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Presumption of the employment relationship of digital workers and the protective function of labour law

Summary

This article summarises key issues related to digital platforms and their impact on the labour market. It first discusses the concept and spread of digital platforms, which can exacerbate labour market inequalities and worsen working conditions. It then looks at the European directives that address non-standard workers, particularly platform workers, focusing on the personal scope of application and the rebuttable presumption of an employment relationship. These directives have a significant impact on the coverage of digital platform workers, but raise questions about their adoption at the national level. The article also examines Polish regulations on employment relationships and the possible incorporation of a rebuttable presumption into Polish law in the context of the protective function of labour law.

Keywords: platform work, digital platforms employment relationship, rebuttable legal presumption, protective function of labour law

1. Introduction

The digital platform market is currently expanding rapidly, having experienced significant growth in a short period. According to the analyses conducted by the European Union, approximately 28.3 million individuals in EU Member States engage in platform work more frequently than sporadically[1]. Most of these individuals are formally self-employed. Reliable estimates show that platform work makes up approximately 1% to 3% of total employment. About 1.5% of the working-age population identifies platform work as their primary occupation, and an estimated 11% of adults have earned income through

[1] European Commission. Directorate General for Employment, Social Affairs and Inclusion, PPMI: *Study to Support the Impact Assessment of an EU Initiative to Improve the Working Conditions in Platform Work: Final Report.* LU 202, p. 5.

platform work at some point[2]. A similar percentage of people working through digital platforms can be observed in Poland[3]. Further analysis reveals that up to 5.51 million individuals in this group may be at risk of misclassification of employment status[4].

Such misclassification can deprive workers of appropriate labour protections, such as limits on daily and weekly working hours, paid holidays, or minimum wages. Moreover, they may not be covered by full social security, resulting in the platforms shifting the burden of contributions onto the employees. Algorithmic decisions, including account suspension or termination, are common, but there has been no established dispute resolution mechanism for workers who feel that they are treated unfairly[5]. Considering the broader context of global mega-trends in societies, economies, and the world of work, it is expected that the number of individuals opting for platform work will increase to an estimated 42.7 million by 2030[6].

In this article, I would like to focus on providing an overview of some fundamental issues related to digital platforms and how work is provided through them. I start by considering the concept of 'digital platforms' and the forms they take in global digital economy. Digital platforms, with their proliferation and expansion within the digital economy, can lead to an increase in inequalities in the labour market, as well as a degradation of the conditions of working through these platforms[7]. I then examine the solutions adopted at the level of European

[2] A. Aloisi: *Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead*. "European Labour Law Journal" 2022, vol. 13, no. 1, p. 7; European Commission. Directorate General for Employment, Social Affairs and Inclusion, PPMI: *Study to Support the Impact Assessment of an EU Initiative*..., p. 5.

[3] D. Owczarek, M. Pańków, M. Koziarek: *Nowe formy pracy w Polsce.* Warszawa 2019, p. 74.

[4] European Commission. Directorate General for Employment, Social Affairs and Inclusion, PPMI: *Study to support the Impact Assessment of an EU Initiative*..., p. 5.

[5] N. Potocka-Sionek: *Niewidzialni pracownicy, czyli kto stoi za sztuczną inteligencją*. "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2022, vol. 29, no. 2, p. 112.

[6] European Commission. Directorate General for Employment, Social Affairs and Inclusion, CEP: *Digital Labour Platforms in the EU: Mapping and Business Models: Final Report.* LU 2021; European Commission. Directorate General for Employment, Social Affairs and Inclusion, PPMI: *Study to Support the Impact Assessment of an EU Initiative*..., pp. 5–6; European Commission. Joint Research Centre: *European Legal Framework for "Digital Labour Platforms."* LU 2018.

