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SPECIAL SECTION

THE ACHILLES HEEL OF THE PLATFORM-TO-BUSINESS REGULATION: NO UNFAIR TERM PROTECTION FOR PLATFORM WORKERS?

Abstract

The rise of digital labour platforms has significantly altered traditional employment dynamics, creating diverse working conditions and employment relationships. Platforms create an ecosystem in which they prescribe standard contract rules, allowing more actors to efficiently find and connect with each other. In order for both consumers and platform workers to use the platform and connect, they need to accept the pre-dictated contractual terms by accepting the terms and conditions. Even though these standard contracts contribute to efficiency and reduce bargaining costs, these potential advantages can be hollowed out if there is a complete lack of actual bargaining power, which may result in unfair contract terms.

This article examines the power imbalances and unfair terms that can often be perceived in platform work contracts, particularly focusing on how these imbalances manifest in platform's terms and conditions. This article highlights the contractual vulnerabilities of platform workers by analysing the terms of five major platforms, namely Deliveroo, Uber, Upwork, Clickworker, and Amazon Mechanical Turk. It further scrutinises the effectiveness of existing legal frameworks in addressing these imbalances from a platform worker point of view, focusing on the Unfair Contract Terms Directive (UCTD) and the Platform-to-Business (P2B) Regulation while briefly touching on the new Platform Work Directive.

The UCTD provides protection against unfair terms that have not been individually negotiated, though limits this protection to consumers captured in business-to-consumer relationships. This limitation renders the UCTD inapplicable to most platform workers, as the majority are self-employed and therefore fall outside the consumer protection realm.

In the P2B Regulation, requirements for the clarity, content and modification of the terms are imposed. The question is, however, how effective this instrument is for remedying the contractual power balance and what impact this Regulation has specifically on labour platforms. While the European Commission clearly intended all online platforms to fall within the Regulation's scope, it is not entirely clear if and to what extent the Regulation applies to labour platforms. This article therefore analyses whether platform workers can be considered "business users" and whether labour platforms can be considered "online intermediation

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 DOI 10.13135/2785-7867/11331

service providers". In this analysis, significant gaps are revealed that consequently leave platform workers inadequately protected. Furthermore, an apparent discrepancy in conception between the Commission and the Court of Justice is discovered, since the former seems to believe the Regulation applies to Uber and other transportation platforms while the latter has ruled in its *Elite Spain* judgment that Uber is to be excluded from the information society service definition. A (potentially unintended) consequence of this judgment is the fact that Uber has now been seemingly precluded from the Regulation's scope, meaning that Uber drivers cannot benefit from its protective provisions. Further, the analysis of the terms and conditions showcases which of the five platforms are in compliance with the P2B Regulation and highlights substantial non-compliance, even multiple years post-implementation.
The conclusion emphasises the need for a holistic legislative approach to protect all platform actors and ensure fairness and transparency in platform relationships. It advocates for a unified framework that promotes compliance through effective public enforcement mechanisms.

JEL CLASSIFICATION: K2

SUMMARY

1 Introduction

Over the last decade, the world has witnessed a rapid emergence of digital labour platforms engaging platform workers to provide services. Some forms of platform work are physically visible in our society, for instance Deliveroo delivery couriers or Uber drivers, while other forms of platform work happen purely online, such as AI training or the performance of microtasks. Several factors may explain the proliferation of platform work, including technological, economic, and sociocultural influences. However, there is a general trend towards the precarisation of work, driven by the need for easily accessible job opportunities among vulnerable labour profiles, such as people with migration backgrounds - a trend that labour platforms often take advantage of.[1] Especially the structural vulnerability of *inter alia* low-wage migrant workers due to their regular

[1] Niels van Doorn, Fabian Ferrari and Mark Graham, 'Migration and Migrant Labour in the Gig Economy: An Intervention' (2023) 37 Work, Employment and Society 1099, 1101.

