written contract indicates the opposite. There is no reversal of the burden of proof for these cases.

Although the question of qualification depends on the facts in the individual case these facts may be similar in many cases of platform work for the same platform because the platform sets the rules of platform work. But in this context the German law does not know any kind of class action whatsoever.

2.1.3.2. Claiming for labour rights

Furthermore, the platform worker must claim their rights on their own. That is not easy if a foreign worker claims in German courts. It would have been much easier for them to get assistance by domestic supporters. Trade unions can help insofar as representing them in the trial, but there is no possibility for the trade unions or other organisations to launch a trial in their name in order to enforce the rights of the respective worker.

[23] Deinert (2015) 27 et seq.; cf. also Hensel (2019) 215 et seq.
[24] BAG from 17 October 1990, case 5 AZR 639/89, *Arbeitsrechtliche Praxis*, Munich ,ArbGG 1979§ 5 no. 9.
[25] Cf. Däubler (2016) 38; Preis/Brose (2016) 52-53; Schubert (2018) 204; Stöhr (2019) 422.
[26] Giesen/Kersten (2017) 110-111.
[27] Deinert (2018) 363; Walzer (2019) 157-158.

The works council also plays an important role for the protection of employee's interests in the German industrial relations system. According to section 80 para (1) no 1 of the Works Constitution Act the works council shall monitor compliance of the enterprise with legislation and collective agreements for the benefits of the workers. Although the works council is not allowed to claim for the workers' rights it may insist on performance by the employer. But representing platform workers encounters problems. Firstly, the works council can represent them only if they are employees or persons engaged in home work who work principally for one and the same establishment. Secondly, it may be difficult to get in touch with platform workers, especially if there is only a virtual link to the establishment like in the case of digital platforms.

2.2 Unfair treatment and limited representation

The platform defines the rules for platform work, irrespective if it is direct or indirect platform work. The other contracting party needs protection in the case of presented standard business terms by the trader. Therefore, the German Civil Code contains legislation on limits for the use of standard business terms. It appears that the dangers for the interests and freedoms of the contracting party are bigger for platform workers than for workers in 'normal' business relations. The reason is that there is low competition between platforms. Platforms do not only 'open' or create markets. They also often control these markets. Irrespective of whether the platform worker is an employee, an employee-like person, a home worker or an independent self-employed they are hardly able to bargain on the legal conditions of platform work. Platform work normally takes place under a structural imbalance between the platform and the worker.[28] Nevertheless, there is no legislation for this particular situation. Any contract clause only has to pass the check for standard business terms. The validity of such terms may sometimes be questionable. Some of these are highlighted below.[29]

The rules of the platforms often include a right of the platform to change the terms. Such a modification clause may be a practical necessity. But according to section 308 no. 4 BGB such a clause, if it concerns the performance of the term user, must be reasonable and is only valid if the reasons for change are described carefully in advance. For B2B contracts, where this section is not applicable, the same result will be true since such a clause is 'unfair' and therefore void.[30]

Some platforms call for participation by presenting a solution for a given task. The platform or the client may decide which solution would be the most advantageous. Only the performer of the chosen solution will be entitled to the remuneration. This has a certain similarity to an open tender procedure. The legal rules for employment contracts as well as for service contracts or contracts of service have another legal basis: normally, the service provider will get a reward according to section 612 BGB. The client of a service contractor must pay deductions according to section 632a BGB and, if they terminate the contract, they have to pay according to section 648a para (5) BGB for the work already carried out. Therefore, a contract term as described is in contradiction to the spirit of the legal rules. According to section 307 para (2) no. 1 BGB, this has the consequence that the term is presumed to be unfair and therefore invalid.[31] A clause according to which the platform or the client will receive user rights of intellectual property even without paying for the work is all the more unfair and therefore invalid.[32]

Some platforms set out rules according to which the platform workers are not allowed to be in contact with users of other platforms and have to inform the platform if other users try to contact them. In legal literature doubts arose if such clauses were

[28] Cf. Brose (2019) 331.

[29] Däubler (2014)250-258), discusses further clauses; cf. also Deinert (2015) no. 54 et seq.; Walzer (2019) 105 et seq.

[30] Däubler (2014) 252; cf. also Walzer (2019) 105-107.

[31] Däubler (2014) 253-255; cf. also Waas/Liebman/Lyubarsky/Kezuka (2017) 174-175; against: Walzer, (2019) 110-111.

[32] Däubler (2014) 257.

compatible with the right of personality of the platform worker.[33] It may be added that this is also a violation of the fundamental right to organise.

As far as platforms evaluate the performance of the platform worker through a scoring system the score may have a professional and/or economic value because the platform worker will have better opportunities for well paid jobs. It has not yet been discussed very much in the legal literature if these systems may harm professional freedom (by limiting the freedom of the service provider to change platform) or even harm the fundamental freedom of movement of the worker. That leads to the question of whether platform workers may be entitled to transfer their score to another platform or at least to information on their score. The latter shows a certain similarity to the entitlement to a certificate of an employee according to section 630 BGB.

2.3 Social protection

A lack of social protection is seen as the main risk of platform work in Germany – according to a recent survey of gig workers.[34] This result can be explained by 1) an insufficient legal protection of overall self-employed in Germany; and 2) the fact that platform workers – like many other self-employed – do not opt for available voluntary social insurance.

Access to statutory social protection differs if self-employed platform work represents the main job or a side job (as measured by income or working hours). Income from a main job is mandatorily covered by statutory health and long-term care insurance in Germany. In other branches of social security, such as pensions or accident insurance, coverage is, generally,[35] voluntary (see Figure 1.).[36] In practice, most self-employed do not take this opportunity: less than 1% of self-employed (as main job) apply voluntarily for statutory pension and only about 2% for statutory unemployment insurance.[37] With these voluntary insurance regimes Germany is exceptional in Europe. Most EU Member States apply mandatory regimes for all self-employed, in particular when it comes to old age pensions (23 of 28 EU Member States), maternity (19 of 28) and sickness benefits (15 of 28).[38]

[33] Däubler (2014) 257; Klebe/Neugebauer (2014) 6.
[34] Baethge et al. (2019). This is the only German survey which asks gig workers about the risks of platform work. Its results should be treated with some caution: With 710 respondents the sample is relatively small. The study provides no information on survey design and includes renting platforms (e.g. Airbnb).
[35] Mandatory pension insurance exists only for selected professions (e.g. farmers, artists, lawyers, doctors). Similar groups are obliged for accident insurance.
[36] Only some selected professions are mandatorily covered by pension (e.g. lawyers and doctors) and accident insurance (e.g. farmers). Overall, about 3 million of 4 million self-employed (with main job) remain uncovered by obligatory pension insurance.
[37] DRV Bund (2019) and Oberfichtner (2019). Access to unemployment benefits is restricted to individuals with longer social insurance records (at least 12 months in the last 24 months) who start their business as a self-employed and work at least 15 hours.
[38] Spasova et al. (2017). The study also covers the UK which is no longer a Member State of the EU.