[7] S. Vallas, J. B. Schor: *What Do Platforms Do? Understanding the Gig Economy*. "Annual Review of Sociology" 2020, vol. 46, no. 1, pp. 285–288.

directives on the employment conditions of non-standard workers, including platform workers. Of particular importance are the statements on the personal scope of application and the rebuttable presumption of an employment relationship, which significantly affect the coverage of digital platform workers by the directives, but also raise the question of the possibility of adopting such solutions into the Member States' legal systems. In the next part, I scrutinise the Polish regulation of the employment relationship and the possibility of introducing a rebuttable presumption of employment relationship into the Polish legal system in the context of the protective function of labour law. By the function of labour law, I mean the consequences of legal norms provided by the legislature[8]. By the protective function of labour law, I mean the consequences of legal norms aimed at strengthening the position of the employee in the employment relationship and ensuring the realisation of his/her labour rights, such as the right to safe and hygienic working conditions, respect for his/her dignity or the right to social security[9].

2. Dimensions of the digital platforms

The term 'digital platforms' does not fully capture the diversity of work forms provided through them. At this point, I would like to briefly refer to the taxonomy of digital platforms proposed by the S. Vallas and J. B. Schor[10].

[8] Compare: "the functions of labour law can be seen as the way(s) through which labour law may lead to those purposes. They can be seen as tasks which labour law receives and assumes on the basis of its foundations. When the focus moves to the question how labour law functions, an answer may be provided to the question what role labour law can play" F. Hendrickx: *Foundations and Functions of Contemporary Labour Law*. "European Labour Law Journal" 2012, vol. 3, no. 2, p. 110.

[9] Compare: "The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship" O. Kahn-Freund: *Labour and the Law*. London 1972, p. 8; A. Sobczyk: *Prawo pracy w świetle Konstytucji RP*. Vol. 1: *Teoria publicznego i prywatnego indywidualnego prawa pracy*. Warszawa 2013, pp. 24–26.

[10] S. Vallas, J. B. Schor: *What Do Platforms Do?...*, pp. 275–277.

The first group encompasses platform architects and technologists, comprising founders, highly skilled staff, and independent contractors. Research on these contributors is limited thus far, as they are responsible for designing and upkeeping the digital infrastructures of platforms. Consequently, the outcomes of their work hold significance for the working conditions that other categories of platform workers may encounter[11].

The second form of platform work involves cloud-based consultants or freelancers utilising such platforms as UpWork or Freelancer for professional services. Unlike digital platforms' architects and technologists, these workers use platforms instead of creating them. Their work, often location-independent, requires high technical expertise in such fields as graphic design, computer programming, and journalism, with workers who are typically employed on a project–by–project basis. Thus, it can be noted that success for cloud-based consultants relies on maintaining a steady client base. A significant concern is whether platforms supporting this type of labour promote the outsourcing of tasks by traditional firms or substitute the role of temporary employment agencies in providing a digital infrastructure[12].

The third group comprises gig workers whose services are secured through platforms and are typically conducted offline, such as in transport services, food delivery, home repair, or caregiving. This sector, encompassing delivery, day labour, and miscellaneous tasks, offers providers flexibility in their work schedules and autonomy, a feature often emphasised by the companies and by the digital contractors. Nevertheless, gig workers not only bear the burden of operating expenses and risks, relinquishing employee protections, but they also must align with the timing dictated by customer demand, significantly limiting their autonomy[13].

[11] L. Irani: *Difference and Dependence among Digital Workers: The Case of Amazon Mechanical Turk*. "South Atlantic Quarterly" 2015, vol. 114, no. 1; S. Kelkar: *Engineering a Platform: The Construction of Interfaces, Users, Organizational Roles, and the Division of Labor*. "New Media & Society" 2018, vol. 20, no. 7, https://doi.org/10.1177/1461444817728682; S. Vallas, J. B. Schor: *What Do Platforms Do?...*, p. 275.

[12] A. Christin: Counting Clicks: *Quantification and Variation in Web Journalism in the United States and France*. "American Journal of Sociology" 2018, vol. 123, no. 5; A. Piasna, J. Drahokoupil: *Digital Labour in Central and Eastern Europe: Evidence from the ETUI Internet and Platform Work Survey*. "ETUI Research Paper" 2019, pp. 14–15; S. Vallas, J. B. Schor: *What Do Platforms Do?...*, p. 275.

