Part IV:
Transborder Perspective: The Future Role of the European Union

Chapter 12
Building Up and Implementing the European Standards for Platform Workers

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I. Introduction

Is platform work changing the way in which we organise our work? If so, to what extent does this have an impact on organising social protection in our national social security systems? Is the EU – on the basis of its policy monitoring procedures and, in particular, through its European Pillar of Social Rights – saying anything on how to organise social protection for platform workers? If so, is this enough in terms of concerted European action or do we need additional (legal) measures coming from the EU? These are the main questions that are put forward in this contribution addressing the overall theme of the future role of the EU in a transborder perspective, one of the major topics that came to the fore at the conference held at the Max Planck Institute for Social Law and Social Policy in Munich on 12 and13 December 2019.

Platform work essentially refers to the organisation of professional activities through the mediation of a (digital) platform where supply of work and demand for work can be exchanged (against remuneration). The facilitation of work through the means of an intermediary agent is not new; a vast industry related to agency work emerged from it in the past. The novelty now lies more in the digitalisation of these intermediary platforms; as they are now internet-based and/or driven by an IT app(lication), quite some opportunities have been created for a faster and more global work organisation. Labour and services can thus easily be exchanges at a global level though the "World Wide Web"; work can be performed from a distance and is not necessarily bound to the premises of the employer. It can be performed at home, and depending on the complexity of the job, can be done without too big an amount of instructions; the fact that the job can be done almost instantly is considered as yet another asset, as the restrictions stemming from regular work-time patterns are avoided. Platform work can be done on a free-lance basis (by self-employed persons), which has potential with a view to cost reduction. In order to facilitate this global

approach to labour exchange, work activities are increasingly divided into a series of sub-tasks which can be easily contracted out to an endless number of platform workers. Platform work is indeed often related to "gigs" or "small tasks" which do not always require major skills and hence there is a large pool of candidates who can perform the work. Platform work challenges the more traditional organisation of work and its underlying regulatory frameworks, in particular social security.

In this contribution, we will focus on the European Union and how the EU institutions address the challenge of organising social security for platform workers. Knowing that the main competence to organise social security remains at Member State level (Article 153 of the Treaty on the Functioning of the European Union, TFEU), it may seem awkward to raise this question from the outset. The EU can, however, intervene to provide support (Article 6 TFEU). All the more so when the Member States are confronted with similar problems for which a solution is hard to find. With the European Pillar of Social Rights (EPSR) of 2016 the EU set itself a common framework to monitor the social policies of its Member States in terms of their social outcomes. One of the major goals of this Pillar is to safeguard (enough) access to social protection for all workers and self-employed workers (principle 12). To that purpose, the Recommendation was launched, inviting all Member States to provide to all professionally active persons access to an adequate level of social protection. The Recommendation is considered to be an answer to the growing groups of non-standard workers and self-employed persons that face exclusion from social security because of their irregular work patterns, low levels of income or their autonomous way of working.

For this contribution we address the question as to what extent the Recommendation responds to the challenges that platform work generates for the organisation of social security. Since platform work did not really emerge fully until after the EPSR and the Recommendation had (already) been launched, in essence we are trying to figure out whether the Recommendation is still relevant for the latest evolutions in work organisation. In order to do so, we will first define the concept of platform work and subsequently indicate where it deviates from standard work forms. After this definition, the major typical features of platform work that pose challenges to our traditional social security will be assessed based on the provisions set out in the Recommendation; finally, we will try to indicate where the Recommendation (and its underlying EU vision on access to social protection) may fall short and what kind of action is (still) to be expected. After this definition, we will have the major typical features of platform work

that cause challenges to our traditional social security assessed against the provisions of the Recommendation.

In a final section we shall address the question of whether the legal standards developed by the Recommendation are sufficient. And complementary to this question, what kind of EU legal action in the field of social security could still be relevant. The section takes up the discussion again in a broader perspective and will by definition go beyond the strict set of problems surrounding platform work and its impact on the organisation of social security. That being said, platform work is to be considered as yet another development in work organisation that urges the EU to develop clearer rules in order to safeguard fair competition (i.e. an equal-level playing field) on the internal market. Organising social security has an impact on labour costs; this is true as well for platform work, even if only in the sense that this new work form is often (falsely) used for legitimising a reduction in production costs and hence improving its competitive position at the detriment of the worker. Common standards at EU level are needed. In the final section, we call for more EU attention to the financing of social security rather than to the benefits side.

II. Platform Work as a New Non-Standard Work Form

1. Platform Work

Platform workers can be defined[1] as persons selected online from a pool of workers through the intermediation of a platform to perform personally[2] on-demand short-term tasks for different persons or companies in exchange for income. It is evident that we restrict ourselves to platform activities that have a (potential) relation to professional work, leaving out plat-

1 As defined previously by us: *Barrio, Alberto/Montebovi, Saskia/Schoukens, Paul*, The EU Social Pillar: An Answer to the Challenge of the Social Protection of Platform Workers?, in: European Journal of Social Security, 20 (2018) 3, pp. 219-241.

2 Our focus is thus on persons who personally deliver the service and are not in a position to have it carried out by another person. This means that the platform worker is required to create a personal profile, to which reviews may be linked. In some cases, this feature is expressly mentioned by the platform in its terms of service. See *Prassl, Jeremias/Risak, Martin*, Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork: in: Comparative Labour Law & Policy Journal, 37 (2016) 3, p. 30. In other cases, it might be evident from the personal character of the ratings.

forms that are based exclusively in the non-profit sharing of property or knowledge. The online character of platforms is one of the major defining features, facilitating access and reducing transaction costs.[3] Furthermore, the fact that the platform acts as an intermediary between the person who receives the service and the person who performs it means that, in its role, the platform typically:

(1) possesses essential information about the relationship (e.g. the nature of the tasks performed, remuneration, the identity of the parties, etc.),
(2) has a monopoly over the contact between the two parties in the relationship (i.e. the person performing the work and the person receiving it may only contact each other through the platform),
(3) provides rules concerning the behaviour of both parties,
(4) may monitor compliance with such rules, and
(5) may sanction the lack of compliance with such rules by stopping temporarily or permanently an individual from accessing the platform.