Figure 1. Access to Social Protection, self-employed platform workers

Social Protection Branch	Health & Long-term care	Family benefits	Social Assistance	Accident	Pensions (old age, invalidity, survivors')	Sickness	Maternity benefits	Unemploy-ment
if PW = main job	FULL	FULL	FULL	Voluntary	Voluntary	Voluntary	Voluntary	LOW
remarks	*obligatory*	*universal*	*universal*	*obligatory for selected professions*	*obligatory for selected professions*	-	-	*high elibility criteria*
if PW = side job of an employee	FULL	FULL	FULL	Voluntary	NO	NO	NO	NO
remarks	*full insurance via main job*	*universal*	*universal*	*obligatory for selected professions*	*generally, no insurance of additional self-employed income possible **	*no insurance of additional self-employed income possible*	*no insurance of additional self-employed income possible*	*no insurance of additional self-employed income possible*

Source: own illustration. ** Only for selected professions insurance possible, if monthly income of side job > 450 €.*

The current Covid-19 crises has exemplarily shown the legal coverage gap of self-employed in general and of platform workers in particular. In contrast to standard employees, these groups had no access to the very widely used short-time allowances (Kurzarbeitergeld) – even if they opted for voluntary unemployment insurance. Also other key social protection benefits during this crisis, such as sickness or unemployment benefits, have, usually, not been paid to self-employed (platform workers) due to low voluntary coverage – discussed above.

The majority of platform workers earn only a supplemental income in the gig economy (see section 1.2). Generally, such supplemental income is not covered by social insurance in Germany (see Figure 1). One reason lies in rigid income and working time eligibility criteria. Generally, supplemental income below the threshold of EUR 450 per month cannot be insured. The problem is aggravated as different income exception thresholds exist which may be cumulated.[39] Very important is also that employees who earn additional self-employed income cannot cover it in the pension, sickness, maternity and unemployment insurance. At the end these coverage gaps translate into lower protection levels – at least in schemes which rest on the principle of contribution-benefit equivalence (e.g. pension benefits).

If platform work grows further, the described coverage gaps can create substantial financial risks for social protection, in particular, in the German health, accident and pension schemes. As a result, a lower adequacy of social benefits for the overall population may be expected, if growing platform work substitutes standard jobs. These risks are further discussed for each branch of social insurance in Annex 2.

The financing and adequacy of social protection may be challenged even if legal coverage gaps can be closed. This is because earnings from platform work activities often remain unreported. The reasons for such low effective coverage is manifold: driven by a lack of knowledge, resources and/or willingness to comply with tax and social security obligations. In particular, in case of online, cross-border platform work the potential of social and tax fraud may be substantial.[40] High administrative burdens may also be a reason for underreporting of platform work income. Self-employed in Germany have to declare their income to different public institutions separately (such as tax as well as health care authorities). The administrative burden of such multiple declaration of income is high in particular compared to the often low income earned with platform work (causing under declaration).

[39] Freudenberg et al. (2019) 393 or DRV (2020), 17f.
[40] These work forms are relatively anonymous (no direct contact with clients) and gig workers may judge it as unlikely that foreign platform report their activities to the authorities of their residence countries.

2.4 Reliable data for policy makers

Reliable data for evidence-based policies and regulations in the field of platform work is limited. There are no robust estimates about the scope of platform work (see section 1.1). Administrative data is also lacking. No common methodological standards and best practices for the estimation of platform work have been developed and definitions of this new labour market phenomenon vary widely which makes available estimates hardly comparable. The fact that the platform economy is evolving dynamically exacerbates measurement challenges ('hitting a moving target').

High quality information on the socio-economic background of platform workers is also missing. In particular, robust information about incomes earned is lacking. Whether a new 'digital precariat' is evolving on a larger scale with the platform economy cannot be answered. Similarly, only limited data about the scope of cross-border platform work and the factual social protection of these new work forms is available.

The lack of reliable data means that crucial questions for policy makers cannot yet be answered sufficiently for Germany.

- Does platform work substitute or complement traditional work forms?
- Is platform work only a short 'gig' in employment careers to fill breaks in between standard jobs or does it become a dominant part of individuals' careers?
- To what extent are platform workers covered by social protection via a main job as an employed person outside the gig economy?

3 Implemented and planned policies and initiatives

3.1 Governmental initiatives

Many governments expect that the platform economy will continue to grow as digitalisation becomes more embedded in their economies, and that this growth could happen relatively quickly. The German Federal Ministry of Labour and Social Affairs (*BMAS*) aims to foster a strong platform economy, which enables companies to make the most of its potential – whilst at the same time ensuring that good working conditions and access to social security are guaranteed.

Given the rapid evolution of the platform economy and the lack of a robust evidence-base, it has been important for the BMAS to develop a better understanding of the opportunities and challenges of platform work in Germany – in order then to develop sustainable policy proposals. This requires cooperation between all relevant departments in the Ministry, as well as the in-depth integration of external perspectives and stakeholders at an early stage.

Two 'hearings' on the opportunities and challenges presented by the platform economy were held with platform operators and platform workers in February 2019, and in May 2019. Two 'labs', each with around 15 interdisciplinary experts from science and practice, developed recommendations for policy-making in the platform economy. Over a four-day process, the 'labs' developed a description of the challenges and jointly developed recommendations for action. The main recommendations were as follows:

- including the self-employed in pension insurance provision (and providing support for social-security contributions in the low-income segment);
- strengthening transparency and control of evaluation procedures on platforms; and
- strengthening the data sovereignty of platform employees in order to reduce lock-in effects and dependency on the platforms.

These external inputs fed into the discussions of an internal cross-departmental project group in the BMAS. The central topic of the project group's work was the question of whether and to what extent self-employed can and should still benefit from certain social protection rights and to what extent platforms can be made more responsible for good working conditions. Policy-options that are currently being evaluated within the BMAS include a reversal of the burden of proof concerning worker-classification (as employee or as self-employed), in order to strengthen the enforcement of existing labour law. Specific regulations for platform work (e.g. with regard to notice periods or aspects of health and safety) and requirements for platforms to contribute to pension insurance for self-employed service providers in the platform economy are also being discussed, as well as requirements around platforms' reporting and information obligations.