[13] A. Aloisi: *Platform Work in Europe...*; T. Bakalarz: *Zatrudnienie za pośrednictwem platformy internetowej jako przejaw „uberyzacji" pracy*. "Przegląd Prawa i Administracji"

The fourth form of platform work is conducted exclusively online through microtasking, exemplified by workers on such platforms as Amazon Mechanical Turk (AMT) or CrowdFlower. These workers handle human intelligence tasks integral to machine learning processes that computers cannot perform. Unlike the work of cloud-based consultants and freelancers, these tasks generally demand less training and experience. Examples include describing or categorizing image content, editing computer-generated text, verifying user accounts on social media, or transcribing short audio clips. Instances are cited where microtasking has become the organisational model for companies that previously relied on in-house employment[14].

Incidentally, the last category of platform workers operates within the social media and encompasses content creators and influencers engaged in what is termed 'aspirational labour'. Typically, this form of platform work is undertaken without compensation, with individuals aspiring to attain enough visibility in the attention economy to eventually secure a steady income. This type of work involves workers willingly accepting precarious positions in the labour market, driven by their vision of desirable future[15].

As can be seen, platform workers differ in the scope of their platform work, the level of its complexity and the varying degree of dependence on the platform and its management. The first two groups are in some ways better positioned in relation to digital platforms, as their jobs require high qualifications or they are freelancers, which leads to higher earnings and greater flexibility in their work. Other forms of digital platforms, especially crowdwork and on-demand work platforms, may have characteristics of precarious work in the form of uncertainty about the frequency of opportunities for 'gig jobs', the

2019, vol. 117, p. 11, https://doi.org/10.19195/0137-1134.117.1; V. De Stefano: *The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowd Work and Labour Protection in the "Gig-Economy"*. "Conditions of Work and Employment" 2015, no. 71, https://doi.org/10.2139/ssrn.2682602; S. Vallas, J. B. Schor: *What Do Platforms Do?...*, p. 275.

[14] J. Berg: *Income Security in the on-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*. "Comparative Labor Law and Policy Journal" 2016, vol. 3, no. 37; European Commission. Joint Research Centre: *European Legal Framework for "Digital Labour Platforms"...*, p. 10; S. Vallas, J. B. Schor: *What Do Platforms Do?...*, p. 274.

[15] B. E. Duffy: *(Not) Getting Paid to Do What You Love: Gender, Social Media, and Aspirational Work.* Yale University Press, 2017; S. Vallas, J. B. Schor: *What Do Platforms Do?...*, p. 274.

number of wages received for these jobs. The unpredictability of work particularly affects people from minority groups and those in more vulnerable economic situations. Non-transparent conditions for the performance of services using algorithmic management lead to asymmetry of information on the part of employees, and make it difficult to claim their rights in disputes with platforms. Platform workers often carry out their tasks in isolation, presenting difficulties for collective bargaining. This is especially challenging for platforms that facilitate online services, where service providers are distributed across various countries[16]. Digital platforms, due to their structure, make it difficult for workers to effectively realise their right to labour representation[17].

Researchers have been far more likely to address issues related to on-demand work platforms, apparently because of their easier embedding in a classically conceived employment relationship, as well as stronger efforts to regulate their situation through the actions of particular trade unions. As a result, there is limited information on workers in the EU who use digital platforms to carry out tasks online without any face–to–face interaction[18]. Similar observations can be made in the case law of European and UK courts, which have more often established the employment relationship for delivery workers or drivers than for crowdwork[19].

[16] European Commission. Directorate General for Employment, Social Affairs and Inclusion, CEPS: *Digital Labour Platforms in the EU...,* pp. 10–11.

[17] See: V. Lehdonvirta: *Algorithms that Divide and Unite: Delocalisation, Identity and Collective Action in 'Microwork'*. In: *Space, Place and Global Digital Work*. Ed. J. Flecker. London 2016, pp. 75–76; N. Potocka-Sionek: *Niewidzialni pracownicy...,* p. 112; J. Unterschütz: *Come Together Now! New Technologies and Collective Representation of Platform Workers*. "Acta Universitatis Lodziensis. Folia Iuridica" 2021, vol. 95, pp. 63–65.

[18] A. Aloisi: *Platform Work in Europe...*, pp. 5–6; L. Ratti: *A Long Road Towards the Regulation of Platform Work in the EU*. In: *Collective Bargaining and the Gig Economy. A Traditional Tool for New Business Models*. Eds. J. M. Miranda Boto, E. Brameshuber. Oxford, New York 2022, pp. 56–67.