Finally, in the definition the on-demand[4] nature of platform work is essential too. It means that the performance of a task is offered when and if a person requests it, without any obligation by the platform to ensure that a minimum amount of work is performed by the workers registered in it. It goes without saying that significant periods of unremunerated time will often exist, when a worker waits between tasks, for instance. This shows what the fragmentation of work (assignments) can cause with regard to the total working time (all tasks added), the irregularity of work time (tasks can be done at whatever time of day and workers are thus not confined to the traditional 9-to-5 time schedule) and the intermittency of work (tasks do not always succeed one another without any transition, meaning that persons are often confronted with non-remunerated waiting periods between assignments).

3 For some examples on the importance of the online character (which results, among other things, in the use of apps), see *Valenduc, Gerard/Vendramin, Patricia*, Work in the Digital Economy: Sorting the Old from the New, ETUI, Brussels, 2017, https://www.etui.org/publications/working-papers/work-in-the-digital-economy-sorting-the-old-from-the-new. Accessed 18 June 2020.

4 *Kittur, Aniket/Nickerson, Jeffrey/Bernstein, Michael/Gerber, Elizabeth/Shaw, Aaron/Zimmerman, John/Lease, Matt/Horton, John*, The Future of Crowd Work, in: CSCW 2013 – Proceedings of the 2013 ACM Conference on Computer Supported Cooperative Work, 2013, pp. 1301-1307, https://doi.org/10.1145/2441776.2441923. Accessed 18 June 2020.

2. Platform Work Compared to Standard Work

Its definition makes clear that platform work deviates from normal (standard) work that traditionally forms the basis for labour regulations and (work-related) social security schemes. In general terms, standard work is understood to be subordinated, full-time work of an indefinite duration. More specifically, it may be defined as the "stable, open-ended and direct arrangement between dependent, full-time employees and their unitary employer". This definition not only contains the traditional elements[5] of the employment relationship but also refers to the outcomes of this traditional labour relationship, this being job security[6] and income security[7].

Atypical work deviates from one or more of these characteristics of the standard work relationship. Originally, deviations could occur in relation to one of the following (three) components:

(1) The subordinated relationship between worker and employer: the absence of such a relationship refers traditionally to autonomous (or self-employed) work; the self-employed are mainly characterised by the freedom to organise their work and their work time. Since they work for various commissioners they can also spread their economic dependency. Contrary to the full-time worker, their income is derived from various clients.
(2) Full-time work: part-time work arrangements challenge in particular the income security that normally originates from standard work. Consequently, part-time work will create problems for traditional social security schemes that guarantee income security on the basis of income replacement of labour income (wage). Part-time work often results in lower income, so the income replacement guaranteed by social security is at risk of falling below minimum subsistence levels. Part-time work (and covering part-time work in social security) often be-

5 This being the presence of personal subordination, the bilateral character of the relationship, and hence mutuality of obligations as a consequence, the wage as (main) source of income that is provided in return to the offered labour, the economic dependency as the worker depends fully for this income on the employer, and a fixed workplace where the work is done, normally at the premises of the employer.

6 Labour contracts are concluded for an indefinite period and relate to full-time occupation.

7 The wage may be the only source of income but is guaranteed at a certain (minimum) level and in case of loss of the position, income replacement is guaranteed through the means of social security.

comes an issue of poverty alleviation (combating poverty and social exclusion). This is especially true for persons living alone or persons who are head of the family. Part-time work will often demand that systems provide corrective (supportive) income support.

(3) Indefinite work: contracts for specific fixed-time periods challenge work security. Work is only guaranteed for the contracted time period, which is by definition restricted in time (short). The workers risk intermittent periods of (no) work (and consequently no income). As a result, social security will often function as a bridge covering intermittent periods (of no work) by providing income replacement (see e.g. schemes of temporary unemployment).

These major categories aside (part-time, fixed time or self-employed work), we have recently been observing an increase of new kinds of atypical work forms, such as on-call work, zero-hour contracts, solo self-employment, internships, self-employed workers active within management companies, student work, interim work, agency work, crowd work, portfolio work etc., with platform work being one of them. When we take a closer look at these new forms[8] we notice however that they are a further development (to the extremes) of the traditional atypical work categories (part-time work, fixed-time work or self-employment), sometimes even applied in combination and including some new elements that deviate from standard work (no remuneration, the triangular contractual relations, etc.). In some situations, typical of work forms seen on platforms such as crowd work and portfolio, hardly any of the traditional elements present in the standard work relationship are seen. It should not come as a surprise that this in turn creates challenges for traditional (work-related) social insurance schemes.

III. Platform Work as a Challenge for Organising Social Security

Platform work creates some challenges for the organisation of social security systems. We shall enumerate a selection of some major challenges, based on previous research work[9]:

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8 *Barrio, Alberto/Schoukens, Paul*, The Changing Concept of Work, in: European Labour Law Journal, 8 (2017) 4, pp. 306-332.

9 *Barrio, Alberto/Schoukens, Paul*, The Changing Concept of Work (fn. 8), pp. 306-332; *Barrio, Alberto/Montebovi, Saskia/Schoukens, Paul*, The EU Social Pillar: An Answer to the Challenge of the Social Protection of Platform Workers? (fn. 1), pp.

1. What is "Work"?

The main aim of income replacement schemes, addressing risks such as old age, unemployment and work incapacity, is to compensate the loss of income when persons are no longer in a position to work. For these schemes it is therefore rather crucial to have the concept of work well-defined, since income originating from work is the main element around which the eventual protection is organised. This is true for schemes with both a Bismarck and Beveridge signature, even if in Bismarckian social security schemes the work-related income has even more relevance for financing purposes (employee and employer contributions levied on wages).