In view of the cross-border nature of platform business models and the technologies they use, it also makes sense to develop regulations for a fair and balanced platform economy at the EU level For this reason, it is important for the BMAS to accompany national regulatory efforts with an exchange on regulatory requirements at an EU level. This is also, why the platform economy is one of the focus areas of Germany's EU Council Presidency in the second half of 2020. The BMAS supports the proposals in the EU Commission's 2020 Work Programme on platform workers. In particular, the BMAS sees the following aspects as key areas for discussion:

- Registration of businesses at EU level;
- Clarification of the applicable legal frameworks;
- Conflicts rules for platform work;
- A broad choice of judicial system on platform workers' side;

- Europe-wide general liability for platform operators;
- A ban on discriminatory contract clauses; and
- A reversal of the burden of proof regarding worker status.

3.2 Non-governmental initiatives

Additionally, non-governmental initiatives have been developed in Germany to improve working conditions in the platform economy. Three of these initiatives, namely Faircrowdwork.org, the Crowdsourcing Code of Conduct and the Ombuds Office, are presented below.[41]

Faircrowdwork.org is a trade union website with information about platform work. It presents information about labour platform working conditions gathered from platform workers. The site was launched in 2015 and revised in 2016. The 'reviews' of different platforms include quantitative ratings which cover payment, communication, work evaluation, tasks and technology. The ratings are based on answers to 95-question surveys completed by workers. The site also includes reviews of platform companies' legal terms.

The site has achieved some successes. First, platform workers contact trade unions via the site. Second, some of the platforms that received unfavourable ratings, especially of their legal terms, asked trade unions how to improve their ratings. Suggestions were sent about how to change their legal terms; which were then implemented by the platforms. As a result, the contracts for the platform workers were fairer and the platforms received better ratings. Third, the site is a resource for trade unions, journalists and researchers.

Maintaining the site has involved some challenges. Keeping the site up-to-date is time-intensive, as the landscape of labour platforms constantly changes. Platforms go out of business; new ones are established. The project is carried out by a small unit in IG Metall, which has a specific national and sectoral mandate. But platform work exceeds national and sectoral boundaries. So it could make sense in the future for an institution with a supranational, cross-sectoral mandate to maintain this information. Additionally, the changing regulatory landscape and evolving knowledge means that the rating criteria have to be updated on a continuous basis. This is another level of complexity beyond updating the data within the existing criteria. While this could be beneficial, thus far it has been beyond the trade unions' abilities.

From the perspective of IG Metall Union, these experiences suggest possibilities to improve platform working conditions through non-legislative action at EU or national level. For example, Codes of Conduct for labour platforms under Article 40 *G*eneral Data Protection Regulation (GDPR) and Article 17 Platform to Business Regulation (P2BR) could be created. Additionally, procurement guidelines could be established for large crowdsourcing clients, much like Fairtrade or similar certifications for food.

The **Crowdsourcing Code of Conduct** was initiated in 2015 by Testbirds, a German 'crowd software testing' company, in response to negative coverage of crowdsourcing in German media. In 2016, IG Metall entered into dialogue with Testbirds and other early signatories to the Code, and provided suggestions for improvement. These suggestions were integrated and a new version was published in late 2016. By this time, eight platforms had signed up to it.

In late 2017, an '**Ombuds Office**' was established to mediate disputes between platform workers and platforms that had signed the Code of Conduct. For example, if a worker completes a task but is refused payment, they can file a complaint with the Ombuds Office. The Ombuds Office 'panel' is 'bipartite', with two 'worker side' members (one crowdworker and one trade unionist), two 'platform side' members (one platform

[41] The following description has benefited from inputs of Six Silbermann (IG Metall).

employee and one representative of the German Crowdsourcing Association), and a neutral chair.

Since 2017 the Ombuds Office has resolved over 40 cases, mostly by consensus. In many cases, either payment was refused for completed work or a platform worker's account was closed. Often the Ombuds Office finds that the decision was a misunderstanding or technical error.

The Ombuds Office is one of only a few mechanisms worldwide (perhaps the only one for location-independent work) where platforms work with a union to resolve disputes with self-employed. The fact that the Office has resolved some of these disputes shows that social dialogue is possible and useful, even when platform workers are self-employed. At the same time, the Code of Conduct is voluntary, and the signatory platforms compete in a global market against platforms who have not signed up to it. The result is that from a union point of view the outcomes in the Ombuds Office are not always entirely satisfactory which may point to a need for EU-wide regulation.[42]

[42] From the view of IG Metall, such regulations may include the establishment of basic procedural rights for all platform workers (regardless of employment status), e.g. the right to a written explanation for, and a right to contest, adverse decisions such as non-payment or account deactivation. To go along this path the Platform-to-Business Regulation may be a good step forward (e.g. its Art 18).

4 Considerations for future policies and initiatives

4.1 Improving data quality on platform work

Different measurement approaches could be applied to study the platform economy. Surveys (still) provide the best estimates of the scope of platform work and its structure. However, such surveys are associated with high costs and quality standards have to be met to come up with reliable survey estimates. For example, very large sample sizes are required to draw differentiated information on platform work (e.g. by age, income or working hours per month).[43] It is questionable whether cheaper online surveys provide a representative picture for the overall population (even after the application of adjustment factors). Experience from existing surveys[44] shows that survey respondents require a sufficient understanding of survey questions (e.g. via feedback loops) and plausibility checks of survey answers are crucial as survey respondents tend to misinterpret themselves as platform workers. An incorporation of platform work questions in labour force surveys could be considered based on the experiences from other countries such as Switzerland, Finland and Canada. Additionally, best practices and the planned publication of a handbook in 2021-2022 by the OECD/ILO Technical Expert Group on measuring platform work should be closely followed.[45]

A data exchange with platforms should be started to learn more about the scope and development of platform work. The virtue of the platform economy is that all economic activities are digitally stored. Thus, the question is only whether and how to get access to this large pool of available information. One option would be to introduce a mandatory data transmission as has been adopted in France in 2019 where all platforms are obliged to provide information on individuals' income to tax authorities (further discussed in section 4.5). Such data could be used to derive average hourly earnings of gig workers (given that information on tasks duration is also provided). A question is, however, whether all platforms on which national residents are active will cooperate in the data transmission, in particular foreign platforms.

Further data sources and techniques could be considered. This includes the use of banking data (applied by Farrel et al., 2019), as well as tax data (see, for example, Jackson et al., 2017).[46] Additionally, web scraping may prove to be a useful and relatively cheap approach to measure the development (not the overall size) of the gig economy as demonstrated with the Online Labour Index.[47]

4.2 Applicable labour law for cross-border platform work

Private international law leads in most cases to the applicability of the worker's domestic law, irrespective if they are an employee or not, provided that there is no choice of law clause. Protection under German labour law is, therefore, guaranteed if the worker is an employee in the sense of the substantive law. Labour law will apply at least partly if they are an employee-like person. If the worker is a mere self-employed person they will get protection under German substantive economic and civil law which means at least protection against unfair standard business terms. This result is *mutatis mutandis* also true for the case that the platform is based abroad.