[19] Compare for instance: C. Hießl: *The Classificaton of Platform Workers in Case Law: A Cross-European Comparative Analysis*. "Comparative Labor Law & Policy Journal" 2022, vol. 42, no. 2, p. 4–6.

3. The EU's approach to regulating digital platforms

The core issue with platform work is the difficulty to determine the level of control which platform companies have over workers' labour, which often makes it impossible to establish a proper legal relationship between parties, employment relationship or self-employment. This problem has also been recognised by the European Union, which adopted the European Pillar of Social Rights (EPSR) on November 17, 2017, in Gothenburg, to improve working conditions in the new socio-economic reality. For instance, principle no. 5 of EPSR states, *inter alia*, that "employment relationships leading to precarious working conditions should be prevented, including by prohibiting the abuse of atypical contracts"[20] and in EPSR Action Plan inducted in 2020 points out a "[new] emerging trend is the blurring of traditional lines between a worker and a self-employed person, and a growing heterogeneity among the self-employed. A case in point is the emergence of vulnerable self-employed working through platforms and operating under precarious conditions. The pandemic has highlighted this for delivery workers, in particular regarding their access to social protection, and health and safety risks"[21]. It is worth noting that the European Parliament, in its resolution adopting the EPSR, pointed out that "for work intermediated by digital platforms and other instances of dependent self-employment, a clear distinction – for the purpose of EU law and without prejudice to national law – between those genuinely self-employed and those in an employment relationship, taking into account ILO Recommendation No 198, according to which the fulfilment of several indicators is sufficient to determine an employment relationship"[22].

As A. Aloisi emphasises, the EPSR is more aspirational than mandatory, however it marks a new and promising step towards strengthening the EU's social dimension[23]. The adoption of the EPSR can also be seen in the context of the protective function of labour law. The Eu-

[20] Interinstitutional Proclamation on the European Pillar of Social Rights (OJ C 428, 13.12.2017).

[21] The Council, The European Economic and Social Committee and The Committee of the Regions, COM(2021) 102 final.

[22] European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)).

[23] A. Aloisi: *Platform Work in Europe...*, p. 14.

ropean legislator has noticed, in this case with regard to platform work, a strong imbalance between digital platforms and the individuals who work through them. Analyses show that digital platforms have repeatedly given workers the status of self-employed workers, while defining themselves solely as intermediaries between clients and individuals who perform work through digital platforms[24]. The measures taken are a response to the changing labour market, but also an attempt to provide all working people with more stable and secure working conditions.

To this end, the Directive (Eu) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union[25] and Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work have been adopted[26]. Both Directive 2019/1152 and Proposal for a Directive use the same personal scope, indicating that they apply to every worker (platform worker) in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice[27]. Domestic, on-demand, intermittent, voucher-based and platform workers, but also trainees and apprentices are entitled to a set of minimum rights as long as they meet the criteria established by the CJEU, according to this Directive[28]. The Directive's 'hybrid' formula seeks to strike a balance between Member States' autonomy in defining employment relationships and compliance with ECJU case law. While re-

[24] European Commission. Directorate General for Employment, Social Affairs and Inclusion, CEPS: *Digital labour platforms in the EU...*, p. 30.

[25] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L186/105.

[26] Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM/2021/762 final; on 11 March 2024, the Council adopted the content of the Directive agreed during the informal trilogue on 8 February 2024. The Directive is to be adopted by the European Parliament at first reading and Member States will then be obliged to transpose it into their national law within two years.

[27] Art. 1(2) Directive (EU) 2019/1152 and art. 2(2) Proposal for a Directive on improving working conditions in platform work.

[28] A. Aloisi: *Platform Work in Europe...*, p. 15.

specting national legal frameworks, the overarching aim of this interpretation is to inclusively interpret the Directive's protective objectives. Therefore, a broad interpretation would likely bring platform workers within its scope[29]. The adoption of the proposed amendments would give the ECJU more flexibility in interpreting the Directive, potentially reducing the impact of overly strict national criteria. Without a legal presumption, digital labour platforms could take advantage of traditional national standards and ignore the nuances of platform work[30]. A broader understanding of employment relationships can help reduce this risk by acknowledging the unique nature of platform work. However, the classification of workers is still a controversial issue and presents an opportunity for dialogue between courts at various levels.

