



# **Mutual Learning Programme**

DG Employment, Social Affairs and Inclusion

**Peer Country Comments Paper - Ireland**

## **Just another gig? Platforms and On-Demand Work in Ireland**

**Peer Review on "Platform Work"  
Germany, 12-14 October 2020**

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## 1 Introduction

This paper has been prepared for the Peer Review on "Platform Work" within the framework of the Mutual Learning Programme. It provides a comparative assessment of the policy example of the host country (Germany) and the situation in Ireland.<sup>1</sup> For information on the host country policy example, please refer to the Host Country Discussion Paper.

## 2 Situation in Ireland

As is well-known, the phenomenon of platform work provides many challenges for policy-makers and researchers, not least in terms of definition and data collection. The true size of the platform economy is notoriously difficult to measure. Nonetheless, we can refer to the COLLEEM II data (Urzi Brancati, Pesole and Fernández-Macías, 2020, pp. 15-16) for some indicative figures in Ireland. The data suggests the numbers of platform workers, while small in absolute terms, are relatively high in European terms; 7.2% of workers are classified as 'main' or 'secondary' platform workers' (as against 5.7% in Germany). The report notes that a much higher proportion of foreign born workers provide services via digital labour platforms than native workers, and that this is especially true of countries with strong labour markets that attract many immigrants overall, like Ireland.

In general, debate on platform work in Ireland has been very much subsumed within a general, and significant, policy debate about contingent/ casual / on-demand work (whether an online platform is a mediator or not). A report in 2015 (O' Sullivan, et al., 2015) coined the term 'if and when' workers, which refers to employment relationships where individuals are not contractually required to make themselves available for work with an employer, but rather are offered work 'if and when' it becomes available (irrespective of whether the parties were brought together through technological means). The policy challenges involving such work are similar in many respects to those involving platform work (e.g. employment status of workers, employment legislation rights and responsibilities, enforcement of rights, social security coverage, and collective representation rights).

A significant policy debate has focused on the question of 'bogus (false) self-employment' (see below; sections 3.1.3 and 3.2.2), and the implications for workers' rights, and the State's tax and social insurance coverage, where employment status is misclassified. This has not concentrated on platform work specifically, but, as with 'if and when' work, is closely linked in terms of policy challenges.

## 3 National policies and measures

It is striking that, despite the very many differences between legal jurisdictions, the challenges facing national policy-makers in the sphere of platform work are very similar. In this section, we look at some of the key issues that have arisen in Ireland.

### 3.1 Overview of the Regulation of Platform Work in Ireland

#### 3.1.1 Legal Status

Ireland retains a rather strict 'binary divide' between those working under an employment contract (a 'contract of service') and the self-employed (who engage under a 'contract for services'). There is no 'third category' set out in legislation. However, it has been noted that under some labour legislation, the personal scope of 'employee' is rather wider than in others; in the case of minimum wage laws, for example, the definition appears quite close to the UK concept of 'worker' (Doherty and Franca, 2020,

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<sup>1</sup> I am very grateful for the assistance of Emma Guyatt (Maynooth University) in preparing this report.

p. 135).<sup>2</sup> There is no stand-alone concept of 'economic dependence', outside of the specific context of collective bargaining (see below; section 3.1.4).

The question of 'employment status', i.e. determining who, in law, is an 'employee', has primarily been left to the courts to develop. The courts focus on issues of *personal service*, *integration* into (or independence from) the day-to-day operation of the employer organisation, *control*, and the extent to which there is *mutuality of obligation* between the parties to the relationship (Doherty and Franca, 2020a). Those who qualify as 'employees' have access to the full range of statutory protections (minimum wages, unfair dismissal, paid annual leave, etc). The self-employed have very limited rights under protective labour legislation (they do have certain protections under health and safety law, and in relation to non-discrimination).<sup>3</sup> There has been no case law directly concerning platform workers in Ireland.