exclusion from standard employment relations, makes platform labour and its low thresholds particularly appealing.[2]

These platforms have reshaped the traditional notions of employment, creating a diverse array of working conditions and employment relations. Eurofound defines platform work as "a form of employment that uses an online platform to enable organisations or individuals (workers) to access other organisations or individuals (clients) to solve problems or to provide services in exchange for payment."[3] Platform work is therefore a broad term covering a wide range of both physical and online work forms, each with highly individualised working conditions, employment relations and policies.[4]

Due to the important differences within platform work, there is no universal work classification or set of rules that can be implemented to regulate the platform economy as a whole. Despite this diversity, one feature that almost all digital labour platforms share, is the fact that they classify platform workers as self-employed rather than as employees. In the EU, it is estimated there will be 45 million platform workers by 2025, 93% of which are – *contractually* - classified as self-employed, often involuntary.[5] *Legally*, however, it is disputed whether these platform workers are genuinely self-employed or whether this is a form of false self-employment. Numerous national courts have been confronted with the complicated task of qualifying platform workers, with varying legal outcomes that consequently cause legal uncertainty.[6] Many platforms impose this self-employed status on their platform workers to avoid steep employee costs and the related employer responsibilities.[7] Labour laws generally protect employees against unfair terms in their contracts, such as *inter alia* unjustified or arbitrary terminations or unilateral variation clauses. However, since most platform workers are classified as self-employed, the majority is excluded from the protective labour law scope and therefore unable to enjoy the same safety net as employees.[8]

In the platform economy, as opposed to standard employment, it is not unusual to witness sudden changes in the terms and conditions or seemingly arbitrary dismissals of platform workers. This can be explained by the fact that platform workers are usually not employed by individual labour contracts but rather merely need to agree to the pre-

[2] ibid 1101.
[3] Eurofound, 'Employment and Working Conditions of Selected Types of Platform Work' (Publications Office of the European Union, Luxembourg 2018) 9.
[4] James Duggan and others, 'Algorithmic Management and App-Work in the Gig Economy: A Research Agenda for Employment Relations and HRM' (2020) 30 Human Resource Management Journal 114, 116.
[5] European Council and Council of the EU, *Spotlight on digital platform workers in the EU*, <https://www.consilium.europa.eu/en/infographics/digital-platform-workers/> accessed 12 October 2023.
[6] See for example the Dutch Supreme Court ruling that requalified Deliveroo riders as employees while the Belgian court (in the first instance) contrastingly ruled that they should remain classified as self-employed; Hoge Raad 24 maart 2023, ECLI:NL:HR:2023:443 and Arbrb. Brussel (Fr.) (25e k.) nr. 19/5070/A, 8 December 2021, *JLMB* 2022, afl. 9, 390.
[7] European Commission, '*Q&A: Improving Working Conditions in Platform Work*' <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_6606> accessed 9 March 2023.
[8] World Economic Forum, '*The Promise of Platform Work: Understanding the Ecosystem*' (White Paper REF 10122019 12, 2020) <https://www.eurofound.europa.eu/et/data/platform-economy/records/the-promise-of-platform-work-understanding-the-ecosystem-0> accessed 28 February 2023.

dictated contractual terms by accepting the platform's terms and conditions. Most platform workers do not have the ability to bargain about these terms before entering into a contractual arrangement with the platform while traditionally, self-employed workers are able to negotiate their own terms and conditions. All activities that take place within the platform ecosystem are thus subject to the contractual regulation that is unilaterally provided by the platform through its terms and conditions.[9] This raises concerns about the consequent power imbalance between the platform and its platform workers and puts the latter at risk of unfair terms.