Which activities are now considered to be work? Normally, two main elements are taken into account for the application of social security: the regularity of the activity and the intention to earn one's living from the performed activities. Most of the social security schemes are still based on the assumption that the activity should be of a regular and repetitive nature in order for it to be considered as a genuine work activity; this applied at least for the default case reflecting standard work in subordination (the "9-to-5" job).

When applied to platform work, it is not always easy in reality to find out which of the activities can be considered as labour-related activities and which cannot. This might be due to the fact that the scope of the activity (the gigs) is too marginal in nature to be considered as genuine work; or it may be due to the fact that the generated income can only be indirectly related to the platform activity (e.g. sponsorship granted to influencers). In some cases, the activity may generate enough financial means but the underlying activity cannot be considered as work (lack of regularity).

A second issue refers to the relationship between work and income: what should be done when income is less work-related and based more on returns from goods such as capital or property? It is currently already hard to make the division between professional income and return from (invested) capital for the self-employed, and the latter kind of income source is traditionally left out of social security financing.[10] In many non-standard

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219-241; *Barrio, Alberto/Montebovi, Saskia/Schoukens, Paul*, The EU Social Pillar: An Answer to the Challenge of the Social Protection of Platform Workers?, in: Devolder, Bram (ed.), The Platform Economy. Unravelling the Legal Status of Online Intermediaries, Cambridge – Antwerp – Chicago: Intersentia 2018, pp. 227-258.

10 *Schoukens, Paul*, Adequacy and Financing. Thematic Discussion Paper. Report for European Commission, Brussels, 2020 (publication online to follow).

work forms, the distinction between work-related income and other income sources is becoming blurred, especially in the case of the prosumers, platform workers, employee shareholders, self-employed shareholders also performing professional activities within the ambit of the company in which they are shareholders, etc. Work-related social security schemes face problems in addressing income that is not strictly related to work, both from the financing side (income as basis for the levy of contributions) and from the income replacement side (previously earned income as basis for the calculation of benefits). Income sources that are not strictly work-related (such as income in nature, return on investment, income from movable or immovable property) disqualify as a source for social security purposes. But is this not somewhat unrealistic as in reality people may live on these income sources and hence may risk losing them when confronted with certain types of social risks?

2. *Who is the Employer?*

Determining the (main) employer is a key aspect for social security, in order to identify who is responsible for paying contributions (financing), deciding on redundancy (unemployment) and for granting the income replacement (work incapacity). Nevertheless, this is not always straightforward for several non-standard forms of work. Temporary agency work is a field in which a great deal of effort has been put into overcoming this problem, mostly through ensuring that agency companies remain responsible for satisfying the obligations of the employer with regard to contributions. However, this challenge reappeared with significant force in the situation of platform work. Whether these workers are employed by the users of the platform or the platform itself is an on-going discussion, the outcome of which will have different consequences (employer responsibilities for social security). Finally, it should be noted that, in the case of forms of work as flexible as platform work, the same person is often active on several platforms almost simultaneously (while, at the same time, the person is not necessarily active on all the platforms he is registered with), and these platforms may be based in different countries, making it extremely difficult to track employers and work that has been performed (see also below).

3. Irregular Work Patterns

This problem is particularly clear in the case of thresholds to access certain social insurance schemes, i.e. the requirement of having paid contributions for a certain time within a specific period. As a consequence, persons in atypical work forms are pushed out of social insurance schemes, as even though they may end up accumulating a multitude of fixed-/part-time work assignments, each of these assignments is too small to be taken into account for social insurance purposes.

Again, regulations on temporary agency work have pioneered in tackling this issue, and in some European countries employers, agencies and trade unions have collaborated to create particular provisions to compensate for some of the periods of inactivity which characterises the fragmented careers of temporary agency workers. Another approach is to considerably lower the threshold for accessing social insurance schemes such as the unemployment scheme.[11] Labour instability may also hinder the tracking of periods of employment, as in some cases the person may perform work for a few hours in a row with one employer, after which long periods of inactivity may follow. Social security schemes should be redesigned to accommodate these irregular work patterns where active periods followed by periods of inactivity and/or work periods generating low income alternate with high-income work assignments. Otherwise, schemes may miss out on a large group of work activities that do not coincide with the traditional work organisation characterised by full-time work assignments within a fixed working time period (9-to-5 jobs).

4. Virtual Mobility of Platform Workers

In a similar manner, the discussion on the geographical aspect of work will increase. New work forms applied in e.g. telework and platform work are becoming more virtual. Most of our (work-related) social insurance schemes start from a very physical concept of work: it is required that the work is physically performed on a particular territory in order to be made subject to a certain social security system. The EU coordination rules (in particular Title II of Regulation (EC) 883/2004) follow this logic closely us-

11 *Barrio, Alberto/Montebovi, Saskia/Schoukens, Paul*, The EU Social Pillar: An Answer to the Challenge of the Social Protection of Platform Workers? (fn. 9), pp. 227-258.

ing the *lex loci laboris* principle as a basis to indicate the competent state in case of cross-border activities: ultimately, the physical place where the person is working determines the Member State competent for social security, such as in the *Partena*-case.[12] But also in national social security law it is often required that work is performed on the territory where an employer is based in order to have it taken into account for social security.

Can this still be upheld as a basic assumption now, in a world where people organise their work in an increasingly virtual manner? Virtual work as often applied in platform work makes long-distance work relations possible, where employers and employees are well-connected online but remain geographically very distant from each other. Moreover, due to IT tools it is now much easier to carry out (parts of) the work at home. The "geographical" relationship between employees, self-employed persons and employers on the one hand, and the Member States on other hand will become more virtual and hence will further complicate the applicable law rules in their application.[13] Persons do not necessarily organise their work anymore in a given place.