### 3.1.2 Enforcement of Rights

The situation as regards enforcement of rights in Ireland is quite similar to the host country. Platform workers seeking legislative protections as employees need to establish employment status (i.e. bear the burden of proof). Irish law does not recognise class actions, and while unions can represent workers, they cannot launch actions in their name in order to enforce the rights of the respective workers. The Irish 'voluntarist' system of industrial relations does not provide for works councils (outside of EU law obligations) or give trade unions mandatory bargaining rights (Doherty, 2015). If platform workers cannot establish employee status, any contractual terms set out in the agreement with the platform must only pass the check for standard business terms (as in the host country).

### 3.1.3 Social Protection

If platform workers cannot establish employee status, this reduces their access to social protection. Increasingly, this has come to mean access to short-term payments available to employees, but not the self-employed.<sup>4</sup> Similar to the host country, the policy debate in Ireland has not focussed on platform workers specifically, but the issue of the sufficiency of legal protection for the self-employed in general. In recent years (since 2017, in particular), more social protection payments that were traditionally confined to 'employees' have been extended to the self-employed; the most significant include Jobseeker's Benefit (unemployment assistance), Treatment Benefit, and the Invalidity Pension. It is now estimated that the self-employed have access to benefits accounting for more than 80% of social insurance expenditure (Department of Finance, 2018).<sup>5</sup>

A big area of policy debate in Ireland has been around 'bogus (false) self-employment' (Department of Finance, 2018). Considerable concern has been expressed that, by misclassifying workers as 'self-employed' (where the workers are, in reality, employees), those supplying the work are avoiding their social security obligations

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<sup>2</sup> 'Worker' under UK law (section 230(3)(b) of the *Employment Rights Act 1996*) is a specific category, whereby those falling within the definition are granted specific labour law protections, which are not afforded to the 'self-employed', but do not equate fully to those guaranteed to 'employees' (notably, rights to the national minimum wage, paid annual leave, and limitations on weekly working time).

<sup>3</sup> See sections 3.2.1 and 3.2.3 for recent developments.

<sup>4</sup> For example, Illness Benefit, Health and Safety Benefit, Occupational Injuries Benefit, Carer's Benefit, and Partial Capacity Benefit.

<sup>5</sup> In Ireland, healthcare is mainly funded through general taxation and thus not linked to employment status (healthcare is also partly financed by private insurance). Ireland has a 'pay-as-you-go' statutory public pension scheme, under which the self-employed are mandatorily covered (Spasova et al, 2017, p 35). There is also the State Pension (Non-Contributory) payment, which is a means-tested payment for people age 66 or over, who do not qualify for State Pension (Contributory) on their record of social insurance contributions. Private pension schemes are strongly encouraged, but not mandated, in the Irish system (see, for example, <https://www.revenue.ie/en/employing-people/what-constitutes-pay/employees-pension-payments/personal-retirement-savings-account-prsa.aspx>; accessed August 26 2020).

(employers must contribute social insurance (pay-related social insurance; PRSI) contributions into the national Social Insurance Fund on behalf of employees).

The COLLEEM study indicates, as in the host country, that platform work, for many such workers in Ireland, is not their primary occupation/ source of income (Urzi Brancati, Pesole and Fernández-Macías, 2020). The test for accession to social protection benefits, for employees, is whether or not the employee is in 'insurable employment', i.e. the work performed must be related to the hirer's trade or business, and must attract a payment of no less than EUR 38 per week (Keane, 2020); workers earning less than this are only entitled to occupational injuries benefit. If platform workers are deemed to be self-employed, they must make PRSI contributions to access the social protection benefits outlined above. A self-employed person with income of less than EUR 5,000 per annum is exempt from PRSI, and thus does not gain social protection entitlements (other than means-tested payments, like the non-contributory State Pension).<sup>6</sup>

### **3.1.4 Collective representation**

There is no specific trade union representing platform workers in Ireland. As with other workers, Irish law protects a right to form and join trade unions, but employers in Ireland are free not to bargain with trade unions and not to enter into collective agreements (Doherty, 2015). Some unions in Ireland have mounted 'coalition building' campaigns with other civil society organisations in respect of precarious / contingent workers generally and are attempting to utilise technology (especially apps) to better organise those without regular workplaces / work schedules, like platform workers (Doherty and Franca, 2020).