[43] A large sample is needed given that only 1-2% of the adult population are active in platform work. As a result, even surveys like the German Socio Economic Panel (SOEP), covering about 30,000 people may be too small for detailed analysis (Bonin and Rinne, 2017).
[44] Perrenoud, 2019; Bonin and Rinne, 2017, Bureau of Labor Statistics, 2018.
[45] See UN (2019), p. 3. Additionally, a Eurostat working group (LAMAS) is considering the introduction of a platform work module into European labour force surveys. First results are expected after 2022.
[46] However, both the use of banking and of tax data may lead to an underestimation of the scope of platform work as not all platform work is reported to tax authorities and not all platform work payments are intermediated via a given bank.
[47] See e.g. Kässi and Lehdonvirta (2018).

Real self-employed are, as shown above, not protected by the favorability principle against choice of law clauses, apart from the rules of Article 3 para (3) und (4) on mere internal or only EU-connected situations which, however, seem to be of minor importance. The freedom to choose the applicable law which seems to be appropriate for entrepreneurs who run their business is improper for platform workers because of their weaker situation with respect to the substantial market power of the platforms. It is, therefore, disputable if choice of law clauses should be acceptable in the case of platform workers.

These reflections focus more on the situation of the employee working in Germany. But what about platforms in Germany seeking workers all over the world? It is an unforbidden strategy of enterprises to search for contract partners with the best or even the cheapest conditions. International competition within the EU is protected by the fundamental freedoms. However, this competition is not guaranteed without limits. The ECJ recognised the right of Member States to restraint of fundamental freedoms in order to secure labour rights.[48] From a political point of view it cannot be acceptable that competition via labour costs takes place by undercutting a minimum of labour standards which should be indispensable all over the world. This does not mean that weaker working conditions than the *aquis communautaire* are inacceptable for people working outside the EU. But one could argue that it is not acceptable that an enterprise seated in Germany will benefit from violations of ILO core standards like forced labour, refusal of union rights, child work or discrimination. Furthermore, undignified low pay would fall into this category as well as unlimited working time. It seems reasonable to hold that these minimum conditions should be considered according to section 9 Rome I Regulation as overriding mandatory law that should apply irrespective of the contract statute if a platform worker works for a German platform. In our view the legislator can set out rules for this minimum of working standards *de lege ferenda*. It would be, furthermore, much more appropriate, if this minimum would be guaranteed by EU standards, setting the limits of fundamental freedoms as well as the limits of the rights of third country national enterprises.

This private international law solution will only work if the employees are able to claim in the courts of Germany, respectively the EU. This is normally no problem if the enterprise is seated in Germany, respectively the EU. Problems may only arise in the case of prorogation clauses. For the same reasons like in the case of choice of law clauses one could plead for limitation of prorogation clauses like they are already set out in the Brussels I bis Regulation for consumer and employment contracts.[49]

4.3 Changing labour law

There seems to be no reason to amend the definition of employment contract in section 611a BGB with respect to the special situation of platform workers. The German legislation still follows the idea that a person should enjoy the full protection of labour law if they are personally dependent which means that they have to subordinate in a work environment which is determined by someone else. If they are free to organise their own work civil law should apply, notwithstanding that appropriate protection against freedom limitations should, nevertheless, be guaranteed if there is a need for. This leads to the result that legislation should not protect platform workers who are no employees by present law by only defining them as employees by legal amendment.[50]

One exception should be made. As shown, platform workers are often independent. But changing (now digital) work organisation, legal scholars argue that control competences

[48] ECJ from 23 November 1999, case C-369/96 and 376/96, ECR I-8453 (Arblade).

[49] Risak (2019) 117 goes beyond this proposal. In his view the posting directive 1996/71/EC aims at combating competition via labour costs in the host country. He, therefore, proposes to follow the idea of the directive also in the case that someone occasionally works abroad but virtually in the host country and pleads for applicability of the full labour law regime of the host country in the case that someone works habitually virtually in the host country.

[50] Against: Kocher (2019) 173 et seq.

of the client substitute traditional instruction rights.[51] Platforms determine the conditions of performance of the involved parties.[52] Digitalisation makes it possible to split request for work into extremely small tasks which undermines the traditional labour law concept of instruction and integration.[53] It should be added that this is especially the case in the platform economy. This is even true in the case that the platform is only an intermediary because the determination of the specific rights and duties of the parties by the platform goes far beyond the mere business of an intermediary[54]. The need for social protection is, therefore, comparable to that of dependent employees in the traditional sense of labour law.[55] In this regard, platform workers could be possibly digitally dependent on the platform or the client in the case that the digital environment does not allow a free decision on where, how and when to perform the work and may even decide on future job opportunities by scoring performance.[56] This argument has not yet been successfully presented in court trials[57] but may convince for future policy.

It can be very difficult to prove employment status. It thus seems worth discussing a reversal of the burden of proof. It would be helpful to set out some criteria that indicate dependent employment with a reversal of the burden of proof if a certain number of criteria has been met.[58] However, since the judges have to consider all the facts of the case when checking the relation of the parties, it is not appropriate to create an absolute presumption which makes it impossible for the employer to prove the opposite.

Independent platform workers are in a weaker situation because of the market power of the platforms. Therefore, it is reasonable to create minimum rights for platform workers. For example, it is worth discussing the creation of a right of transfer of a score or protection against unfair scoring. Legislation could also set out a catalogue of illegal standard terms of business. It seems also worth discussing a general liability of the platform for the clients' duties.[59] Scholars in legal literature discuss more such rights.[60]

Furthermore, the lack of legislation on social protection of self-employed persons seems to be reasonable because self-employed may earn more than employees and therefore be able to 'buy' their protection against sickness, disability or liability and may be able to 'finance' unpaid holidays.[61] But it seems that this legal prototype is not always reality. There is a growing number of self-employed persons who are not able to earn enough for this kind of self-protection. Platform work, as far as the work is divided into many little tasks, seems to promote such 'weak self-employment'. Having this in mind, it seems worth discussing the extension of labour law protection, at least to a certain degree, to platform workers. They may already have the status as employee-like persons if they work only for one platform or at least primarily for one platform. But in the case of direct platform work they will in most cases work for several clients. And indirect platform work may be possible for more than one or two platforms as well.[62] But the need for social protection does not depend on the number of clients. It seems much more likely to link the protection rules to a small income. One proposal would be

