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From Chasing Stability to Searching for Flexibility: Bogus Self-employment and Platform Work

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Abstract. The advent of the fourth industrial revolution has profoundly impacted labour markets, challenging traditional regulatory frameworks, particularly in labour and social security law. As non-standard work arrangements, such as platform work and bogus self-employment, proliferate, the inadequacy of existing legal definitions and protections has become apparent. This article critically examines bogus self-employment, its misclassification issues, and its implications for workers' rights. It also explores the rapid growth of platform work, analysing the challenges of regulating digital labour platforms under evolving EU directives. Through empirical evidence and case law, we propose a legal framework addressing these emerging work models while emphasizing the urgent need for harmonization across the European Union.

Keywords: bogus self-employment, platform work, labour law, digitalization, employment misclassification

1. Introduction

With the appearance of the fourth industrial revolution, labour law, among other fields, challenged various regulations and faced numerous problems in keeping

up with the modernization and digitalization of work and its environment.[1] Starting at the beginning, the first industrial revolution, which introduced water and steam to help the productivity of several fields of industries, began around the late 18th century. This was followed by the second industrial revolution, which boosted the mass production of various sectors with the help of electricity.

The third Industrial Revolution arrived through the use of information technology systems, which not just helped productivity but also started to automate some tasks, and with this phase, a new era started, in which automatization, mass-productivity, or digitalization of industries came to the fore. Just after almost three centuries, we arrived at the so-called fourth industrial revolution, which introduced, among other innovations, artificial intelligence.[2] The present phase of the industrial revolution has brought people an enormously fast evolution and development. Self-driving cars or 3D printing, to mention some examples, are unquestionable signs of the rapidly evolving digitalized world.

Without any doubt, the present phase of the industrial revolution has many positive effects – for example, automatization is currently taking new steps, and mass production reached a new level in several industries. With the help of AI, we can solve an increasing number of tasks in no time compared to a human worker. We are in a fast-developing world where people are trying to live in symbiosis with developing technology rather than just supervising it, as they did up to the third industrial revolution.

Also, this new era undeniably brought numerous negative or possibly negative effects or side effects. In this unprecedented, fast-evolving time, it is getting harder and harder to keep up with the changes in the field of law, manifested by the fact that regulations can hardly keep up with real-world changes. The areas of labour law and social security law are not exceptions to this. New types of work organization appeared in the last fifteen-twenty years, which spread rapidly. The old paradigm based on standard employment relations was shaken by the new kinds of work organization, which shifted from chasing stability to searching for flexibility when speaking about working. Professor Frank Hendrickx summarized the present problem by stating the following: 'The "modernization" or "future" debate pushed labour law into a sort of regulatory crisis.'[3]

The 'golden rule' was proven correct once again, the demand for flexible work met the 'supply' in no time, and non-standard ways of employment and self-employment are more popular than ever. At this point, it is essential to mention that standard employment as a model is still the most popular among European Union Member States due to the harmonization process in the EU. Still, Member States have different approaches to the present topic. For example, Romania

1 Miroslawski 2023. 1–2.
2 Strban 2021. 336.
3 Hendrickx 2018. 197.

chose the path of gradual flexibilization in this regard, while Hungary's legal environment is considered one of the least restrictive.[4]

On the other hand, non-standard or atypical work cannot be underestimated. Numerous occasions and events assisted in the spread of atypical employment and self-employment. The last event was the COVID-19 pandemic, visibly boosting the demand for non-standard working models.

The lack of a clear and universally accepted definition of bogus self-employment contributes to the exploitation of workers and the erosion of labour rights.

In this article, we will explore the various factors that contribute to the phenomenon of bogus self-employment, such as the misclassification of workers, the use of contracts that obscure the employment relationship, and the practices of employers to evade labour regulations. Through a critical analysis of existing literature and empirical evidence, we will highlight the challenges faced by policymakers, labour unions, and other stakeholders in defining and addressing bogus self-employment. By addressing this issue, we aim to provide a comprehensive understanding of the implications of bogus self-employment on workers' rights and contribute to the ongoing discussions on labour market reforms.