IV. The EU Recommendation on Access to Social Protection

1. The Recommendation as a Concrete Outcome of the European Pillar of Social Rights

With the idea of socially counterbalancing the economic financing of the monitoring procedures applied by the EU in the European Stability Pact[14], the EU Commission launched the European Pillar of Social Rights under

12 ECJ of 27 September 2012, Case C-137/11, Partena vzw v Les Tartes de Chaumont-Gistoux *SA*, ECLI:EU:C:2012:593; see also: *Schoukens, Paul*, Social Security Coordination and Non-Standard Forms of (Self-)Employment, in: Revue belge de Sécurité sociale, (2019) 2, pp. 81-112.

13 For some examples, see the conference Employment, Social Policy, Health and Consumer Affairs Council (EPSCO), The Future of Work, Making it E-Easy, Tallinn, Estonian Presidency, 13-14 September 2017, https://www.eurofound.europa.eu/sr/events/future-of-work-making-it-e-easy-eu-presidency-estonia. Accessed 18 June 2020.

14 *Beke, Joris/Schoukens, Paul*, Fighting Social Exclusion under EU Horizon 2020. Enhancing the Legal Enforceability of Social Inclusion Recommendations?, in: European Journal of Social Security, 16 (2014) 1, pp. 51-72 and *Schoukens, Paul*, EU Social Security Law: The Hidden "Social" Model. Inaugural Address, Tilburg: Tilburg University 2016.

the Presidency of Juncker. The programme, which should serve as a reference framework for assessing national social policies, contains a series of fundamental social rights that will undergo further development via concrete European actions. In the end, The European Pillar of Social Rights[15] was jointly announced by the European Parliament, the Council and the Commission in November 2017; it set out 20 principles and rights to support fair and well-functioning labour markets and welfare systems.

Principle 12 of the Pillar states that "regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed have the right to adequate social protection". In order to have this principle further developed, a proposal for a Council Recommendation was launched by the European Commission on access to social protection for workers and the self-employed,[16] finally adopted in November 2019.[17]

Interestingly, the Recommendation addresses all atypical forms of work, and calls for proper social protection for different types of work, even though they may be organised in a different way than traditional standard work. An essential principle in the proposal for a Recommendation is the neutral character of the labour status of the worker or self-employed worker: the basic principles shaping social security are equal for all professionally active persons, whatever the kind of work or work status; yet at the same time, social security should in its application respect as much as possible the specific working circumstances under which the work is carried out. In a way, it applied the general principle of equal treatment (underlying Union citizenship as per Article 18 TFEU) to work-related social security: the same rules should apply to groups of persons that are comparable; however, by the same token, in situations where groups are different, the rules need to be adapted in order not to apply one and the same rule to different groups. The Recommendation, which seeks to ensure minimum standards in the field of social protection of workers and the self-employed, applies to all traditional social insurance schemes related to labour (i.e. unemployment benefits, sickness and health care benefits, maternity

15 European Commission, Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights, COM (2017) 251.

16 European Commission, Proposal for a Council Recommendation on Access to Social Protection for Workers and the Self-Employed, COM (2018)132.

17 Council Recommendation (EU) of 8 November 2019 on Access to Social Protection for Workers and the Self-Employed (Recommendation Access Social protection), OJ C 387/1, 15 November 2019.

and equivalent paternity benefits, invalidity benefits, old-age benefits, and benefits in respect of accidents at work and occupational diseases).[18]

2. *Access to Social Protection*

The Recommendation regulates access across four main angles: formal access and effective access; adequacy of benefits and transparency. The Recommendation makes thus a clear distinction between formal and effective coverage, the first referring to the elements conditioning the personal scope of (work-related) social insurance, the latter mainly targeting entitlement conditions to benefits. Formal coverage stems from existing legislation or collective agreements setting out that the workers are entitled to participate in a social protection scheme in a specific branch.[19] Effective coverage refers to real protection in cases where workers and self-employed persons have the opportunity to accrue adequate benefits and the ability, in the case of the materialisation of the corresponding risk, to access a given level of benefits.[20]

a) Formal Access

In its final version that was accepted by all Member States the requirements regarding formal access have been levelled down for the self-employed. As some Member States had difficulties with the idea of a mandatory coverage for the self-employed for the eventuality of work incapacity and work accidents, it has been decided to provide at least a voluntary coverage for this group of workers. However, this creates a somewhat unbalanced approach by the Recommendation from the outset: it is difficult to strive towards a comparable protection for all professionally active people, yet at the same time accept that for the self-employed, access to social protection can be organised on a voluntary basis. This is especially problematic for the group of platform workers, as the issue of legal qualification – are they wage-earners or self-employed – is still strongly disputed in the

18 But not family benefits; Article 3.2 of Recommendation (fn. 17). Not directly linked to work-related protection, social assistance has been left out as well from the scope.
19 Article 7, Sub. e of Recommendation (fn. 17).
20 Article 7, Sub. f of Recommendation (fn. 17).

majority of Member States. The reason for this is the limited protection the self-employed "enjoy"[21] and hence the reduced cost of hiring them as self-employed on platforms. Hiring platform workers as self-employed freelancers is part of a deliberate business policy as (some major commercial players in the) platforms want to cut labour costs as much as possible. Asking now from Member States to make access to social protection available on a voluntary basis will not change much in this respect as the majority of low-income (and high-income) self-employed do in the end not take out social insurance when they are given the freedom to do so.[22] The original objective to create an equal-level playing field for all workers is thus seriously undercut in the Recommendation.

b) Effective Access

Of particular interest for platform workers are the provisions dealing with effective coverage (Articles 9-10). The Recommendation establishes that rules governing contributions and entitlements should not hinder the possibility of accruing and accessing benefits due to the type of employment relationship or labour market status; and, moreover, that differences in the rules governing the schemes between labour market statuses or types of employment relationship should be proportionate and reflect the specific situation of beneficiaries. Platform work is characterised by specific work patterns, often leading to intermittent work periods (see above). Minimum qualifying periods and minimum working periods may prove to be problematic to opening entitlement to benefits for these workers.