[51] C.f. – with different directions of impact – Greiner (2016) 306; Klebe (2016) 279; Kocher/Hensel (2016) 984; Preis/Brose (2016) 27; Risak (2015) 16; Schubert (2018) 204; Waas/Liebman/Lyubarsky/Kezuka (2017) 152-153.
[52] Schubert (2019) 345-346.
[53] Krause (2016)B 20.; Scholle (2019) 29.
[54] Scholle (2019) 30.
[55] Scholle (2019) 30.
[56] Cf. Däubler/Klebe (2015) 1035.
[57] Implicitly rejected by Landesarbeitsgericht München 4 December 2019, Case 8 Sa 146/19.
[58] Cf. Risak (2018) 13-14; Risak (2018a) 322. *Member of European Parliament Joachim Schuster* pleads likewise for an EU directive on this, cf. communication in: *RVaktuell*, Deutsche Rentenversicherung Bund, Berlin 2018, p. 271.
[59] *Scholle* (2019) 32.
[60] E.g. Risak, (2018a) 322-323); Risak (2018) 14-16.
[61] Cf. Deinert (2015) no. 71.
[62] According to the Federal Government more than 80% of the platform workers work for three or more platforms, *Bundestags-Drucksache* 19/6186, p. 6.

to check if someone does not earn more, after deduction of expenses, than the minimum pay for dependent employees. We are, nevertheless, aware that it is a challenge to regulate this in an appropriate way.[63]

These proposals for platform workers' protection could be realised by widening the concept of employee-like persons[64] or homeworkers[65] and by an additional set of rules of platform workers' rights. It would be also possible to adopt a specific platform work statute which exclusively regulates platform work.[66] The question is, however, why a special status is needed merely for (the small group of) gig workers and not also for other non-standard forms of work, such as on-call work – which often share similar features of precarious working conditions.[67] Still it is debatable whether specific circumstances of the platform economy may justify a specific set of rules only for platform workers. Another, not necessarily alternative, way could be to provide a minimum payment for solo self-employed persons.[68]

4.4 Enabling collective agreements

Platform workers are not yet as well organised by unions as employees. They may, nevertheless, find out ways for collective self-protection. For example, by providing information about good and bad practices of platforms and clients[69] or even by organising a strike.[70] They may engage in bargaining codes of conduct[71] or try to bargain collectively on agreements. At present no collective agreements exist.

Under Article 12a of the Collective Agreements Act it is possible to conclude collective agreements for employee-like persons under specific circumstances. The law describes precisely who are employee-like persons for the purpose of this Act. Again, the applicability of the law depends on the fact that the self-employed person is mainly dependent on one client. But one could discuss if, *de lege ferenda*, the law should cover self-employed people who are economically dependent even if they are not dependent on only one client.[72] That seems at least desirable for those self-employed who work on their own for other enterprises and have no possibilities to design their working conditions freely.[73] In a further step it seems reasonable that platforms should also be able to conclude agreements on the working conditions in cases of direct platform work.[74]

In our view there is no doubt that this solution is compatible with the German Constitution because employee-like people are by definition people who need social protection like employees.[75] They enjoy the right to organise and therefore the trade unions may bargain collectively on behalf of them.[76] That would be also compatible with

[63] Deinert, (2015) no.143 et seq.
[64] Klebe (2016) 280; cf. also Walzer (2019) 233 et seq.
[65] Krause, (2016) B106, B 112; Bundesministerium für Arbeit und Soziales (2017) 12, 175-176; Preis/Brose (2016) 37 et seq., 54 et seq.; Waas/Liebman/Lyubarsky/Kezuka (2017) 177 et seq.; Deinert (2018) 366; Deinert/Maksimek/Sutterer-Kipping (2020) 368 et seq.; against: Bayreuther (2018) 15; and also – with a view on the social security systems – Mecke (2016) 488.
[66] Cf. Stöhr, (2019) 424.
[67] Berg, (2016) 21.
[68] Cf. Bayreuther (2018). Proposal in this direction e.g. by Hugo Sinzheimer Institut für Arbeitsrecht (2018).
[69] Cf. http://faircrowd.work/de/ (11 February 2020); Klebe (2016) 281.
[70] Cf. Scholle (2019) 31.
[71] Cf. http://www.crowdsourcing-code.de (11 February 2020).
[72] Deinert (2015) no. 152 et seq.
[73] Bayreuther (2018) 51 et seq.
[74] Deinert (2015) no. 156.
[75] Cf., with references also for the opposite view, Bayreuther (2018) 49.
[76] BAG from 15. February 2005, case 9 AZR 51/04, *Neue Zeitschrift für Arbeitsrecht*, Munich 2006, p. 223; Schubert (2018a) 352.

EU competition law.[77] The Court of Justice of the European Union (CJEU) has already decided that trade unions may bargain collectively for 'false self-employed'.[78] Discussions arose in German legal literature on the question if these people could be people with employee-like status.[79] The reasoning of the court seems to go in this direction.[80] This understanding is more likely than the interpretation that the Court wanted to stress that someone could be a 'worker' in the sense of EU law whereas they could, nevertheless, be self-employed in the sense of national law.[81]

4.5 Adapting social protection

There is a general political and academic consensus that the mandatory coverage gap of self-employed in Germany (discussed in section 2.2) at least in the field of pensions is problematic and requires legislative changes.[82] Against this backdrop, the government plans a pension insurance obligation for all self-employed. This measure is important also for platform workers to obtain an adequate level of social protection. Furthermore, it helps to come closer to a level playing field between self-employed and traditional forms of employment. Before the reform, total (quasi) mandatory social contribution rates for the self-employed added up to between 17-19%.[83] After the proposed reform, they are likely to amount to around 37 % – close to the level of standard employed (39.7%).[84]

However, the planned reform measures may solve only part of the platform work coverage gap. First, it can be discussed whether mandatory coverage should be envisaged also for further branches of social insurance (e.g. maternity and sickness benefits). Second, even if mandatory coverage is generally given, it may be that high income thresholds undermine coverage obligations. This would be the case if the relatively high income exemption limits applied today will be applicable also for new mandatorily insured self-employed.[85] This is in particular a problem for platform workers who mostly earn only a supplemental income in the gig economy (see section 2.3). As a result, a sizeable and potentially growing share of labour income remains out of social insurance with negative repercussions for a sustainable financing and the future adequacy of social protection. Supplemental income should, therefore, be covered by social insurance as far as possible, with much lower income exemption limits, in particular in the case of health care.

Administrative burdens for self-employed platform workers can be high in particularly relative to the low incomes earned with this new work form (see section 2.3). This may cause an under declaration of platform work income. To lower administrative burdens a data exchange with platforms and across public authorities should be envisaged. Following the principle of 'once only', platform work income should be reported only to one public body which then forwards this information to the other relevant public

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[77] Deinert/Maksimek/Sutterer-Kipping (2020) 373 et seq.; at least in the result similar: Schubert (2018a) 351 et seq.)

[78] CJEU from 4 December 2014, Case C-413/13, ECLI:EU:C:2014:2411 (FNV Kunsten, Informatie en Media).

[79] Cf. Schubert (2018) 205.