### **3.1.5 Social Dialogue**

'Employers groups in Ireland have been relatively quiet on the issue of gig work. However, employers (and the labour inspectorate), do have some concerns about the ability of platforms 'to compete unfairly and benefit from competition law rules, which, arguably, have as their aims large scale price-fixing, rather than collective bargaining by groups of self-employed workers in low-pay sectors' (Doherty and Franca, 2020, p. 138). Platforms operating in Ireland do not belong to the main Employer Federations. There is evidence that platforms lobby for legislative change, but do not engage as traditional 'social partners' (Doherty and Franca, 2020, p. 139).

In Ireland, as in the host country and elsewhere, lack of awareness of rights is a problem. Here it might be useful to quote from a Eurofound study, which interviewed platform workers in a number of countries. The study found that, for many, 'knowledge about their rights and entitlements in relation to employment or social protection appears to be [...] limited'; the study notes that many workers 'take on the status the platform ascribes to them' (Eurofound, 2018, p. 17).

## **3.2 Implemented and Planned Policy Initiatives**

### **3.2.1 Working Conditions**

The Irish trade union movement has focused on lobbying for legislative change in order to increase protections for the 'on-demand' workforce (not only, but including, platform workers; ICTU, 2017). The *Employment (Miscellaneous Provisions) Act 2018* mirrors, to some extent, Directive 2019/1152 on Predictable and Transparent Working Conditions, but goes beyond some of the provisions in the Directive. The Act provides, *inter alia*, for improved and more timely provision of information on terms and conditions, minimum hourly payments for employees with unpredictable schedules, and an entitlement to request a contract which reflects the reality of hours worked by employees over a

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<sup>6</sup> A person who ceases to be covered by compulsory PRSI may be able to become a Voluntary Contributor; however, voluntary contributions will only entitle the person to limited payments (State Pension (Contributory); Widow's or Widower's Contributory Pension; Guardian's (Contributory) Payment); see <https://www.gov.ie/en/publication/47cee2-operational-guidelines-prsi-prsi-voluntary-contributions/> (accessed August 26 2020).

reference period. The Act, however, only covers 'employees'. A provision in the legislation making it a *criminal* offence for an employer to incorrectly designate an employee as 'self-employed' was removed late in the legislative process (Doherty and Franca, 2020a).

### 3.2.2 Social Protection

While there has not been much specific discussion around platform workers, recent amendments improve the level of social protection for the self-employed. Most notably, from 1 November 2019, self-employed PRSI contributors who lose their businesses and are no longer engaged in self-employment gained an entitlement to Jobseeker's Benefit (at the same rate as employees who become unemployed; Department of Employment and Social Affairs, 2019). This extension of unemployment assistance entitlements follows on from other changes in recent years, regarding certain health treatment benefits, and the invalidity pension (Spasova, et al., 2017).

As referenced above, the issue of 'bogus self-employment' has been the subject of much policy debate in Ireland. Although not focusing on platform work specifically, the issue is relevant because of the lost social security contributions to the State if a worker is incorrectly classified as 'self-employed' (Department of Finance, 2018). The Irish Parliament (Oireachtas) Joint Committee on Employment Affairs and Social Protection held numerous public hearings on this issue in 2018-2019, and a dedicated inspectorate team, the Employment Status Investigation Unit, was established in late 2019 by the Department of Employment Affairs and Social Protection (DEASP). In May 2018, DEASP launched an awareness-raising advertising campaign highlighting the problem of false self-employment and its impacts on workers and the Irish economy.<sup>7</sup> There was also a commitment to revise *the Code of Practice for Determining the Employment Status of Workers* 2007 (Revenue, 2007) and place this on a statutory footing (the current Code does not have force of legislation, and is merely advisory).