Given that this power imbalance is often encapsulated within the platforms' architecture through its terms and conditions, I have conducted empirical research of five platforms' terms and conditions in order to exemplify the apparent contractual power imbalance and unfair terms. The following five platforms were chosen for analysis: Deliveroo, Uber, Upwork, Clickworker and Amazon Mechanical Turk (hereafter: AMT). These platforms represent a diverse range of labour platforms of both U.S. and European origin and include both platforms with location-based and online platform work.[10] The difference in geographical origin allows for a potential uncovering of cultural differences embedded in the terms and conditions. Further, the legal approach can vary based on whether platform work is location-based and bound by national laws or conducted purely online, transcending national borders.

As labour law is considered a *lex specialis* of general contract law, this article will verify whether contract law might be successful in remedying this apparent power imbalance in section 2. There are two main European instruments that protect against unfair terms. Firstly, the Unfair Contract Terms Directive (UCTD) protects against non-negotiated terms if they cause a significant imbalance in the parties' rights and obligations. In section 3, this article first examines whether, and to what extent, platform workers can rely on this Directive for protection against unfair terms. Secondly, the Platform-to-Business Regulation promotes fairness and transparency specifically for platform business users and implements a set of requirements for platforms' terms and conditions. Even though the European Commission envisioned to capture the *entire* platform economy, this article uncovers some significant gaps in application and protection in the context of labour platforms in section 4. Within this section, the article evaluates the P2B Regulation three years post-implementation and assesses whether the five chosen platforms are in compliance with its requirements. Lastly, section 5 provides a brief overview of the current legal landscape of unfair term protection for platform workers and in section 6, the conclusion follows.

[9] Silvia Martinelli, 'The Vulnerable Business User: The Asymmetric Relationship between the Business User and the Platform' (2020) 2 European Journal of Privacy Law & Technologies 84.

[10] Uber (U.S.) and Deliveroo (U.K.) are platforms that offer location-based services, respectively transportation and food delivery services, whereas Upwork (U.S.), Clickworker (Germany) and Amazon Mechanical Turk (U.S.) are platforms that have a global reach with purely online services, mostly consisting of online freelancing and the crowdsourcing of various microtasks such as data entry and online surveys.

2 Contract law remedies to a power imbalance

Traditionally, there are various legal instruments to remedy a concentration of power and the resulting power imbalance. Generally, labour law, competition law and contract law have all developed some mechanisms to regulate situations where information deficits and unequal bargaining positions reduce the weaker party's freedom.[11] As labour law is mostly inapplicable to self-employed platform workers and is considered a *lex specialis* of general contract law, the scope of this article is limited to contract law solutions that could remedy the contractual power imbalance and the related risks of unfair terms.

There is a spectrum of possible legal responses to new disruptions: on one end is the option of extending the reach of existing legal rules and principles to the specific challenges brought about by the disruption, possibly with minor adjustments.[12] On the other end is the option to start from the specific challenges and develop new and tailored legal solutions to effectively deal with those. In this section, I will discuss and evaluate both ends of this legal spectrum: firstly, I will focus on current legal remedies in contract law, and more specifically on the Unfair Contract Terms Directive (UCTD) to assess whether those provisions can be used to remedy the power imbalance in labour platforms. Secondly, in section 4, I will look at a recent and more specifically tailored European intervention, namely the Platform-to-Business Regulation 2019/1150 and assess whether and to what extent it could resolve the existing challenges.

2.1 General contract law in a platform context

Platforms provide the architecture that shapes how supply and demand are matched and how a vast number of individual contracts are formed.[13] Digital technologies and algorithms are used to find, select and connect potential contractual counterparties. This digitalisation has been considered by the legislators, mostly from the demand side from the consumers' perspective. However, challenges also emerge on the supply side, concerning the supply of services by platform workers through the use of digital platforms.[14]

Classic contract law is based on the conception of a contract as a static, bilateral consensus, which sets the conditions for all future transactions.[15] In traditional contracts, a revision of the contract happens through a mutual renegotiation. Platform contracts, on the contrary, get perpetually revised and changed through the unilateral updating of the