[80] Cf. Junker (2019) 183.

[81] Cf. e.g. Walzer (2019) 219.

[82] See e.g. CDU/CSU and SPD (2018) 93 as well as Preis/Temming (2016); Ruland (2019) 693; Waltermann (2017) 425; cf. also Schmitt (2018a) 197, especially for the case of crowd work Hensel (2017) 897.

[83] The range between 17-19 % is explained by the level of additional health care contributions – varying by insurance fund - as well as by the additional long-term contributions for individuals without kids. Voluntary contributions for sickness benefits are neglected.

[84] Here we assume that self-employed have to pay after the reform the standard mandatory pension contribution rates of today (18.6 %).

[85] Currently, for the small group of self-employed who are already mandatorily insured in the statutory pension insurance an income exemption limit of 450 € per month is applied up to which no insurance obligation is given.

institutions. To further simplify reporting obligations we encourage a data exchange with the platforms themselves. They, generally, record income records for numerous – sometimes millions – of self-employed. Thus, instead of income reporting by each individual self-employed, income could be declared by only one entity, the platform. Such reporting regimes are already a good practice in various countries such as France, Belgium, Estonia and the United States.[86] It is proposed to start with a voluntary reporting regime to limit the administrative burden for the still relatively young platform economy and to give these enterprises some time to prepare for a subsequent mandatory regime. Following the same reasoning, smaller (start-up) platforms may be initially exempted from reporting obligations.

A lack of knowledge about available social protection is one reason for low effective social insurance coverage. To overcome this knowledge gap the digital economy creates new opportunities for well-targeted awareness campaigns. Platform workers can be informed directly at the platform about their duties and rights in terms of social insurance. Electronic links to the websites of the respective administrative authorities may be shown on the platform to provide workers with further information on social regulations only 'one click' away. Such information should be provided by platforms on a mandatory basis.

In the case of platform work it is worth considering that the workers bear (like employees) only 50% of the contributions and the platforms must take the other 50%.[87] A model could be the German social security system for artists according to which also the marketers pay contributions, with additional financing by the taxpayers.[88] But in legal literature doubts arise if this could be a good model for all self-employed.[89] Also the compatibility with the German Constitution has been put into question.[90] There may be good reasons that self-employed should bear their contributions on their own. But especially in the case of platform work a different view may be worth discussing, at least for those with low incomes.

Payments could be secured if the platforms (and not the workers) had to pay the contributions, irrespective of the question who has finally to bear the contributions.[91] This would be a much more effective way to avoid contribution arrears than in the case that every platform worker would have to pay contributions for every small task and payment. This question of collection of contributions at the economic roots leads to the problem that platform work is almost an international phenomenon. For example, Hensel (2017) stresses that a client's contribution in the case of platform work would lead to disadvantages of German platforms in international competition.[92] An open question is, therefore, how to raise social protection coverage of workers who are active across borders on online platforms (see Table 3, in Annex 1). The potential for underreporting of such cross-border platform work can be substantial and foreign platforms show little incentives to comply with national regulations, such as reporting obligations.

One solution to this problem has been proposed by Weber (2019) with the idea of the so called International *Digital Social Security (DSS)* Account. Weber proposes that platforms worldwide pay for each of their (cross-border) platform workers a fixed share of the salary to their individual DSS Account (administered by an international organisation). Contributions accrued on the DSS account are transferred regularly to national social security agencies. The virtue of this idea is the direct payment of contributions at source, namely at the platform, potentially reducing social fraud and

[86] Freudenberg (2019) 21 et seq.
[87] C.f. for any solo self-employed persons Preis/Temming(2016) 48 et seq.
[88] Peters-Lange (2019) 466.
[89] Waltermann (2010) 168-169; Waltermann (2017) 430, cf. as BMAS (2017) 173.
[90] Schmitt (2018) 547.
[91] Waltermann (2019) 647.
[92] Hensel (2017) 915.

contributions in arrears. This advantage, however, comes at (too) high costs and with a number of open questions, to mention one key problem: planned DSS contribution rates will be comparably low somewhere around or below the average worldwide rates which may lead to insufficient social protection levels, in particular in Europe. A promising avenue – which does not come at the cost of lower legal social protection – is to involve internationally operating platforms in a mandatory income reporting regime. This idea is currently concretely discussed on an international level under the umbrella of the OECD (2020). More precisely, a mandatory income reporting by platforms to their national tax authorities is foreseen. Tax administration has sufficient enforcement capacities to ensure platform reporting. The data is then exchanged with tax authorities of other countries (who have signed the respective multilateral agreement). Potentially, the data will also be shared with social insurance agencies to detect social fraud.[93]

[93] The data use for social security purposes is currently under consultation and decided until May 2020.

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Annex 1: Size and scope of platform work

Estimates of the size and scope of the platform economy in Germany differ widely as shown in Table 1.

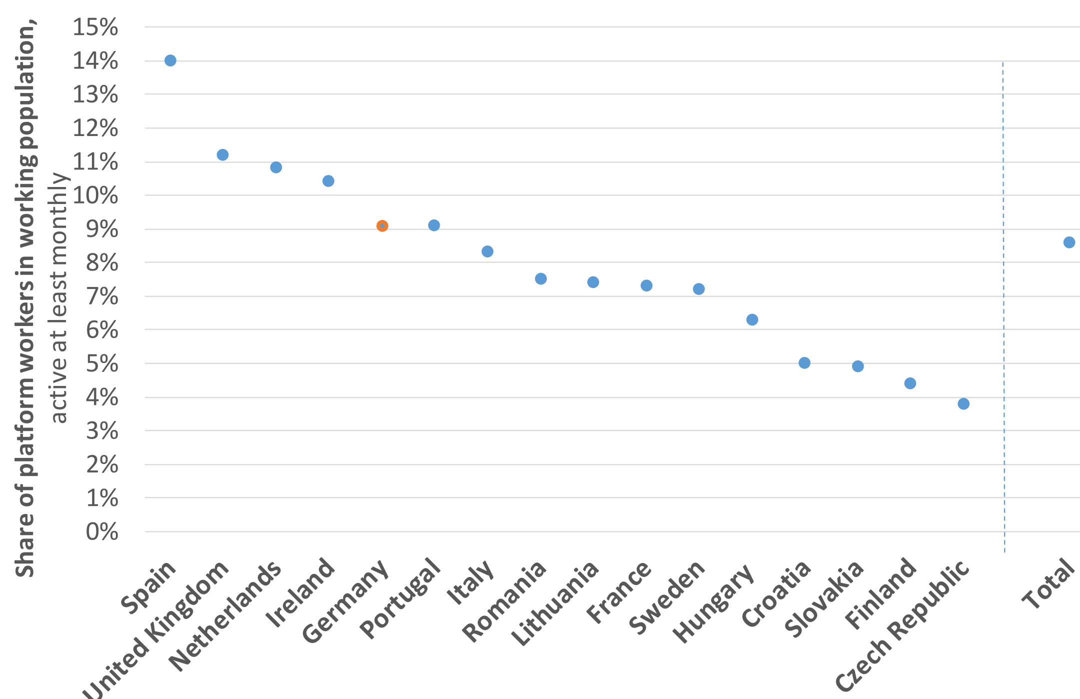
Table 1. Estimates of platform work in Germany[94]