However, the Recommendation states that such minimum conditions should not impede the effective building-up of social protection for per-

21 *Spasova, Slavina/Bouget, Denis/Ghailani, Dalila*, Self-Employment and Social Protection: Understanding Variations between Welfare Regimes, in: Journal of Poverty and Social Justice, 27 (2019) 2, pp. 157-175 and *Spasova, Slanina/Bouget, Denis/Ghailani, Dalila/Vanhercke, Bart*, Access to Social Protection for People Working on Non-Standard Contracts and as Self-Employed in Europe. A Study of National Policies, European Social Policy Network (ESPN), Brussels: European Commission, 2017.

22 European Commission, Behavioural Study on the Effects of an Extension of Access to Social Protection for People in All Forms of Employment, Luxembourg: Publications Office of the European Union, 2018 and *Schoukens, Paul*, Extending Formal Coverage. Thematic Discussion Paper. Report for European Commission, Brussels, 2019, https://ec.europa.eu/social/BlobServlet?docId=21913&langId=en. Accessed 18 June 2020.

sons with an irregularly built up insurance record (Article 9, Para. 1, Sub. a); the rules should be justified by a clear objective (e.g. financial sustainability, insurance logics such as the respect of equivalence and/or the combat of abuse); the reason for their introduction should thus be unrelated to the labour status of the worker.

Consequently, time periods for the definition of qualifying periods or waiting periods (full-time work equivalents per day or per week) may for example be better reformulated in smaller time units (working hours), under the condition that the total result of the smaller time units reflects the same overall volume as that required for standard work. Similarly, the reference period during which the work time or income has to be earned can be stipulated in a more extensive way as long as a comparable average in workload or income is reached (e.g. work hours per year instead of per day, week or month: e.g. at least X euros earned on average on a monthly or yearly basis instead of per week or per month).

c) Adequate Benefits

The Recommendation calls for an adequate level of protection (Article 11). What constitutes adequate protection? And how can adequate benefits levels be guaranteed if at the financing side the income that serves as a basis for the benefits calculation was anything but adequate? The Recommendation remains vague about the level of benefits as no clear figures or references are to be found in the document: what is an "appropriate income replacement" or "a decent standard of living"? What is the minimum? The prior observation (17) in the Recommendation provides further guidance indicating what benefits adequacy could mean: "… [s]ocial protection is considered to be adequate when it allows individuals to uphold a decent standard of living, replace their income loss in a reasonable manner and live with dignity, and prevents them from falling into poverty while contributing, where appropriate, to activation and facilitating the return to work".

Although general in its wording, the Recommendation nevertheless refers to some protection levels that must be respected by the systems. The bottom line is that workers and the self-employed, when on benefits, should be kept out of poverty. Benefits levels should not fall below minimum subsistence levels as applied in the social assistance schemes. Likewise, the minimum social pension for a person having worked a full career should, for example, not fall below the minimum subsistence applied in social assistance.

The starting principle for standard work is a reasonable income protection so that the beneficiary can live in dignity. In this way, the Recommendation strongly reflects the basic philosophy behind our European social security systems, in which social insurance schemes and social assistance schemes overlap when it comes to income protection. The latter schemes are designed to provide residual protection against poverty if labour market (policies) and social insurance fail to do so. Consequently, social protection schemes must do more than (only) protect against poverty: they must guarantee reasonable protection against loss of income (from work). Of course, with no concrete indications of the requested minimum income replacement ratios (such as we e.g. could see in the minimum standard conventions), the condition to guarantee adequate benefits remains difficult to monitor. And although the Recommendation calls for an approach to lower the financial burden on workers and the self-employed with a low income, the fundamental question remains what kind of social protection is to be guaranteed to persons with a structural low income. Providing decent levels of social protection may work well when the vast majority of the professionally active population work in standard work relationships. It becomes more challenging though when a growing number of workers or self-employed workers are on low incomes or do not have regular work.

d) Transparent Access

The condition of transparency refers first and foremost to clear rules that are openly communicated to the citizens. Yet, it refers as well to the design of the schemes; these should not be made too complicated or too costly to be applied by the workers and the self-employed. Especially in relation to the latter group, there should be enough transparency in design, with not too many complicated conditions to comply with. Especially for freelancers with limited income or platform workers who earn small incomes on an irregular basis, applying complicated contribution assessments will in the end be detrimental to system compliance; [23] by the same token, the underlying logic of benefits accrual should be kept simple for persons who bear the responsibility of contribution payment themselves, reflecting the idea of benefits equivalence: entitlements of the self-employed should re-

23 *Schoukens, Paul*, Adequacy and Financing (fn. 10).

flect their actual earnings (adequacy of benefits).[24] Moreover, the Recommendation states that Member States should ensure that entitlements are accumulated, preserved and transferable across all types of employment and self-employment statuses and across economic sectors (transferability of entitlements).[25] In a society where persons are increasingly starting to combine (professional) activities the design of the social protection system should be kept transparent allowing a gradual and integrated benefits accrual across the various income sources.

V. *The EU Recommendation: Are the Needs of Platform Work Sufficiently Addressed?*

The Recommendation regarding access to social protection was not designed specifically with platform work in mind. Platform work came only recently to full exploitation after some major companies saw the "commercial" potential of the sharing economy. The preparatory works for the Recommendation were already too advanced in their development to incorporate this emerging new atypical work form in its regulations. But as the Recommendation had from the outset the ambition to address all different work forms this was probably not necessary; its design should make it versatile enough to incorporate new developments in work organisation, such as all kinds of platform work. Platform work does challenge the Recommendation in some aspects, three of which will be given further attention: the difference between self-employment and wage-earnership when it comes to formal access; adequacy and low-income workers; and finally, the lack of definition of work.