[11] Ton Hartlief, 'Freedom and Protection in Contemporary Contract Law' (2004) 27 Journal of Consumer Policy 253, 258.
[12] Christian Twigg-Flesner, 'The EU's Proposals for Regulating B2B Relationships on Online Platforms – Transparency, Fairness and Beyond' (2018) 7 Journal of European Consumer and Markets Law 4.
[13] Christoph Busch and others, 'The Rise of the Platform Economy. A New Challenge for EU Consumer Law?' (2016) 5 (1) Journal of European Consumer and Market Law 3.
[14] Paola Iamiceli, 'Online Platforms and the Digital Turn in EU Contract Law: Unfair Practices, Transparency and the (Pierced) Veil of Digital Immunity' (2019) 15 European Review of Contract Law 392, 397.
[15] Ole Hansen and Hamish Ritchie, 'Unilateral Variation Clauses in Professional Platform-User Agreements' (2023) 8 CEPRI Studies on Private Governance.

platform's terms and conditions. All five investigated platforms had 'unilateral variation clauses' stating that the terms or the agreement could be changed or revised at any time. Some platforms such as Uber and Clickworker incorporated that the business users would be informed in advance and had the right to terminate their account in case they did not agree. Upwork's terms stated that there would be a 30 days' notice period though only for "substantial changes". Other platforms like AMT stated that they may modify, suspend or discontinue the agreement at any time and without notice, while continued use of the site constitutes the worker's acceptance of the modified terms. These examples demonstrate that the practice of unilaterally modifying the terms to an agreement is widespread in the platform economy. These unilateral variation clauses are therefore a borderline feature of contract law, undermining the fundamental premise in contract law that requires a reciprocal consensus.

2.2 Unfair Contract Terms in Adhesion Contracts

Contracts of adhesion, also called *standard form contracts*, are a welfare-enhancing feature of modern commercial life. To make commerce more efficient, templates where all terms and conditions are already prepared by one party - 'adhesion contracts' - were introduced.[16] These contracts of adhesion are offered on a take-it-or-leave-it basis to the weaker party since the economic power of the business prohibits any meaningful negotiation of the pre-dictated terms.[17] Both for firms and consumers, the uniformity of such contracts could be a benefit, reducing the transaction costs and energy that go into reading, understanding and negotiating every term.[18] Regardless of the benefits, the party 'adhering' to the contract (*in casu*, platform workers and also consumers) is always in a position of inferiority towards the stipulant and is consequently considered vulnerable and in need of protection, regardless of their quality.

However efficient adhesion contracts may be, there is always a risk that the platform's terms will favour its own position given that platform workers find it difficult, if not impossible, to (attempt to) negotiate more balanced terms.[19] Thus, platforms may impose unfair terms to the adherent, either because the latter consents without knowing the contractual clauses (for example when ticking a box without actually reading the contract) or even while knowing the contractual terms but accepting because they felt constrained by the need to conclude the contract.[20] In today's global trade, adhesion contracts are a

[16] Dr Rukhsana Shaheen Waraich, Muhammad Fayaz and Hayyan Zahid, 'Consent Theory and Adhesion Contract: A Critical Analysis of Contemporary Global Business Practices' (2022) 14 Business & Economic Review 73, 74.
[17] Martijn W Hesselink, 'Unfair Terms in Contracts between Businesses' in J Stuyck and R Schulze (eds), *Towards a European contract law* (2011) 133.
[18] Carmen Tamara Ungureanu, 'Cyberspace, The Final Frontier? Concluding and Performing Agreements. Unfair Terms in B2B in Adhesion Contracts' (2021) 67 Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice 9, 10.
[19] Twigg-Flesner (n 12) 3.
[20] Ungureanu (n 18) 12.

useful tool to form agreements in a more expeditious way. However, the power balance needs to be restored to ensure a predictable market that is characterised by fair trade and fair contracts.[21]