### 3.2.3 Collective Bargaining

A second major legislative reform in Ireland recently concerns collective bargaining rights of self-employed workers. The *Competition (Amendment) Act 2017* provides that section 4 of the *Competition Act 2002* (prohibiting cartel action; this Act enacts in domestic law the principles set out in Article 101 TFEU) shall not apply to collective bargaining and agreements in respect of three categories of workers. First, the Act specifically applies to three groups of 'freelance' workers; voice-over actors, session musicians, and freelance journalists.<sup>8</sup> Secondly, the Act introduces the concept of the 'false self-employed' worker.<sup>9</sup> Thirdly, the Act defines a 'fully dependent self-employed worker' as an individual '(a) who performs services for another person (whether or not the person for whom the service is being performed is also an employer of employees) under a contract [...] and (b) whose main income in respect of the performance of such services under contract is derived from not more than 2 persons'.

A trade union which represents a class of false self-employed, or fully dependent self-employed, worker may apply to the Minister to include the class of worker in question as falling within the scope of the Act, in order to allow the union to conclude collective agreements on behalf of the workers. The union must provide evidence that the workers

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<sup>7</sup> See <https://ec.europa.eu/social/BlobServlet?docId=22207&langId=en> [accessed August 14 2020].

<sup>8</sup> These categories of workers have been the subject of a long-running competition law/ price-fixing dispute in Ireland, which led, ultimately, to the enactment of the 2017 Act, and also to a complaint that Ireland was in breach of its obligations under the European Social Charter (see Doherty and Franca, 2020a).

<sup>9</sup> Under section 15(D), this is an individual who: (a) performs for another person, under a contract (whether express or implied and if express, whether orally or in writing), the same activity or service as an employee of the other person; (b) has a relationship of subordination in relation to the other person for the duration of the contractual relationship; (c) is required to follow the instructions of the other person regarding the time, place and content of his or her work; (d) does not share in the other person's commercial risk, (e) has no independence as regards the determination of the time schedule, place and manner of performing the tasks assigned to him or her, and (f) for the duration of the contractual relationship, forms an integral part of the other person's undertaking.

who are the subject of the application fall within the relevant definitions. The legislation represents an attempt to extend collective bargaining rights to dependent, vulnerable workers, who do not fit within the classic 'employee definition' and sets out in law the principle that collective representation should not be automatically denied to those who cannot satisfy traditional tests of employee status (Doherty, 2018). Clearly, the legislation could be utilised to cover certain categories of platform workers, although at the time of writing no applications have yet been made in respect of these 'new' categories of workers.

## **4 Considerations for future policies and initiatives**

### **4.1 Data Quality**

As identified in the host country report, data gaps present a big problem for policy-making responses in this area. In Ireland, an attempt to commission research that would fill some of these gaps resulted in a report (ESRI, 2018) that, while extremely valuable in its findings on 'contingent employment' in Ireland, explicitly acknowledged it was 'not able to isolate aspects of the "gig economy" in the data' (ESRI, 2018, p. 6). The host country report makes the vital point that a virtue of the platform economy is that all economic activities are digitally stored. Therefore, greater obligations on platforms to exchange data would be very useful. Greater powers for regulators (and, arguably, trade unions) to gain 'virtual access' to platforms, and the data that there reside, are key in order to police labour standards for platform work (Doherty, 2018). This latter initiative might be something best coordinated at EU Level, for example, by the European Labour Authority.

### **4.2 Changing Labour Law**

In Ireland, as noted, the discussion of platform work has been subsumed within a wider debate on labour protections for the contingent, or on-demand, workforce (whether or not a digital intermediary is present). The question of employment status remains important. There seems no desire in Ireland to introduce a 'new category' between employee and self-employed, which is seen as simply having the potential to introduce more legal complexity, nor is there any discussion of a 'special' category of platform workers. Rather, it seems, the preference is for an updating/revision of whom is considered to be *genuinely* self-employment, and the rights to which they are entitled; this is reflected in the ongoing debates around bogus self-employment, and in the proposal to update, and make statutory, Codes of Practice to offer guidance to decision-makers (including labour tribunals) on determining employment status (Doherty and Franca, 2020, p. 135).

A reversal of the burden of proof, or the introduction of a 'presumption of employment status', is not generally seen as a priority either. Of more concern in Ireland is the problem of making workers *aware* of their true employment status and making access to the employment tribunals easier (in terms of cost, delay, etc.). Here, the principle of effectiveness of EU Law (where relevant in terms of labour rights, such as working time) comes into play, and may justify EU-level action.