2. Clarifying the Terms Bogus Self-employment and Platform Work

Before speaking about bogus self-employment, we must first clarify the concept of 'sham contracts', which can be defined as a situation 'where the written agreement does not accurately reflect the de facto agreement made between two (or more) parties'.[5] This definition is based on a litigation from 1967 in the UK,[6] meaning that the roots of bogus self-employment were also present in the past century. It is essential to emphasize at this point that the previously mentioned litigation was based on a commercial contract where the parties are equal and base themselves on civil law. Nevertheless, the central concept is similar to the bogus self-employment, shifting from applying labour law provisions to civil law provisions, while in reality we are in a case of employment.

The definition of bogus self-employment is also a challenging task since currently there is no unified or universal definition. Furthermore, it is also problematic to universally name the present issue. There are some terms that need to be put in the right place in connection with the present topic: 'economically

4 Contreras 2008. 18.
5 McNeilly 2013.
6 *Snook v London and West Riding Investments Ltd* (17 January 1967).

dependent work',[7] 'sham self-employment',[8] or 'bogus self-employment'.[9] The different terms used for the present issue accentuate the same problem, but there are slightly different approaches.

The term 'economically dependent work' approaches the present issue from the prism of economics and labour since it focuses on the fact that despite the relation among the parties being based on a civil contract, in reality, the worker is acting similarly to an employee, who is not an independent contractor but an economically dependent employed individual since his or her main income stems from a disguised single employer.[10]

'Sham self-employment' considers the present issue from a civil law viewpoint, meaning that the term used leads to the term 'sham contracts' (disguised contracts), which, as already mentioned, are present when the materialization of the will does not reflect the objective relation among the parties.

The term 'bogus self-employment' or 'bogus employment' considers the current issue concentrating mainly on labour law and social security law problems. Bogus self-employment means the misclassification of self-employment when an employee formally exerts their activity by being self-employed. Still, in reality, the relationship among the parties is an employment relationship. Practically the disguising of employment as a simple civil-contract-based relationship occurs.[11]

Bogus self-employment was present before the appearance of platform work. For example, after the regime change in Romania, many workers entered the territory of informal employment for several reasons such as maximizing their earnings as self-employed (avoiding some social-security-related costs), among other reasons; in this way, a more advantageous tax regime became applicable than to a standard employed person. This trend could also be tracked during the economic crisis after 2008. A study from 2013 conducted by a national trade union in Romania named Bloc shows that ten years ago 2.9 million people were involved in informal employment in Romania.[12]

Bogus self-employment was also preferred by the employers because, in this way, the national Labour Code, social security regulations with all their provisions, or the relevant EU directives[13] were not burdening the employers, instead the Civil Code became applicable: the relationship between the 'employer' and 'employee' was based on a simple civil contract, and not on a

7 Gyulavári 2014.
8 McNeilly 2013.
9 Niebler–Pirina–Sacchi–Tomassoni 2023.
10 Rosioru 2014. 285–286.
11 Williams–Llobera–Hordonic 2020.
12 https://www.eurofound.europa.eu/data/tackling-undeclared-work-in-europe/database/trade-union-study-on-the-informal-economy-romania.
13 For example, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

proper labour contract.[14] From the worker's viewpoint, bogus self-employment creates precarity especially due to the misclassification of employment as self-employment, resulting in a lack of social security standards and minimum working conditions for the simple reason of the apparent relationship between the parties not being that of employment.[15]