3 The Unfair Contract Terms Directive (UCTD)

3.1 European rules for unfair terms

As far as legislative intervention goes, the European Union has harmonised rules in relation to unfair contractual terms in the Unfair Contract Terms Directive ("UCTD").[22] The "unfair term" notion is defined in this Directive as "a contractual term which has not been individually negotiated, if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."[23] The UCTD contains an Annex in which it exemplifies terms that can be regarded as "unfair", such as *inter alia* terms which enable the supplier to alter the terms of the contract unilaterally without a valid reason specified in the contract (Annex (1)(j)), terms which enable the supplier to terminate the contract without reasonable notice except where there are serious grounds for doing so (Annex (1)(g)) and terms which authorise the supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer (Annex (1)(f)).

As previously discussed, in almost all cases of platform-to-worker as well as platform-to-consumer contracts, the terms and conditions are unilaterally drafted by the platform in advance. When assessing terms and conditions of digital labour platforms, it can therefore be assumed that they have not been individually negotiated and potentially cause a significant imbalance in the parties' rights and obligations. Whether the UCTD effectively applies to platform-to-worker contracts and whether platform workers can consequently benefit from its unfair term protection, will be discussed below.

3.2 Scope of protection: platform workers excluded?

The *ratio legis* of this judicial review of contract terms provided in the UCTD is a form of weaker party protection that is meant to compensate for unequal bargaining, information asymmetries and to protect against abuse of power in one-sided standard contracts.[24] This *ratio legis* is well entrenched in European law as the UCTD explicitly refers to this reason as the justification for the control of unfair terms. Moreover, since

[21] ibid 22.
[22] Council Directive (EEC) 93/13/EEC on unfair terms in consumer contracts [1993] OJ L 95, 29, 34.
[23] ibid 3.
[24] Hesselink (n 17) 133.

the *Océano* judgment[25], the Court of Justice of the European Union has consistently explained the rationale of the UCTD in terms of weak or non-existent bargaining power. Even though this weak bargaining power is just as pervasively present in B2B contracting as it is in B2C contracting, the scope of the UCTD is limited to B2C contracts, making consumers the sole beneficiaries of its provisions.[26] As the vast majority of workers are self-employed (*supra*), the UCTD and its unfair contract term protection are inconsequential for most platform workers.

This seemingly makes sense as traditionally, self-employed entrepreneurs are able to negotiate their own terms and conditions in B2B contracts. However, in the current platform economy, many regular individuals have had no other choice than to take the (micro)entrepreneur route to be able to perform flexible platform work. Most labour platforms use adhesion contracts that all users need to accept in order to use the application. This puts platform workers in a weak position without bargaining power. For consumers, through legislative intervention and many consumer protection laws, the balance in platform-to-consumer contracts has mostly been restored throughout Europe. For platform workers, however, the power imbalance vis-à-vis the platform and unfair contract terms have only recently become a pressing matter. The power dynamics within platforms have made clear that that line of reasoning and the rebalancing of contractual power is and should not be constrained to consumer contracts.

Nowadays, standard contract terms play an important part not only in consumer contracts, but also in trader contracts and it should therefore be borne in mind that many of the weaker-party-protection arguments apply equally to business contracts.[27] Being in a weak bargaining position vis-à-vis the platform and having to agree to terms and one-sided contracts drawn up in advance is not a condition in which only consumers find themselves. In the Explanatory Memorandum of the UCTD, it can be read that some envisaged a wider application that should not be confined to consumer protection. However, given the difficulties which would be involved in obtaining acceptance of the common rules applicable to *all* contracts, the Commission decided that the Directive should be confined to consumer contracts.[28] The issue of unfair terms in B2B contracts has nonetheless been on the agenda of the European legislator, who in 2011 discussed a proposal from a European Commission expert group to evaluate whether this Directive could be extended to B2B contracts.[29] However, this proposal was withdrawn in 2014. Even though an extension of the UCTD to B2B contracts definitely would have benefited self-employed platform workers, there is an important caveat in Article 4(2) of the UCTD,