In the proposal for Directive, the European Commission showed that "Criteria indicating that a digital labour platform controls the performance of work should be included in the Directive in order to make the legal presumption operational and facilitate the enforcement of workers' rights". The EU Commission, in Article 4, displayed five criteria relating to the control by digital platforms of the conditions under which work is performed, such as imposing upper limits on remuneration, limiting the ability to build a customer base or supervising the performance of work or verifying the quality of the results of the work including by electronic means[31]. The fulfilment of two triggered the presumption of an employment relationship of the platform worker. This presumption under Article 5 could be rebutted by all parties, even if all the criteria are met. However, in the adopted and agreed version of 8 February 2024, the specification of individual criteria was dropped, instead referring to the notion of 'control' and 'direction'. The contractual relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship when facts showing

[29] Ibidem, p. 16; B. Bednarowicz: *Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union*. "Industrial Law Journal" 2019, vol. 48, no. 4, pp. 612–614.

[30] V. De Stefano: *The EU Commission's Proposal for a Directive on Platform Work: An Overview*. "Italian Labour Law e-Journal" 2022, p. 5.

[31] European Commission: Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM (2021), 762 final.

control and direction, according to national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice, are found. In addition, the possibility of challenging this presumption has changed, so that it is the digital platform wishing to avoid employer status that will have to prove that it was a contractual relationship. There is a significant change to detail and adapt this rebuttable presumption of law to the circumstances of Member States. This development is in line with what trade unions and the European Parliament have advocated in their reports[32].

I consider the solutions adopted at the level of Directive 2019/1152 on transparent and predictable working conditions in the European Union and, if adopted as presented, the Directive on improving working conditions in platform work to be an appropriate way forward. Despite some misgivings about the 'hybrid' definition of '(platform) worker'[33], I believe it will allow the possibility to extend the scope of the Directive to more people who want to claim the existence of an employment relationship with digital platforms. This definition will also make it obligatory for national courts to be familiar with European rulings, which also generates the need for judges to be adequately prepared in order to fully rule on platform work.

The rebuttable presumption of employment relationship as adopted seems to make its provisions immune to the rapid development of digital platforms. The solutions presented in the Proposal have been repeatedly criticised as insufficient and as not reflecting at least the conditions of in crowdwork[34]. A closed catalogue of criteria raising the

[32] European Parliament, Committee on Employment and Social Affairs: *Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*, (COM(2021)0762 – C9-0454/2021 – 2021/0414(COD)); European Trade Union Confederation: *Resolution on the Proposal of the European Commission of a Directive on Improving Working Conditions in Platform Work and Way Forward Ahead of the Ordinary Legislative Procedure*, 2022, https://www.etuc.org/en/document/etuc-resolution-proposal-european-commission-directive-improving-working-conditions (Accessed: 28 February 2024).

[33] B. Bednarowicz: *Delivering on the European Pillar of Social Rights*, p. 613; M. Risak, T. Dullinger: *The Concept of Worker in EU Law*: *Status Quo and Potential for Change*. "ETUI Research Paper" 2018.

[34] For instance: V. De Stefano: *The EU Commission's Proposal for a Directive on Platform Work...*, pp. 4–5; L. Ratti: *A Long Road Towards the Regulation of Platform Work in the EU...*, pp. 58–59; M. Schlachter: *The Initiative of the European Commission for Improving Working Conditions in Platform Work*. "Miskolci Jogi Szemle" 2022, vol. 17, no. 2, pp. 388–389.

presumption of an employment relationship could quickly become out of step with the changing digital marketplace. Amending the definition of the rebuttable presumption of employment relationship and adopting control and direction as the basic categories will simplify the process of establishing the existence of an employment relationship and also allow Member States to adopt the rebuttable presumption of employment relationship in accordance with national solutions and practices already developed.