### **4.3 Adapting Social Protection**

Following on from the above, the policy approach in Ireland has moved in the direction of expanding social protection rights for the self-employed to bring them closer to the rights afforded to employees. A paradigmatic shift can be seen in the provision of Jobseekers Benefit (unemployment benefit) to the self-employed in 2019. However, rates of social insurance contributions by the self-employed are approximately one-third of those made in respect of employees. A reduction in this differential has been proposed as a means to 'reduce the financial incentive to employers and employees to use self-employment arrangements and intermediary-type structures for the purposes of disguising employment' (Department of Finance, 2018, p. 28).

As noted in the host country report, a close examination of how supplemental income (earned as an employee or as a self-employed worker) is treated in terms of social protection rights is an interlinked policy matter that should be addressed.

The proposal for administrative simplicity in the host country report (particularly, the reporting of data for the self-employed by one entity – the platforms) is also one that may be valuable in the Irish context, as is the proposal to make platforms pay social protection contributions. However, as noted, these proposals would work only effectively if implemented on an international basis.

#### **4.4 Enabling Collective Agreements**

Ireland has recently enacted the 2017 law which permits the conclusion of collective agreements by categories of workers that do not fall within the traditional 'employee' definition. We await developments. It is not unlikely that a challenge, on competition law grounds, would be made to such agreements, which may well end up before the EU Court. The manner in which the Court of Justice has determined the application of competition rules to collective agreements (that only employees, or the 'false self-employed', can be covered by collective agreements) may need to be reconsidered. Ultimately, the fundamental right to bargain collectively is only meaningful if the full autonomy of the parties is respected and guaranteed. The current position, where collective agreements are subject to the control of competition authorities at EU, and national, level, undermines this right to autonomy (Doherty, 2018).

### **5 Questions**

- The issue of data appears very important. There is a need for policy-makers to have access to reliable data in order to implement initiatives and measures. Moreover, access to data is vital for adequate policing and enforcement; how can better access to data (including data held by platforms) be ensured?
- How can it be made easier for workers to vindicate their employment rights (especially on a cross-border basis); can the European Labour Authority play a more significant role?
- Social protection coverage is vital- is it time to rethink the link between employment status and social security entitlements?
- Can the social partners (at European and national level) do more to ensure platform workers are integrated into 'normal' collective bargaining processes?
- How is the issue of misclassification of workers as 'self-employed' dealt with in the host country, and other states (e.g. is it a criminal offence)?

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## Annex 1 Summary table

The main points covered by the paper are summarised below.

### Situation in the peer country

- There is a lack of robust data on the size of the platform economy in Ireland, but based on European data, the number of platform workers seems to be above the European average.
- Ireland maintains a rather strict binary divide between employees and the self-employed and does not recognise intermediate categories of worker in labour legislation (other than in the specific case of a 2017 law; see below).
- There is no widespread debate specifically on platform work in Ireland, but rather a huge focus on the contingent/ on-demand workforce (irrespective of the presence of digital intermediaries), and on bogus (false) self-employment.
- Platforms do not belong to the main Employer Federations in Ireland, and do not engage in social dialogue.
- Workers seeking to establish employee status bear the burden of proof, and cases must be brought forward by individuals (there are no class actions).

### National policies and measures

- There is no specific trade union representing platform workers in Ireland, and the main focus of the Irish trade unions has been on seeking legislative changes to protect contingent/ on-demand workers in general.
- Social security entitlements for the self-employed have recently been extended (notably in the area of unemployment assistance), but supplementary or additional income (for employees and the self-employed) is insurable only above certain thresholds.
- A new 2018 Act strengthens labour law protections for employees with uncertain hours and unpredictable working schedules.
- A number of policy initiatives (awareness campaigns, parliamentary hearings, the establishment of a new enforcement unit) have been undertaken to tack bogus self-employment.
- A new 2017 Act allows trade unions to apply to the Minister to negotiate collective agreements on behalf of 'false self-employed' or 'fully dependent self-employed' workers; these are new 'categories' of workers in Irish law, which only apply in the context of this specific piece of legislation.