[25] *Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98)* [2000] CJEU Joined cases C-240/98 to C-244/98.
[26] Hesselink (n 17) 134.
[27] Paolisa Nebbia, *Unfair Contract Terms in European Law* (Hart Publishing 2007) 86.
[28] Explanatory Memorandum to the 1990 Proposal, COM (90) 322 final 12.
[29] Commission Expert Group on European Contract Law, *Feasibility study for a future instrument in European Contract Law*, 3 May 2011.

which states that the assessment of the unfair nature of the terms shall not relate to the adequacy of the price and remuneration in so far as these terms are in plain intelligible language. Consequently, the widespread issue of the unfairly low wages of platform workers would in any case have fallen outside the scope of the UCTD.[30]

3.2.1 Peer platform workers

Nowadays, offering goods and services through platforms is no longer the exclusive domain of professional actors. In the platform economy, there has been an expanding peer platform market where non-professionals (so-called peers) offer all sorts of services to consumers.[31] Examples include BlaBlaCar, where individuals list empty seats in their car for long-distance rides or in some cases Airbnb, where regular individuals list spare rooms or apartments. These so-called 'peer providers' (*in casu*, peer platform workers) refer to the private individuals supplying the goods or services to 'peer consumers' who purchase, acquire or rent those goods and services.[32] These types of peer-to-peer platform markets pose all sorts of challenges for the existing rules and principles in consumer law, as it can be difficult to apply consumer protection frameworks such as the UCTD to (platform) business models that blur the boundaries between consumers and businesses.[33] The EU consumer *acquis*, as well as national consumer protection laws, operate under a dual system that applies exclusively to business-to-consumer transactions (*supra*). Consequently, any non-business-to-consumer transactions such as peer-to-peer transactions are excluded from this *acquis* as both the peer provider and the peer consumers are considered consumers.[34] However, while these peer platform workers provide services to consumers, they simultaneously appear to be in a consumer relationship with the platform. Therefore, when peers use platforms to provide services and insofar as these peer providers act for purposes outside their trade or profession[35] and do not demonstrate the durability to be considered enterprises, this platform-to-peer-provider relationship could mirror that of a business-to-consumer relationship. Consequently, the UCTD would extend to these peer platform workers, including them in the consumer protection framework for unfair terms and conditions.

[30] In relation to the generally low levels of remuneration for platform workers, the Minimum Wage Directive 2022/2041 could play a role as this instrument applies to "workers", but this falls outside the scope of this article.
[31] Helberger Natali, 'Protecting Consumers in Peer Platform Markets' (OECD 2016).
[32] ibid 7.
[33] ibid 6.
[34] Directorate-General for Justice and Consumers 'Exploratory Study of Consumer Issues in Peer-to-Peer Platform Markets' Annex 5 (2017) 41.
[35] In the Consumer Rights Directive 93/13/EEC, article 2 defines a consumer as 'any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession'.

3.2.2 National expansions of unfair contract term protection

Since the UCTD provides only a minimum harmonisation for unfair contract terms in consumer contracts, there are still differences between Member States in relation to the scope of protection. In the absence of a more specific categorisation of unfair contract terms, protection against unfair contract terms varies across Member States, as each country can choose whether or not to expand the protection offered by the UCTD to B2B contracts. As of today, many Member States have some sort of review of unfair terms in B2B contracts based on general contract law, though with varying scopes of protection. Examples of national legislation on this matter include the Belgian Code of Economic Law[36], the French Civil Code[37], the German Civil Code[38], the Scandinavian Contract Act[39] and the Unfair Contract Terms Act in the UK[40]; all legislative initiatives that strive to remedy the power imbalance in B2B contracting. However, there is a rather diverse legal landscape among the different Member States in evaluation of unfairness in B2B relationships, with a wide and variated range of protection.[41] This national approach can lead to a fragmented and uncertain platform-landscape. A concern in using private law principles and *inter alia* contract law to remedy global issues like platformisation is the level where regulation takes place. While Member States can successfully adopt national legislation to remedy the power imbalance, this may only be a cornerstone of a platform's world-wide digital arena. Boilerplate laws that transcend state's territories could result in a more global (or at least European) change, redrawing platforms' arena.