The topic of bogus self-employment gained its popularity in the present also due to the spread of platform work. Eurofund identifies platform work as a new type of employment that is growing and potentially gaining importance in the labour market since around 2000. In 2017, the same agency recognized that platform work 'reached critical mass in Europe as regards the number of labour-intensive platforms and affiliated active workers'.[16] This Eurofund research shows that platform work, despite being a new type of organizing work, can be traced back more than twenty years. Furthermore, we can acknowledge that the growth of platform work through informatization and digitalization, which gained their current prominence by the already mentioned fourth industrial revolution, also began to be an exponential determinant on the labour market as time went by. Mark Graham summarizes the lack of legal regulations of platform work by stating, 'too big to control, too new to regulate and too innovative to stifle'.[17] Just as bogus self-employment, platform work has its own synonyms. Still, a careful examination is needed because they can have slightly different meanings, and just as bogus self-employment, platform work does not have a universal definition. When speaking about platform work, academics differentiate 'crowd work' and 'gig work'. While the term crowd work describes the situation when work is accomplished online, gig work is used when activity is performed offline but still managed by a platform. Divisions can also be distinguished between low-skilled work (often called 'microwork' or 'micro-tasking') and high-skilled work.[18]

Several reasons can be identified when trying to explain the lack of regulations and definitions for these two terms. Tamás Gyulavári, when searching for the reasons for such lacunae, differentiates the EU level and the national level of regulations. On the EU level, Professor Gyulavári identifies a few main reasons. First of all, the lack of universal definitions of the basic terms needed, for example, the terms 'employee' or 'employer'. He links this reason with political willingness rather than the different labour and social security law approaches. These regulations often leave the task of definitions to the Member States. Talking about the lack of definitions at the national level, one of the reasons is the evolution of labour and social security law concentrated on typical forms of

14 Gyulavári 2014.
15 Defossez 2021. 2.
16 https://www.eurofound.europa.eu/topic/platform-work.
17 Graham 2020. 453.
18 Funke–Picot 2021. 349.

employment, especially in the former communist bloc states,[19] or the regulations of the coordinated market economy in western countries such as Germany.[20]

The definition of platform work varies in the academic sphere due to the lack of a uniform set of elements. When searching for a definition of platform work, it is interesting to see the similarities or differences between the definitions used by different institutions or academics. Annika Rosin describes platform work in a more straightforward manner, stating, 'Platform work can be described as the matching of the supply of and demand for paid work through an online platform.'[21]

Another example of definition was made by Eurofund, which defines platform work as 'a form of employment in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services in exchange for payment'. First of all, as an interesting remark, we would like to mention that just after the definition itself, it is noted that Eurofund used the term 'crowd employment' when trying to define 'click-work' (low-skilled and repetitive online platform work). Still, platform work is changing and evolving rapidly, and the term is not suitable anymore.[22] It is important to remark that the present definition, given by Eurofund, mentions *expressis verbis* that platform work is a form of employment, meaning that in this way workers who are using civil contracts, being self-employed, rather than using employment contracts when expressing their will to enter into a contractual relationship with the platform, are left out from this definition. The problem is that by assuming the employment relationship, the definition narrows down the number of individuals who are covered, which in our opinion is dangerous due to the fact that a significant part of platform workers are self-employed, not directly employed at the platform itself.

There is a more careful approach in the directive proposed[23] by the European Commission on improving working conditions in platform work. When explaining the notion, Article 2 expresses that it is needed to 'distinguish between "persons performing platform work" – irrespective of their employment status – and "platform workers" – who are in an employment relationship' while discussing definitions. Furthermore, in its Article 2(2), it defines platform work as 'any work organised through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform and the individual, irrespective of whether a contractual relationship exists between the individual and the recipient of the service'.

19 Gyulavári 2014. 269–272.
20 Funke–Picot 2021. 350.
21 Rosin 2022. 531.
22 https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/platform-work.
23 See European Commission 2021.

Based on the present definition, the key elements of platform work are the digital labour platform, the individual performing the work activity, and the contractual relationship between the platform and the worker. Compared to the previous definition introduced by Eurofund, it is evident that the present definition enlarges the circle of platform workers. Furthermore, it is interesting that the proposed directive does not require a contractual relationship between the platform worker and the client or the beneficiary of the services performed through the platform.