1. *Platform Work: Self-Employment or Wage-Earnership?*

Compared to the proposal in which the option of voluntary access was restricted to the risk of unemployment, the final adopted version levelled down the condition on formal access for the group of self-employed workers. Article 8 now calls upon Member States to improve the formal coverage and have it extended to all workers, regardless of the type of employment relationship, on a mandatory basis; for the self-employed though, the

24 Article 14 of Recommendation (fn. 17).
25 Article 10 of Recommendation (fn. 17).

extension should be at least on a voluntary basis and, where appropriate, on a mandatory basis. Even though one can interpret the Recommendation in an extensive way to mean that mandatory coverage is the standard approach for having social protection organised for all professionally active workers[26], there remains a legal distinction in place between the groups of wage-earners and the self-employed. This distinction goes against the fundamental philosophy of the Recommendation which aims at an equal approach towards social protection for all working groups; distinctions are still accepted but should be restricted to the application of the principles, which can be adapted to the specific working circumstances of the working groups at stake (see above). Choosing between mandatory and voluntary coverage is not in line with this; it goes against the very essence of social protection, which is to be organised on a mandatory basis in order to generate enough redistribution between the groups (of workers).

When applied to platform work, we can see that the distinction between protection levels across the self-employed and wage-earners is one of the major problems at stake. The legal discussion in social law on platform work is still largely focused on the legal qualification of the work activities[27]: are they wage-earners or are they to be considered as self-employed? The vast majority of platforms try to have them contracted as self-employed workers, essentially to keep the labour costs as low as possible. For some platforms, contracting cheap labour is the cornerstone upon which their business is based.

In relation to the Recommendation, a potential weakness could be the differentiation between workers and the self-employed when it comes to guaranteeing social protection. Apart from the idea of equal protection, the Recommendation also aspires to an equal-level playing field across work groups; ultimately, it should not matter for (the cost of) social protection whether one contracts a worker or a self-employed person. The reality of platform work shows that, in reality, it does matter very much indeed. The fact that the self-employed have the choice to be protected (voluntary protection) will have the effect that in the end they will not be protected at all.[28] The Recommendation is running short here: distinguishing

26 *Schoukens, Paul*, Extending Formal Coverage (fn. 22).

27 *Rocca, Marco*, Perspective internationale: les Juges face aux Plateformes, in: Lamine, Auriane/Wattecamps, Céline (eds.), Quel Droit social pour les Travailleurs de Plateformes?, Brussels: Anthemis 2019.

28 European Commission, Behavioural Study on the Effects of an Extension of Access to Social Protection for People in All Forms of Employment (fn. 22) and *Schoukens, Paul*, Extending Formal Coverage (fn. 22).

the self-employed from workers from the outset with regard to the formal coverage risks undermining the very objectives for which the Recommendations stands: equal levels of protection and the safeguarding of an equal-level playing field for all workers. To limit the potential damage caused by this voluntary protection clause, this clause must be interpreted strictly: it is to be restricted to situations where the organisation of coverage against particular social risks is too challenging for the group of self-employed persons (such as might be the case for work accidents or unemployment).[29] For the other eventualities, mandatory coverage is the key principle to be followed, also by the self-employed.

2. *Low-Income Groups Covered by the Guarantee of Adequate Benefits?*

Another major challenge for platform work is low income and how to take this into account for the organisation of social protection. The Recommendation focuses mainly on the work-related social protection risks. From a point of view of sustainability, it is challenging to guarantee adequate (minimum) benefits that are structurally of a higher level than the income on which contributions were paid in the past. This is rather problematic. Platform work is known to have amid the groups a strong proportion of persons earning a low to very low income. And even though some of these workers engage in platform work in terms of a second job, the question remains of how to take into account these low-income levels for the organisation of work-related social protection schemes. The national approaches diverge in their answers, although we notice a strong resurrection of all kinds of minimum thresholds excluding platform workers from (effective access to) social protection.[30]

The Recommendation calls now for guaranteeing an effective social protection and thus for organising the system so that scattered insurance records should not be disproportionally sanctioned in social protection systems. However, it remains silent as to what should be guaranteed in terms of decent levels of social protection; similarly, it remains silent about what kind of decent protection „should be guaranteed if the previous (underlying) income basis (of the worker) was too low during his/her working life to justify a (decent) minimum protection.

29 *Schoukens*, *Paul*, Extending Formal Coverage (fn. 22).
30 *Schoukens*, *Paul*, Adequacy and Financing (fn. 10).

Overall, Article 11 of the Recommendation calls for making sure that (non-standard) workers and the self-employed should not end up in poverty. Article 11 refers to the overall social protection system and the national circumstances that have to be taken into account in that respect. By doing so, it acknowledges that work-related social protection cannot address this problematic issue on its own; when shaping redistribution these systems are still bound by other principles, such as sustainability and equivalence, principles that limit the levels of redistribution that can be put into the system. It is thus an invitation to have a further look beyond the social protection schemes (in the narrow sense) and to see the interplay with other social schemes, such as social assistance, (health) care, family policies and social housing. In order to keep these references to other protection schemes manageable, it would be helpful to make them somewhat more concrete in the monitoring of the Recommendation. First, it would be recommendable to state what is understood by benefits adequacy (and thus indirectly what is expected from the other schemes not targeted by the Recommendation to achieve this). The fact that the EU, but also other international organisations such as the ILO and the Council of Europe, have already developed a substantial arsenal of social indicators enabling the monitoring of social outcomes is promising in this regard. The Recommendation could use a coherent measurement framework with regard to adequacy and in that way Article 11 can be seen as an invitation to coherently bring together these indicators in order to provide some guidance on benefits adequacy and on the positioning of social protection benefits, minimum benefits and social assistance schemes when it comes to providing social protection. Secondly, in order to reach the goal of adequacy, social insurance protection schemes will have to be aligned well with schemes such as social assistance and family benefits.

3. What is a Professional Activity and What is Not?

The Recommendation does not define what is considered to be work or what a professional activity must consist of, nor does it provide its own definitions of workers and the self-employed. There is indeed something to be said about keeping these concepts open and having them gradually defined over the years on the basis of national reporting. After all, the Recommendation is mainly targeting an approach whereby national systems are monitored; using strict legal definitions from the outset does not work very well with this approach.