3.3 Interim conclusion

Platforms continuously reshape how contracts are formed and revised through their digital frameworks, often unilaterally. This practice of unilaterally drafting and changing the contractual terms challenges traditional contract law principles which are based on a bilateral consensus and mutual (re)negotiations. The use of adhesion contracts in the platform economy further exacerbates the power imbalance, putting platform workers in a vulnerable position and at risk of unfair terms.

In the EU, there is protection against unfair terms in the UCTD. Despite its *ratio legis* being a form of weaker party protection, the sole weaker party able to benefit from its protection are consumers under B2C contracts. Consequently, only peer platform workers acting for purposes outside their trade or profession are considered to be in a consumer-like relationship with the platform and therefore able to benefit from the UCTD. This

[36] Article VI.91/1 and following Belgian Code of Economic Law.
[37] Article 1171 French Civil Code.
[38] Article § 305 and 307 (1) German Civil Code.
[39] Article 36 Scandinavian Contract Act.
[40] Hesselink (n 17) 142.
[41] For a more in-depth discussion of where exactly the differences lie in terms of protection and evaluation of unfairness, see Johannes Koenen, Ferdinand Pavel and Stefan Krüger, *Study on Contractual Relationships between Online Platforms and Their Professional Users - Final Report* (Publications Office 2018) chapter 2.1.1.

limitation renders the UCTD inapplicable to the majority platform workers, as they are self-employed and therefore outside the consumer protection realm.

Since the UCTD provides only a minimum harmonisation, multiple Member States have opted to expand the UCTD's scope to B2B contracts through their national legislation. As a result, self-employed platform workers are able to benefit from unfair term protection in these respective Member States, albeit not based on a supranational instrument. While national legislation can mitigate power imbalances, the global nature of digital platforms necessitates a more unified approach. In the next section, it is evaluated whether the Platform-to-Business Regulation is successful in providing platform workers with this unified framework for unfair term protection.

4 The Platform-to-Business-Regulation: restoring the power balance?

In 2019, the European legislator (re)affirmed the need to protect not only consumers but also entrepreneurs from unfair terms when contracting with other professionals in positions of power, particularly in the platform economy.[42] As part of the Digital Single Market Strategy review, the Commission announced that it would take concrete actions against unfair contracts and trading practices in platform-to-business relations.[43] As a result, Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services (the 'Platform-to-Business' or 'P2B' Regulation) has been adopted.[44] This Regulation recognises that digital platforms have a superior bargaining power and enter into contracts with (micro)entrepreneurs to use their services, "which enables them to in effect, behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their businesses users and, indirectly, also of consumers in the Union."[45] Platforms may abuse this stronger position in order to impose unfair terms and conditions upon platform workers. Thus, the P2B Regulation takes a contract- and transparency-based approach in which it seeks to address the identified issues through the contents of platform-to-business contracts.[46] The P2B Regulation aims to tackle these issues at a Union level and establish "a fair, predictable, sustainable and trusted online business environment, while maintaining and further encouraging an innovation-driven ecosystem around online platforms across the EU."[47]

[42] Ungureanu (n 18) 17.
[43] Caroline Cauffman, 'New EU Rules on Business-to-Consumer and Platform-to-Business Relationships' (2019) 26 Maastricht Journal of European and Comparative Law 469, 474.
[44] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (hereinafter: P2B Regulation).
[45] ibid 2.
[46] Twigg-Flesner (n 12) 20.
[47] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services para 7.