Study	Percent of adults currently active in platform work	Equivalent number of people	Survey Year
	National Surveys		
Bonin and Rinne (2017)	0.9	620,000	2017
Serfling (2019) *	2.6	1,791,000	2017-2018
	International Surveys		
Urzi Brancati et al. (2020)**	9.1	5,596,000	2018
Huws et al. (2019) ***	6.2	3,774,000	2016

* Only paid work considered. ** Population (using the internet) aged 16-74, active at least monthly. *** Working population active at least weekly.

Source: own illustration.

Table 2. Estimates of platform work across a selection of European countries[95]



Source: own illustration based on Urzi Branccati et al. (2020).

[94] Absolute numbers provided in this table are based on own estimates. For this calculation population data of Destatis is used and limited to those age groups which are surveyed in the respective studies.

[95] These estimates should be interpreted as indicative. Huws et al. (2019) provide a quite different ranking of platform work prevalence across Europe.

Platform work income is very heterogenous. Some earn thousands of euros per week, while others obtain only 'pocket money' from platform work. There are, however, mixed results regarding the detailed income distribution. According to Leimeister et al. (2016, 45) and Baethge et al. (2019) only 30% of respondents earn above the income limit of EUR 400-500 per month. Serfling (2019, 27), on the contrary, estimates that nearly two-thirds (61%) have a weekly platform work income of EUR 500 and more (around EUR 2,000 per month). This discrepancy in results may to some extent be explained by study design and the smaller sample size of the former two studies. Still, the discrepancy in outcomes is surprising and results should, therefore, be taken with caution. Regarding hourly gross income, the median (net of search time) adds up to EUR 29 (Serfling, 2019) – more than three times the German minimum wage. These results stand in contrast to earnings reported for selective platforms (Freudenberg, 2019, 13 or Urzi Brancati et al., 2020, 31) and Serfling himself states that his income estimates are not fully representative (high share of missing values). Overall, the hypothesis that platform work creates a new digital precariat with mainly low paid jobs has not been clearly proven yet.

Platform work may only be a short 'gig' in employment careers. According to Urzi Brancati et al. (2020) less than half (41%) of platform workers in 2017 remained platform workers in the following year (2018). Over two-thirds of platform workers (69%) are paid by task and not by time.[96] As a consequence, a possible introduction of minimum payments per time unit (hour) may be difficult to implement.

A significant share of gig workers derive income via foreign platforms. No figures are available on the magnitude of such cross-border platform work. Based on own 'back of the envelope' calculations it can be estimated that between 25-50% of gig workers are active on foreign platforms mostly located outside the European Union. For this calculation it has been assumed that only online platform work can be provided across borders. About half of platform workers perform such purely digital platform work (De Groen et al, 2017; Pesole et al., 2018; Eurofound 2018). These 50% correspond to the upper boundary of the estimates. The largest platforms, providing online platform work, are located outside of Europe (see Table 3). Thus, it is not a surprise that many German platform workers report to work for foreign (non-European) platforms such as Freelancer (7%), Crowdflower (5%) or Guru (6%), while only 3% report to work for the largest German platform Clickworker.[97] On this basis we assume that at least 50% of online gig workers or 25% of overall platform workers are active across borders.

[96] Urzi Brancati et al. (2020) 36.
[97] See Serfling (2018, 42).

Table 3. In which country do the largest platforms have their headquarters?

Platform	Field	Registered Workers	Origin / Coverage
Freelancer	Macro Tasking, IT & Business	26,600,000	Australia / International
Zhubajie / Witmart	IT, Business, Design	15,000,000	China / International
Upwork	Macro Tasking, IT & Business	10,000,000	US / International
Crowdsource	Micro-Tasking	8,000,000	US / International
Care.com	Care/Home Services	6,600,000	US / International
Epweike	IT, Design	6,000,000	China / China
Crowdflower	Micro-Tasking	5,000,000	US / International
Taskcn	IT, Design	3,000,000	China / China
680	IT, Design	3,000,000	China / China
Fieldagent	Market Research	800,000	US / International
Microworkers	Micro-Tasking	760,000	US / International
Clickworker	Micro-Tasking	700,000	Germany / International
Amazon Mechanical Turk	Micro-Tasking	500,000	US / International
Uber	Ride Services	400,000	US / International
99designs	Design	365,000	US / International
Peopleperhour	IT, Business	250,000	GB / International
Twago	Micro-Tasking	225,000	Spain / Latin America
Others recorded by Codagnone et al. (2016)	-	1,005,000	-
Total Number of registered Workers		**88,205,000**	
Approximation of total active Workers *(assuming activity rate of 10 %)*		***8,820,500***	

Source: Own illustration/research based on Codagnone et al. (2016, To and Lai (2015), Li et al. (2017) and annual company reports.

Annex 2: Risks of growing platform work for financing adequate social protection

The legal coverage gaps described in section 2.3 go along with three major financial risks. First, uncovered social risks eventually have to be paid by tax payers. Already today self-employed in Germany have, for instance, an almost twice as high probability to receive tax financed social assistance at old age than formerly employed persons.[98] Second, lower labour costs may lead to a substitution of well protected standard jobs by cheaper, less-protected self-employed (platform) jobs – eventually affecting also social protection finances. Third, coverage gaps challenge the financing of social protection and therewith the adequacy of future benefits for the overall population, in particular, if the platform economy rises further. Especially, health care, accident and pension schemes (under current rules) are at high fiscal risk in Germany if the gig economy gains momentum (see Figure 2).

Figure 2. Financing risks of growing platform work

Social Protection Branch	Health & Long-term care	Family benefits	Social Assistance	Accident	Pensions (old age, invalidity, survivors')	Sickness	Maternity benefits	Unemploy-ment
Financing Risk	HIGH	MEDIUM	MEDIUM	HIGH	HIGH	LOW	LOW	LOW
remarks	*no coverage of side income*	*potential tax fraud*	*potential tax fraud*	*high unfunded entitlements financed by fewer contributors*	*high unfunded entitlements financed by fewer contributors*	*low unfunded entitlements, equivalence based*	*low unfunded entitlements, equivalence based*	*low unfunded entitlements, equivalence based*

Source: own illustration.