3. Is the Proposed Directive on Improving Working Conditions in Platform Work by the European Commission Tackling Bogus Self-employment Effectively?

The need for guidance is enormous due to the fact that, at present, the reclassification of platform workers mostly remains the task of the Member State courts. Without any instructions, courts are starting to suffocate under a deluge of litigation, while, due to the lack of legal provisions, controversial decisions are being made.

The issue of bogus self-employment among platform workers was recognized by the EU, and at the end of 2019, the European Commission proposed its directive on improving working conditions for platform workers. In its first chapter, called *Reasons for and Objectives of the Proposal*, the first objective enumerated is 'to ensure that people working through platforms have – or can obtain – the correct employment status in light of their actual relationship with the digital labour platform and gain access to the applicable labour and social protection rights';[24] meaning that one of the most important goals is to eliminate the misclassification of platform workers.

For these reasons, the proposed Directive chooses to regulate such situations with the institution of a legal presumption, meaning that the relationship between the worker and the digital labour platform should be presumed to constitute an employment relationship. Furthermore, the regulation concentrates on factual reality rather than purely relying on the contract agreed between the worker and the platform when applying the legal presumption of the employment relation.[25]

For the applicability of the presumption, the proposed Directive offers five conditions from which the worker needs to meet two to be classified as an employee. The conditions can be categorized into two main blocks. The first block contains the first and the last conditions enumerated, which concentrate

24 Op. cit.
25 Rosin 2022. 536.

on bogus self-employment, namely the determination of remuneration and the restriction of the possibility of building a client base. The rest of the criteria focus on the worker itself through the conditions of subordination to which they are subjected, enumerating the requirements of the existence of rules set by the platform for the worker, which are binding regarding the appearance or the worker's conduct while performing, the supervision of the platform over the worker, or restricting the freedom of the worker.

The presumption can be rebutted, but the proof of the employment relationship's non-existence will be more challenging than the burden of proof of meeting two conditions from the five enumerated. The asymmetry of the burden of proof can be explained by the fact that the proposed Directive favours the employment relationship rather than self-employment.[26] One of the criticisms of the proposal is that real self-employed platform workers benefit from a different, lower level of protection than employed platform workers.[27]

Many scholars argue that the EU misses a uniform and universal definition of the term worker.[28] While there are several approaches to defining worker, the definition is made through the prism of the regulated subject in these cases.[29] For example, Regulation 883/2004 tries to approach the present problem from the coordination of social security systems and defines some parts of this institution.[30]

If we are examining the ECJ case law, it is important to mention the Lawrie-Blum case,[31] which is a milestone when trying to define worker on the level of EU legislation. In the present case, the Court stated, 'The essential feature of an employment relationship is that a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration.'[32]

Interestingly, despite the already mentioned insufficient uniform definition of worker at the EU level, the proposed Directive contains a definition of the platform worker, connecting the term to the simple fact of performing platform work having an employment contract or employment relationship,[33] providing a vague definition instead leaves the possibility of defining the term to the Member States.

Furthermore, in the chapter named *Employment Status*, a kind of harmonization can be traced when determining employment status – by linking it to the jurisprudence of the Court of Justice of the EU (CJEU). While the

26 Falsone 2022. 110.
27 Id. 105.
28 Gruber-Risak–Dullinger 2018. 17.
29 ILO 2010. 6.
30 EC Regulation 883/2004, Art. 1 defines activity as an employed person or activity as a self-employed person 'for the purposes of this Regulation'.
31 Judgment of the Court of 3 July 1986. *Deborah Lawrie-Blum v Land Baden-Württemberg*, Case 66/85. EU:C:1986:284.
32 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61985CJ0066.
33 The proposed Directive Article 2(2).

initiative is welcomed, relating the term to the jurisprudence of the CJEU[34] will mean that Member States will have a living definition of the term, having the task of reviewing the legal norms along with the Court's jurisprudence.[35] Alongside the task of determination, the Member States also have an obligation to ensure appropriate procedures for classifying the workers.