The case of platform work does, however, immediately show some limits of this approach: what is to be considered as work and professional income becomes increasingly blurred. If social protection systems do not start to recalibrate their scope of application (and thus the underlying concepts, such as work and income, that fall within this scope) they may lose out on the new and evolving realities of work. Already with regard to self-employment we notice that it is difficult to delimit precisely which income sources are work-related and which are related to capital. This is also the case with platform work. Platform work itself is possibly the exponent of a societal evolution where people's main concern is, in the first place, to earn sufficient income to earn a living. This can be on the basis of a regular standard job (as had for many decades been the main tool for earning sufficient income), but it can also be through other means in place of or in combination with a job. Taking into account the latest evolutions in non-standard work (platform work), increasing emphasis is put on income protection rather than on the protection of labour income.[31] More than ever before, persons tend to combine a series of activities and/or live from various income sources (from movable and immovable property). Social protection should develop alongside this evolution and incorporate these various income sources both into the financing of social protection and the payment of benefits. Some systems have already started to move in this direction, hence it is a call for the Recommendation to incorporate this evolution as well and to apply a broad definition of work and income in order to do what it had originally intended to do: monitor the design of proper social protection systems where all workers are treated equally in the protection of their social needs, regardless their source of professional income.

VI. An Alternative to Benefits Harmonisation: Towards an EU Financing Fork?

The Recommendation can be considered as a positive evolution in the standard-setting history of the EU, be it because from a legal point of view

31 *Barrio, Alberto/Schoukens, Paul*, The Changing Concept of Work (fn. 8), p. 221 ff; European Commission, Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Council Recommendation on Access to Social Protection for Workers and the Self-Employed, Strasbourg, 13 March 2018, p. 32 ff.

nothing considerably happened since 1992.[32] However, at the same time some criticism arose, most often referring to the weak legal character of the Recommendation. This is especially true knowing that originally the Recommendation was conceived as an EU directive, which as an instrument could have had a stronger legal impact than the Recommendation, where ultimately any sanctioning is restricted to naming and blaming the Member States which do not follow the Recommendation. Moreover, the fact that the Recommendation weakened the formulation in relation to the formal access conditions for the self-employed has also been strongly criticised, as well as the too general wording in relation to benefits adequacy; the trade unions expected a clearer stipulation of what is considered to be the minimum income replacement for social protection benefits that Member States have to respect (somewhat in the style in which the minimum standard-setting instruments such as ILO Convention 102 and the European Code of Social Security do so).[33]

As mentioned earlier, another point of criticism is the fact that no clear definitions have been developed for the description of the professional groups for which standards have been set: workers, self-employed, and non-standard workers.[34] Consequently, the Recommendation does not add very much in the ongoing legal fight on whether platform workers are to be considered to belong within the group of wage-earners or that of the self-employed. Similarly, the Recommendation does not give much direction as to the protection to be guaranteed for the emerging group of in-between workers that has been identified by quite some Member States, as a mid-group of sorts between wage-earners and the self-employed (such as the "*parasubordinati*" in Italy and the "*trabajador autónomo economicamente dependiente*" (*TRADE*) in Spain); some see this third group to be representative of the growing group of platform workers. From a perspective of the Recommendation, it is however not clear which standards are to be respected for these "in-between" workers; at least voluntary protection such

32 The year during which were enacted: Council Recommendation (EEC) 92/441 of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems, OJ L 245, 26 August 1992 and Council Recommendation (EEC) 92/442 of 27 July 1992 on the convergence of social protection objectives and policies, OJ L 245, 26 August 1992.

33 *Schoukens, Paul*, Extending Formal Coverage (fn. 22).

34 *Barrio, Alberto/Montebovi, Saskia/Schoukens, Paul*, The EU Social Pillar: An Answer to the Challenge of the Social Protection of Platform Workers? (fn. 1), pp. 219-241.

as for the self-employed, or mandatory protection for all contingencies as is applicable for wage-earners should be introduced (see also above).

However, one should not lose sight of the fact that the Recommendation and, more specifically, its application will be monitored, and as has been mentioned before, the strength (or the weakness) of the application of this instrument will also depend on how additional contents and follow-up will be given on the occasion of this control process of monitoring. In case some of the country recommendations made by the EU are picked up for the annual semester monitoring, the legal impact may become even stronger than originally foreseen by the designers of the Recommendation on access to social protection.[35]

For possible future initiatives the EU might think of an instrument that targets, in the first place, the financing of social security, indicating at once the minimum investments but also the limits of the contributions to be made for social protection schemes. Recently we have pleaded for this (rather new) approach after we came to the conclusion that both in international and European law not much attention has been paid to the financing side of social security.[36] In short, we can summarise this idea as the concept of the financing fork. We will explore this concept more profoundly in the following paragraphs.

So far, lawyers have mainly focused on the benefits side, if only with little impact. On the other hand, the financial side of social security has been the focus of the monitoring of systems at European level from a fiscal-financial view (addressing the national budgets and inevitably looking at social security mainly as a cost). Perhaps the time has come now for the financial side to become the object of legal harmonising measures that deal with the concerns which from the start called for the wide diversity of national social security schemes to be addressed. In other words, rather than trying to overcome (only) the differences in the benefits side of social security, we should try to develop some harmonising standards with regard to the financing of national social security schemes. This would optimally respect the national competence to define a state's social security system (see above), yet at the same time take into account the concern about the socio-economic and financial impact of social security on the budgets. It also allows for a direct address of the main arguments that the EU had raised

35 *Beke, Joris/Schoukens, Paul*, Fighting Social Exclusion under EU Horizon 2020. Enhancing the Legal Enforceability of Social Inclusion Recommendations? (fn. 14), pp. 51-72.