### Considerations for future policies and initiatives

- Greater obligations on platforms to exchange data, and greater powers for regulators to gain 'virtual access' to platforms and their data would aid enforcement of labour standards (perhaps coordinated by the European Labour Authority).
- There is little focus in Ireland on introducing a new category of employment status; rather, the policy focus is on updating and clarifying what is meant by genuine self-employment.
- There has been an extension in the social protection entitlements offered to the self-employed, but rates of social contributions are much lower than for employees; reducing this differential is seen as a way of tackling bogus self-employment.

- Allowing collective bargaining for certain groups of 'vulnerable' self-employed workers in Ireland is a new initiative, but it is unclear as of yet what impact this law will have for platform workers.

### Questions

- The issue of data appears very important. There is a need for policy-makers to have access to reliable data in order to implement initiatives and measures. Moreover, access to data is vital for adequate policing and enforcement; how can better access to data (including data held by platforms) be ensured?
- How can it be made easier for workers to vindicate their employment rights (especially on a cross-border basis); can the European Labour Authority play a more significant role?
- Social protection coverage is vital- is it time to rethink the link between employment status and social security entitlements?
- Can the social partners (at European and national level) do more to ensure platform workers are integrated into 'normal' collective bargaining processes?
- How is the issue of misclassification of workers as 'self-employed' dealt with in the host country, and other states (e.g. is it a criminal offence)?

**Annex 2 Example of relevant practice**

Name of the practice:	Establishment of the Employment Status Investigation Unit
Year of implementation:	2019
Coordinating authority:	Department of Employment Affairs and Social Protection
Objectives:	This sub-unit was established within the Department to specifically investigate claims of misclassification of employment status. To date, employment status, in terms of social protection, is an issue that mainly arises when a claim is made, and an adjudication is sought. The Unit is tasked with proactively investigating employment status in sectors/ workplaces where it is suspected (based on any empirical evidence, anecdotal evidence, or information supplied to the Department) misclassification is occurring.
Main activities:	The Unit has been established very recently. It has worked on co-operating with the labour inspectorate and the Revenue Commissioners in terms of information sharing, and in terms of co-ordinating joint inspections. It has targeted, initially, some sectors where allegations of exploitation have been made (by trade unions and others in parliamentary hearings); for example, in construction, and in the meat industry.
Results so far:	The Unit is at a very nascent stage, and is relatively small, so initial results have not been published. Furthermore, the outbreak of the Covid pandemic has stalled its work for most of 2020.

Name of the practice:	The Employment (Miscellaneous Provisions) Act 2018
Year of implementation:	2018
Coordinating authority:	The Workplace Relations Commission is where complaints under the Act are brought.
Objectives:	The Act provides, <i>inter alia</i> , for improved and more timely provision of information for employees on terms and conditions, minimum hourly payments for employees with unpredictable schedules, and for an entitlement for employees to request a contract which reflects the reality of hours worked by employees over a reference period.
Main activities:	Law
Results so far:	New law, so virtually no case law at this stage.

Name of the practice:	The Competition (Amendment) Act 2017
Year of implementation:	2017

Coordinating authority:	Applications by trade unions are made to the Minister for Enterprise, Trade, and Employment.
Objectives:	The Act allows trade unions to apply to conclude collective agreements on behalf of 'false self-employed' workers, and 'fully dependent self-employed' workers. Such agreements are exempt from competition law restrictions on cartel action.
Main activities:	Law
Results so far:	No applications made for these categories of workers to date.

Name of the practice:	Extension of Jobseekers Benefit (unemployment assistance) to the self-employed
Year of implementation:	2019
Coordinating authority:	Department of Employment and Social Protection
Objectives:	Self-employed persons who lose their businesses and are no longer engaged in self-employment, and who have made a specified number of social insurance contributions, may claim Jobseeker's Benefit (at the same rate as employees who become unemployed),
Main activities:	Budgetary measure
Results so far:	Significant increase in protection for the self-employed, but not financed by increased social security contributions by the self-employed.