4. Presumption of employment relationship in Polish labour law

Art. 22 §1 of Polish Labour Code[35] states that by establishing an employment relationship, an employee assumes the obligation to perform specific work for the employer and under the employer's direction at a place and time specified by the employer, and the employer assumes an obligation to employ the employee against payment of remuneration. Additionally, employment on the terms referred to in §1 is taken to be based on an employment relationship, regardless of the name of the contract concluded by and between the parties. Furthermore, a contract of employment cannot be replaced with a civil-law contract based on the conditions of work referred to in §1.

In the case law of the labour courts[36], as well as in some academic papers, there are remarks suggesting the existence of the so-called 'soft presumption of an employment relationship'[37]. They point out that when the Labour Code was amended, the legislator introduced the so-called 'soft presumption of an employment relationship'. This presumption is characterised by the fact that subordination in the

[35] Act of 26 June 1974 Labour Code (Journal of Laws 2023.1465 of 2023.07.31).

[36] For instance, see: Judgment of the Supreme Court II UKN 229/98, OSNAPiUS 1999, no. 19, issue 672; Judgment of the Supreme Court I PKN 191/98, OSNAPiUS 1999, no. 14, issue 449; Judgment of the Supreme Court III PK 38/09, LEX no. 560867.

[37] Compare: A. Dral: *Powszechna ochrona trwałości stosunku pracy. Tendencje zmian*. Warszawa 2009, p. 395; G. Orłowski: *Umowa zlecenia a „miękkie domniemanie stosunku pracy*. "Monitor Prawa Pracy" 2007, no. 3, pp. 134–135; J. Unterschütz: *Ograniczenie w zakresie zawierania umów na czas określony a „miękkie" domniemanie istnienia stosunku pracy (uwagi na marginesie wyroku Sądu Najwyższego z dnia 14 czerwca 2012 r., i pk 222/11)*. "Rozprawy Naukowe i Zawodowe Państwowej Wyższej Szkoły Zawodowej w Elblągu" 2013, no. 16, p. 133.

provision of remuneration services or the replacement of an employment contract with a civil law contract while maintaining subordination is considered to be an employment relationship, regardless of the name given to the agreement by the parties. They also argue that in the Supreme Court's jurisprudence, a liberal approach dominates the interpretation of the provisions on the so-called 'soft presumption of an employment relationship'. According to this approach, in the name of freedom of contract, parties are free to choose different forms of work arrangements, including civil law contracts. If an agreement has similar characteristics to both an employment contract and a civil law contract, the actual intention of the parties should be decisive in determining its nature. Whether it is an employment contract or a civil law contract depends not only on the name, but primarily on the purpose and the common intention of the parties. There are also such statements, although in the minority, indicating the existence of a legal presumption of an employment relationship in Article 22 of the Labour Code[38]. This argument, however, is unsupportable. Although the wording of Article 22 §1[1] and §1[2] of the Labour Code might suggest otherwise, these provisions do not create a presumption of employment. Rather, they reinforce the view, well established in both legal literature[39] and case law[40], that the nature of the employment relationship is defined by the actual intentions of the parties and not by the formal title of the contract. Accordingly, this provision is considered to be purely explanatory.

A particular exception can be found in Articles 4(2) and 4(4) of the Act of 15 June 2012 on the consequences of entrusting work to foreigners residing illegally on the territory of the Republic of Poland[41] (hereinafter: u.s.p.p.c.), which implements Directive 2009/52/EC of the

[38] A. M. Świątkowski: *Cywilnoprawne zatrudnienie niepracownicze*. In: *System Prawa Pracy*. Vol. 7: *Zatrudnienie niepracownicze.* Ed. K. W. Baran. Warszawa 2015.

[39] M. Gersdorf: *Cechy konstrukcyjne umowy o pracę*. In: *Prawo zatrudnienia.* Warszawa 2013; K. Rączka: *Czy domniemanie stosunku pracy?* "Przegląd Ubezpieczeń Społecznych i Gospodarczych" 1997, no. 2, p. 12; A. Tomanek: *Ciężar dowodu w prawie pracy*. In: *System Prawa Pracy. Część ogólna.* Vol. 1. Ed. K. W. Baran. Warszawa 2017, p. 1444.