In the health system all additional self-employed income – irrespective of its size – remains uncovered in Germany. For example, somebody who earns EUR 2,500 per month as an extra self-employed income next to their monthly earnings of EUR 3,000 from a standard employee job, generally, pays no social health contributions on this supplemental income. Thus, if more people receive supplemental incomes in the gig economy, the health care system – already challenged by an ageing population – may be in fiscal jeopardy. Collectives of self-employed (e.g. SMart) start to take advantage of this coverage gap by employing freelancers to the extent that they are insured with a main job, while all supplemental income is earned as a self-employed without health care contributions. Pension schemes – already challenged by an ageing population – and accident schemes face similar problems if a growing number of people work in the platform economy. Gig workers are, generally, not covered in these schemes – under current rules. As a result, fewer contributors may be available to finance the high unfunded entitlements of current beneficiaries.[99] The fiscal risk in other branches of social insurance, which are based on the equivalence principle and where benefits are paid out for a shorter period of time, is smaller. Here a lower coverage and resulting lower contributions will translate very quickly into smaller benefits to be financed.

[98] See BMAS (2016), p. 8.

[99] One may consider that in the equivalence-based pension system lower (or no) contributions translate automatically into lower (or no) entitlements to be paid, which should reduce financing risks of rising platform work. However, this mechanism works only in the very long-term because lower contributions today take usually decades to affect fully the pension expenditure side. Therefore, a fiscal risk is ssen for the next 10-20 years if platform work, so far largely uncovered by statutory pension insurance, gains momentum and substitutes standard jobs.

Annex 3: The private international law status of platform workers

The Regulation (EC) 593/2008 (Rome I Regulation) contains the private international law rules for contracts. The question of legal status of platform workers that arises in substantive national law is also of relevance in private international law because platform work contracts must be qualified in order to find out the relevant connecting rule. The question is if it is 'normal' service contract in the sense of article 4 para 1 lit. b Rome I Regulation or a labour contract in the sense of article 8 or – possibly – a consumer contract[100] in the sense of article 6 of the regulation. These questions arise from EU law and call for interpretation by the CJEU because the answer is not absolutely certain. Nevertheless, it can be argued that normally the contract is governed by the law of the place where the platform worker carries out their work.[101] This follows clearly from article 8 of the Rome I Regulation in the case of an employee, i.e. if they are obliged to carry out work under the direction of the platform in the case of indirect platform work or under the direction of the client in the case of direct platform work. The same is true in the case of a consumer and also in the case of an independent service contractor because in most cases they will perform at their habitual residence. In all of these cases a choice of law clause in the sense of article 3 of the regulation may prevail. The difference lies for consumers and employees in the impossibility to deviate from the national legislation aiming to protect the worker according to articles 6 para (2), 8 para (1) of the regulation. On the contrary, there are few limitations on the application of the chosen law in the case of independent service contractors.

This leads to the question if it is possible to qualify platform workers who could have employee-like status in substantive national law as 'employees' in the sense of article 8 of the Rome I Regulation. The need for employment law protection of employee-like persons pleads for this interpretation.[102] This is, nevertheless, not unequivocal and the CJEU must finally decide this question.

[100] Surprisingly, the preconditions of the definition of consumer in the sense of article 6 para (1) could be fulfilled in the cases of platform workers, Däubler (2014) 265-266; Däubler (2016) 40. Against this interpretation: Klebe/Neugebauer (2014) 5; Pfalz (2019) 430-431.
[101] Risak (2015), 15.
[102] Deinert (2015) no. 125, with further references; against: Pfalz (2019) 430.

Annex 4: Social security law status of platform workers

According to article 11 para (3) lit. a of the 'coordination regulation' (EU) 883/2004 an employee as well as a self-employed person is subject to the Social Security legislation of their domestic Member State because they pursue activity in that state.

The German substantive social security system provides security in the different insurance systems if someone is employed dependently. Therefore, the status as dependently employed person is of importance not only for labour law but also for social security law. Section 7 of the Social Code book IV (*Sozialgesetzbuch IV – SGB IV*) provides a definition of employment (in the sense of socials security law). According to this section employment is dependent work, in particular under an employment contract. An occupation under instruction and integration in the work organisation of the instructor are by law indications for employment. Like in labour law the qualification depends on the specific facts of the case. If the parties perform in reality dependent employment courts will ignore the fact that they declared the contract as a contract with a self-employed. The parties' agreement that it should be no employment is of any importance. Only in cases of doubt such an agreement has high importance.[103] The law shows that in the cases of employment contracts as described above employment in the sense of section 7 SGB IV is given as well. But as shown before, in most cases there is no employment relation. This indicates that the same is true for social law.[104]

Interesting enough, section 7 SGB IV seems to focus more on the aspect of integration, compared to the labour law definition. And also, the case law of the Federal Social Court (*Bundessozialgericht*, *BSG*) takes this criterion serious. In some younger decisions the court held that fee-based physicians were employed, although they work under nearly any instructions, by the mere fact that they were integrated in the hospital organisation and had to subordinate under this framework.[105] Although starting from a similar legal framework it seems that the *BSG* is more likely to decide in favour of employment than the *BAG*.[106] This possibly allows easier than in labour law to qualify platform workers as employees according to their virtual dependence.[107]

A particular protection for self-employed in the pensions scheme is foreseen in section 2 no. 9 SGB VI. According to this rule self-employed persons are covered by the system if they have no employees and work permanently and predominantly only for one client. The case law shows that the (more or less) exclusive relation between client and self-employed person may not only have its origin in a contractual agreement but also in the mere fact that the client is the one and only partner who opens the market for the self-employed person.[108] In the case of indirect platform work the platform worker could, therefore, be covered by the statutory pensions system.

Platform workers, if they are homeworkers, have access to social security since section 12 para (2) SGB IV states that they should be considered employees. The same is true for the purpose of unemployment insurance according to section 13 SGB III.

[103] BSG from 14 March 2018, case B 12 R 3/17 R, BSG-Cases Vol. 125, p. 177.
[104] Brose (2017) 12; Brose (2019) 332-333; Mecke (2016) 483; Peters-Lange (2019) 465; Preis/Brose (2016) 23 et seq. This is not new, cf. for the debate on "new self-employment" in the 1990ies: Bieback (1999) 166; for the debate on increase of "small self-employment" Waltermann (2010) 162.
[105] BSG from 4 June 2019, case B 12 R 2/18 R, *Neue Zeitschrift für Sozialrecht*, Munich 2019, p. 785.
[106] In his observations Greiner (2019) 763, speaks about "emancipation" of the social security law term of employment.
[107] Cf. Ruland (2019) 691; against: Brose (2019) 333-334.
[108] BSG from 23 April 2015, case B 5 RE 21/14 R, *Neue Zeitschrift für Sozialrecht*, Munich 2015, p. 710.

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