36 *Pieters, Danny/Schoukens, Paul*, Harmonising Social Security Financing, in: Van Lancker, Wim, et al., Liber Amicorum Wim Van Oorschot 2020 (forthcoming).

from the very start for the harmonisation of social security: the avoidance of unfair competition through social security; and the combatting of the social dumping phenomena. In relation to emerging platform work, "false competition" between social security systems should be a major concern; as highlighted before, the (reduction of the) employment cost of platform workers definitely plays a major part in many a business model applied by platform providers. Instead of undergoing yet another attempt to undermine the solidarity underlying all of the national social security systems, the EU should urgently call for some fair playing rules in its internal market – and respecting an equal level playing field when it comes to the cost of protecting working persons may be one of them. To that purpose, the financing (rules) of social security should be harmonised within a given bandwidth or fork. Harmonising standards with regard to the financing of social security could indeed best be developed by defining a "fork" or a "bandwidth" within which social security contributions and government subsidies to the social security systems would need to be allocated.

The basic idea is to set a minimum and maximum percentage for social security contributions to be levied on the real professional incomes and a minimum and maximum percentage for the costs of social security to be financed out of the public budget. These minimums and maximums constitute the "fork" or "bandwidth" within which national social security systems can determine the specifics of the social security benefits (e.g. amount payable, eligibility criteria, etc.).

It is obvious that in doing so, the possibilities to (ab)use social security arrangements to falsify competition between (enterprises of) Member States would be considerably reduced; at the same time, the specified fork would guarantee that each Member State allocates an adequate amount of the workers' incomes and of the state budget to social security, thus countering a rush to the bottom.

Such an approach would call for the use of some clearly defined concepts related to work and income out of work. It is expedient that future evolutions, such as we can already see emerge from platform work and the like, be taken into account. First of all, we will have to define clearly what we understand by social security and by social security schemes affected by this financing fork. Which social security schemes are to be taken into account? In an initial approach, we mainly consider the contributory social insurance schemes of the country and, specifically, the schemes that today fall under the EU coordination regulations, however excluding the special non-contributory benefits schemes. As for social assistance and special non-contributory benefits, Member States would continue to retain competence to finance these as they wish. As for other social

security benefits, they should be financed by the fork-related levy. Perhaps the cost compensating schemes, health care and family allowances could also be excluded, as these have little to do with the social charges on labour, but this would require further examination.

When it comes to social contributions, we would not make any distinction between employer and employee contributions.[37] What matters in the end is the overall social security cost for the employer (nominal wage plus employer's contribution) and what net income the worker receives for his/her work (wage minus employee contribution). We would set the "fork" for the total of the contributions, not considering the specific social risk schemes separately. All kinds of special tariffs (such as financing exemptions) for specific groups or for specific situations would have to be incorporated in the final totals of the eventual set (maximum) level of the fork. This could end up being a rather complex, but in our opinion possible procedure.

A "fork" for the social security contributions levied on the income from work (wages, professional income of the self-employed) would also require a clear definition of what is to be considered "income from work" and thus, ultimately, what is "work". This will inevitably lead to a broader definition of work and income from professional activities compared to the one we are using today (see above). Otherwise, a new danger, namely that of competition falsification, could indeed result from the emerging new patterns of work such as gig work, platform work, etc.

Furthermore, the "fork" for the amount of state subsidies (to the relevant social insurance schemes) could perhaps best be defined in relation to the share of that financing in the total cost of the social insurance schemes concerned; or perhaps, more practically, in relation to the total amount of social contributions. In the latter case the "fork" could be expressed as a fraction (or multiple fractions) of the total amount of social security contributions.

In order to keep the necessary order and structure, the EU should make a clear classification of what should be understood (for the purpose of EU law) as a contribution and what as a state subsidy. National social security levies should then, regardless of their national classification, belong to the one or the other category. Social security levies that are not (clearly) labelled in the country as social security contributions should best be allocated to either the "social contribution" or the "state subsidy" rubric; in order

37 See on this fictitious distinction: *Pieters, Danny*, Social Security: An Introduction to the Basic Principles, Alpen aan den Rijn: Kluwer Law International 2006.

to make that distinction, it could, for example, be useful to fall back on (or at least be inspired by) the labelling as it is applied right now in the existing EU coordination instruments (Regulation (EC) 883/2004). If the levy is considered to be a tax, then the proceeds should be added to the rubric of direct subventions of the state.

The question, of course, remains as to whether it will be feasible to define a minimum and a maximum of social security contributions for all EU Member States. Here too, research on the current financing of national social security schemes would be needed: What is the share of social contributions? What is the share of state subsidies? Simple questions they may seem, but they are, however, very complex to answer, requiring not only legal and social policy knowledge but also macro-economic expertise. Anyhow, let us first explore what for most EU Member States could be a reasonable "fork" of social contributions and of public subsidising of the work-based social insurance schemes.

VII. Conclusion

Platform work is challenging labour and social security law, probably more than any other (new) work form ever. Moreover, due to the fact that it gives many employers a new impetus to hire low cost work that due to its virtual character is intrinsically mobile on the global market, the question for more harmonisation in the field of social protection again comes to the fore. This new emerging form of work thus challenges national and European policy makers, in particular with regard to low-income workers (working poor) and to activities which are not of a professional nature, but from which persons (can) generate (sufficient) income to live on. Low-income work is a challenge to the sustainability of every (work-related) social insurance scheme and will in the future call for a smart co-existence of social insurance, social assistance and other welfare schemes. At the same time, the second form of work calls for the rethinking of our professional social insurances. When generating income is no longer (only) a matter of standard work, but is increasingly accompanied by other types of activities and returns from (movable/immovable) goods, it may be the right time to reconsider the organisation of social security. This may call for a broadening of the income basis for social security financing, but at the same time will demand a rethinking of our social security risks (unemployment and work incapacity in particular) and of a different way of conditioning and calculating our social security benefits. At the European level, it invites policy makers to think beyond the protection

of social benefits (social outcomes) but in turn takes interest in developing fair competition rules on the internal market: the financing of social security definitely belongs to the scope of these competition rules – hence our proposal to apply a fork or bandwidth within which Member States have to set their social security contributions. In that way, platform work is not to be considered as a threat to social security but mainly as a strong invitation to finally bring social security into the 21st century ("towards a work-related social security 2.0").