[40] Judgement of the Supreme Court I PK 60/17, LEX no. 2486218; Judgement of the Supreme Court I PK 182/07, OSNP 2009, no. 5–6, issue 60. Judgement of the Supreme Court I PKN 432/99, OSNP 2001, no. 9, issue 310.

[41] Act of 15 June 2012 concerning the effect of employing foreigners residing illegally on the territory of the Republic of Poland (Journal of Laws 2021.0.1745 of 2021.09.27).

European Parliament and of the Council of 18 June 2009 laying down minimum standards on sanctions and measures against employers of illegally staying third-country nationals[42]. Articles 4(2) and (4) of the u.s.p.p.c. introduce a presumption of an employment relationship when pursuing overdue wages and related benefits. These provisions do not automatically presume the existence of an employment relationship in situations where there is doubt as to its nature. Their sole purpose is to guarantee wages for foreigners illegally residing in Poland, regardless of the form of employment. The existence of an employment relationship is the basis for this presumption, which covers a three-month period of employment. Proof of employment on any other basis leads to a presumption of the right to compensation. These presumptions can be rebutted, for instance, by challenging their basis or by providing evidence that contradicts the presumption, such as proof of a different period of employment or a wage structure other than that established by the legislature[43]. Thus, Polish labour law does not provide for a general presumption of the existence of an employment relationship. The only exception to this rule is for foreigners residing illegally in Poland, who, in the event of non-payment of wages by the employer, can benefit from the legal presumption and thus improve their legal situation.

5. Conclusion

Recent technological innovations, such as digital platforms and their regulation, have dominated labour law discourse both nationally and globally. This is not surprising given the rapid proliferation of digital platforms in the digital economy and the often low threshold of entry for users and, above all, those providing work through them. As I have pointed out earlier, the work and the people who do this work *via* platforms are diverse and in many cases hard to clearly place into a specific category, be it employment relationship or self-employment. I believe that digital platforms will revolutionise (or have already revolutionised) the way in which work is done, not only lo-

[42] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals OJ L 168, 30.6.2009.

[43] For more: A. Tyc: *Ciężar dowodu w prawie pracy. Studium na tle prawnoporównawczym*. Warszawa 2016.

cally, but also in crowdwork, where such work becomes an opportunity for economically disadvantaged people to earn extra income. Nevertheless, the current rather residual regulation of platform work exposes some people working through digital platforms to an inappropriate framing of the situation in relation to the form of work they are undertaking. I interpret the presented ways of regulating the minimum working conditions of non-standard workers as well as the attempt to introduce a rebuttable presumption of employment relationship for platform workers as a step towards ensuring more stable and predictable working conditions, especially on digital platforms. The solution in the form of a presumption of employment relationship also implements Recommendation no. 198 of the International Labour Organisation, which expresses a double aim: firstly, developing methods to identify genuine employment relationships; and on the other hand, combating the hidden practice of disguised employment[44].

However, the European Commission's proposal to introduce a specific legal presumption for platform work in Poland would introduce a drastic change that fundamentally contradicts the apparent foundations of Polish labour law. It would introduce an unjustified distinction between traditional workers and platform workers. It would also put those not employed *via* digital platforms at a disadvantage by unjustifiably differentiating their position on the labour market. It would also consequently lead to an attempt by digital platforms to circumvent the law in order to avoid qualifying as platforms and thus not having to prove that the legal relationship in question was not an employment relationship. To avoid legal uncertainty and maintain a clear distinction between traditional and platform work, the Polish parliament should instead consider adopting a general presumption of employment status. The presumption of employment relationship would, in my opinion, realise to the fullest extent the constitutional principle of the protection of labour and also the protective function of labour law can be seen in it.