The proposed Directive visibly aims to accomplish a distinction between self-employed and employed rather than creating a new third category suited for the current situation. The idea of creating a third category for 'independent workers' was circulating among academics. Still, there was yet to be an agreement about whether the EU should shift towards creating a new category or revise the already existing ones (employee and self-employed).[36]

While examining the balance of the freedom of platform workers, a critical remark must be made. Theoretically, if the freedom of platform workers means that they can refuse to work based on contractual mutuality, the platform also does not have the obligation to assign the work or tasks to the worker as well. In the described case, 'the existence of the contract can become questionable'.[37]

Platforms are basing their arguments on the upper-mentioned freedom of the workers when arguing that platform workers are instead self-employed than direct employees of the platform. Platform workers have a certain freedom, but their choice can also bring consequences. For example, workers in the food delivery field, such as Bolt, Foodora, or Wolt, can choose their working times and shifts. Still, their activity is measured by ratings (materializing in stars, for example), which reflect their choices and frequency of the undertaken shifts, among many other factors.[38] The apparent freedom of the workers in the present case needs to be more evident than stated by the platform companies when arguing that their workers should be categorized as self-employed. Platforms influence the decisions of the workers through rating them, meaning that in the present case, there is a kind of subordination of workers that is more accentuated than the freedom of the workers due to the fact of the logical sequence: the ratings are influencing the freedom of the workers through influencing their choices.

34 The most important case when it comes to defining these terms is the Lawrie-Blum case (Case 66/85).

35 Falsone 2022. 103–104.

36 Harris–Krueger 2015. 10.

37 Rosin 2022. 532.

38 Also, punctuality, efficiency, or customer satisfaction are influencing platform workers' ratings.

4. Can Self-employment Be Suitable for Platform Work at All?

When researching the suitability of self-employment, the examination can be made through several viewpoints.

Economically speaking, self-employment is a business model, meaning that the aim should be to generate profit. Academics argue that using the self-employment model in the platform economy is undermining the reach of this economic aim under several platform businesses. It is essential to remark at this point that in the present situation an examination of business models needs to be made bearing in mind the distinction between the various platform businesses since every platform's relation with its workers is different.

If we analyse the situation of food delivery platforms, such as Glovo, Foodora, or Uber Eats, just as in the case of platforms in the transportation field, such as Uber or Taxify, self-employment indeed is unable to reach its economic aim. The operation of such platforms is not suitable for building a working business. One of the main problems is building a customer base, as the platforms connect the worker with the client. Furthermore, during the working activity, the worker represents the platform business rather than working under its own brand. In numerous cases, creating a client base is forbidden by the contract agreed upon between the platform company and the worker. The worker in these platform businesses is also unable to choose their clients. The worker can accept or decline tasks, but they cannot choose among the clients.[39] Furthermore, even the freedom of the worker to reject tasks is not limitless because the worker's rating will reflect the acceptance rate of the tasks, thus influencing the workload when the platform distributes the work. Furthermore, in many cases, these self-employed persons work for one platform, meaning their earnings come from a single source. This situation is best described by using the term economically dependent. It is important to mention that the two institutions – economically dependent worker and bogus self-employment – are two distinct institutions, but for a better understanding it can be helpful to clarify the terms.

There are several platform business models in which working operation needs to set the upper-mentioned barriers for the workers, such as TaskRabbit. On the mentioned platform, clients can upload several tasks, such as painting the interior of a house or moving from one apartment to another, and workers notified can accept or decline the work. The distribution of the work is instead based on location rather than ratings. Ratings aim to inform the client about the satisfaction of other clients. Furthermore, the tools used by the worker when carrying out the working activity can be provided by the client or by the worker.[40]

39 Miroslawski 2023. 4.
40 Rosin 2020. 9.

There are other platform businesses as well, such as Airbnb, where the platform is not offering services. Therefore, the platform is not organizing the work itself in this case. For example, Airbnb is a platform where clients can rent properties from the offeror. This business model is called the short-term rental market. At this point, it is important to remark that the CJEU in 2017 ruled that Airbnb's business model falls under the E-Commerce Directive.[41] The ruling leads to the possibility of Airbnb escaping national regulations.[42]

The current problem of different platforms operating differently and of the way they differ in organizing work was taken into account by the European Commission when creating the proposed Directive already mentioned.

Maurizio Falsone, when analysing the material scope of the proposed Directive, shows in one of his articles that by defining labour platform in the way proposed, 'On the one hand, it properly includes online and on-location digital platforms, excluding only platforms with services that do not involve the organization of work as their main component (such as Airbnb). On the other hand, it excludes platforms with services that are not provided at the request of a recipient (such as the digital platforms adopted in the logistics industry, such as Amazon).'[43] By this, the proposed Directive concentrates on the platforms that organize work, and the client's demand is present through the platform's function.

5. Conclusions

We can conclude that the lack of universal definitions, the fast development of the industry through digitalization and the development of artificial intelligence, and the exponential growth of the platform work economy aroused the interest of European lawmakers and, at the same time, put them in a challenging position regulating the current problem.

The proposed Directive aims to 'improve the working conditions of persons performing platform work by the correct determination of their employment status'.[44]

There are still arguments about fundamental questions regarding the regulation of the occurred situation. There are arguments about whether creating a new category of workers, somewhere between employment and self-employment, is the correct solution. A group of academics are analysing the possibility of using the already existing law institutions and regulations. For example, few academics researched whether platform workers' situation could be regulated using fixed-

41 Judgment of the Court (Grand Chamber) of 19 December 2019. *Airbnb v Ireland*, Case C-390/18.
42 Kramer 2022. 3–4.
43 Falsone 2022. 113.
44 European Commission 2021. Article 1(1).

term[45] or zero-hour working employment contracts.[46] Furthermore, Delphine Defossez draws a parallel between the status of the self-employed platform workers and the situation of pilots and aircrew members. She emphasizes that bogus self-employment had been present among pilots and aircrew members of low-cost airlines before platform work gained popularity. Still, due to the unpopularity of the topic compared to platform work, these workers are in a more precarious position than platform workers themselves. She explains the similar situation of the aviation industry workers to that of platform workers, aviation workers being contracted as self-employed for occasional flights rather than being employed by the aviation company.[47]

One thing is certain, the national courts are overwhelmed by litigations. Therefore, the attempt of the EU is welcomed in this regard.

The proposed Directive aims to solve the problem of classification of platform workers by a legal presumption, accentuating the priority of direct employment relationships and, in this way, providing an opportunity for platform workers to enjoy the minimum standards in the fields of labour law and social security law. Furthermore, the proposed Directive indirectly aims the harmonization of the missing legal definitions among Member States by relying on the jurisprudence of the CJEU. While harmonizing in this particular way, these legal institutions will result in a living definition that the Member States must revise when the Court makes relevant decisions.[48]

For several reasons, a universal solution for the distinction between self-employment and direct employment cannot be reached at the moment. Platform businesses vary from one another on fundamental levels. Some organize work, and some do not. Specific platforms involve the demand of a client, certain platforms leave out the client, and workers perform their working activity for the platform itself. Furthermore, even the supervision and the extent of subordination differ among platforms. When reclassifying the status of platform workers, an in-depth analysis of the facts is needed.

Predictions of the future are hard to make due to the present situation. Marco Biasi states the following:

> As a consequence, if part of the current forms of platform work is replaced by the technological developments (i.e. the food delivery riders by drones and for-hire drivers by… drive-less cars), the scope of application of the EU directive would significantly shrink, while the new forms of work, unless

45 Rosin 2020.
46 Rosin 2022. 538–541.
47 Defossez 2021.
48 Falsone 2022. 103–104.

the parallel initiative of an Artificial Intelligence Act takes off, would be left unregulated (at least, in their work-related aspects).[49]

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