While stressing the social and protective dimension of the solutions proposed, it is important not to depart from the socio-economic system

[44] More on this topic: V. De Stefano: *The Rise of the 'Just-in-Time Workforce'...*; F. Hendrickx: *Platform Work and Beyond*. "European Labour Law Journal" 2023, vol. 14, no. 4, pp. 466–467.

of the country concerned. Therefore, a social market economy, based on freedom of economic activity and private property, cannot exist without solidarity, dialogue and cooperation of social partners, which should constitute the basis of the economic system of the Republic of Poland[45]. Thus, the state is also entitled to correct the inequalities and distortions created by the free market, acting in agreement and dialogue with social partners. I advocate the statement that the introduction of the rebuttable presumption will greatly benefit workers by providing legal clarity in determining the nature of their employment relationships. Uncertainty over classification has a significant impact on working conditions and deprives workers of their labour rights and social protection. By shifting the burden of proof to employing entitites who argue for contractual rather than employment relationships, the presumption helps to ensure fair treatment. In addition, a definitive determination of the employment status of platform workers would help trade unions in particular to defend the interests of these workers in collective bargaining. Finally, the legal presumption improves the enforcement and monitoring of labour laws by requiring that individuals who meet the criteria of the presumption be recognised as being in an employment relationship, thereby allowing a platform worker to be presumed to be in an employment relationship and, if not, to be subject to appropriate sanctions[46].

The proposed Directive on improving working conditions on platform work provides for a rebuttable presumption of an employment relationship. Presumptions of this kind impose an obligation to accept a particular conclusion if the condition formulated on the basis of the presumption is met. A party benefiting from a legal presumption is not completely relieved of the burden of proof. S/he must prove the basis of the presumption from which a particular conclusion follows. This basis can be challenged by various means of evidence, and the conclusion itself can only be rebutted by rebuttal evidence. Cases of establishing legal presumptions in Polish labour law are rare. The use of legal presumptions and the shifting of the burden of proof are justified for

[45] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997.78.483 of 1997.07.16), art. 24.

[46] In the context of digital platforms among others: M. Kullmann: *'Platformisation' of Work: An EU Perspective on Introducing a Legal Presumption*. "European Labour Law Journal" 2022, vol. 13, no. 1, pp. 70–71.

pragmatic reasons. In a few cases in labour law, the reversal of the burden of proof is used to strengthen the position of an employee claiming compensation for discriminatory practices (e.g. art. 18^{3b} § 1 *in fine* of the Labour Code)[47].

The labour law in its content is filled with a view of human labour as a special value subject to a different regulation from typical commercial relations between two equal contractors. Therefore, Article 24 of Polish Constitution states that work shall be protected by the Republic of Poland. The State shall exercise supervision over the conditions of work. The State has as its primary objective the protection of human labour and the supervision of the way in which it is carried out through its institutions. Thus, I believe that the presumption of an employment relationship will allow the fulfillment of the State's basic tasks in the field of labour relations. There is no doubt that the shape of such a presumption should serve all those who perform work of a certain kind, being in a subordinate relationship with respect to, while it should not affect those who provide their services as self-employed persons. In this case, a deeper analysis of ILO Recommendation No. 198 at the level of parliamentary work will be beneficial in order to guarantee workers their due rights.

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[47] A. Tomanek: *Ciężar dowodu w prawie pracy...*, p. 1465; A. Tomanek: *Ustawowe określenie stosunku pracy jako narzędzie delimitacji zatrudnienia pracowniczego i niepracowniczego*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej", vol. 30, no. 3, p. 198.

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Domniemanie stosunku pracy pracowników cyfrowych a ochronna funkcja prawa pracy

Streszczenie

Niniejszy artykuł zawiera przegląd kluczowych kwestii związanych z platformami cyfrowymi i ich wpływem na rynek pracy. W pierwszej kolejności omówiono koncept i rozpowszechnienie się platform cyfrowych, które mogą pogłębiać nierówności na rynku pracy i pogarszać warunki pracy. Następnie przeanalizowano dyrektywy europejskie dotyczące pracowników nietypowych, w szczególności pracowników platform cyfrowych, koncentrując się na zakresie podmiotowym i wzruszalnym domniemaniu stosunku pracy. Dyrektywy te mają znaczący wpływ na pracowników platform cyfrowych, ale budzą wątpliwości co do ich przyjęcia na szczeblu krajowym. W artykule przeanalizowano również polskie przepisy dotyczące stosunku pracy oraz możliwość wprowadzenia wzruszalnego domniemania do polskiego prawa w kontekście ochronnej funkcji prawa pracy.

Słowa kluczowe: praca platformowa, platformy cyfrowe, stosunek pracy, wzruszalne domniemanie prawne, funkcja ochronna prawa pracy