4.1 Material scope: does the P2B Regulation apply to labour platforms and platform workers?

As the name of the Regulation suggests, the focus of the Platform-to-Business Regulation is the relationship between a platform, defined as an "online intermediation service provider" (hereafter 'OISP') and a "business user". But does the Regulation target all sorts of online platforms, including labour platforms, and all forms of business users, including platform workers? In the Recitals, some types of platforms such as e-commerce marketplaces, app stores and social media platforms are explicitly mentioned, but there is no specific mention of labour platforms.[48] In this chapter, it will be discussed whether and to what extent the P2B Regulation applies to digital labour platforms and consequently, to what extent platform workers can benefit from its provisions.

4.1.1 Are all platform workers "business users"?

Both of the targeted users have definitions in article 2 of the Regulation. The first relevant actor is the "business user", which is defined as "any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession."[49] The question is now whether platform workers can be considered as business users for the purposes of the Regulation. There are multiple concerns that complicate whether platform workers fall under this definition.

4.1.1.1 Impact of national caselaw requalifying platform workers as employees

Worldwide, the legal status of platform workers has been disputed with varying legal outcomes as a result. Firstly, a lot of national courts have been confronted with the difficult task of classifying platform workers according to their national labour laws. The classification of platform workers has been the subject of over 100 court decisions across the EU, the majority of which classified the platform workers as employees.[50] An important caveat here is that the majority of cases have been about location-bound platforms where the work is performed physically. Platform workers who perform the work purely online – often called 'crowdworkers' - have rarely been considered employees, since there is a lack of court cases on the matter. The first judgment on online platform work – in this case: crowdwork, a type of online platform work where tasks are distributed to a large, undefined group of individuals often referred to as "the crowd" - was issued at the end of 2020, in which the German Bundesarbeitsgericht rather

[48] Recital (11) P2B Regulation.
[49] Art 2(1) P2B Regulation.
[50] For an overview of European judgments, see Christina Hießl, 'Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions' [2022] Forthcoming in Comparative Labour Law & Policy Journal <https://papers.ssrn.com/abstract=3839603> accessed 2 February 2024.

surprisingly classified the platform worker as an employee.[51] This demonstrates an inherent difference within the denominator of 'platform work' between location-bound platform work and online (crowd)work when it comes to the national practice of requalifying platform workers. As mentioned briefly in the introduction, platform work encompasses a diverse range of work arrangements with differences in terms of the nature of the work, the platform control, the level of autonomy, and the associated risks. However, a regulatory distinction based on the (physical or online) nature of the work cannot be similarly witnessed in European initiatives such as the P2B Regulation or Platform Work Directive (*infra*, section 5).

At first glance, national caselaw qualifying platform workers as employees and the P2B Regulation seem to be mutually exclusive: if platform workers were to be qualified as employees, they would be excluded from the scope of the P2B Regulation since employees cannot be business users. Furthermore, a duplication of protection would be unnecessary as employees would not usually need the protection of the P2B Regulation; national labour laws are better fit to their contractual role and would generally be more favourable than the transparency rights under the P2B Regulation.[52] Therefore, the P2B Regulation seemingly excludes platform workers who have been (re)classified as employees under national law. As a result, national caselaw can seemingly influence which platform workers the P2B Regulation applies to.

However, another interpretation is possible, namely that "business user" in the sense of the P2B Regulation should be interpreted autonomously and subsequently does not take into account national labour law or judgments.[53] Generally, protective EU laws tend to have autonomous interpretations, as is the case in most labour laws. For example, for the purpose of the Treaty on the Functioning of the EU (TFEU) and EU labour law regulations, the European Court of Justice (CJEU) has continuously held that the concept of a 'worker' or 'employee' must be determined autonomously, independently and regardless of the national law.[54] If we borrow from consumer law the relevant case law and literature on the term "trader"[55], it can be assumed that "business user" should be interpreted broadly in order to extend the circle of protected persons.[56] Thus, it can be argued that this principle can be transferred to the P2B Regulation as well, thereby making national labour laws and judgments inconsequential for the application of the Regulation. This would

[51] Bundesarbeitsgericht 1 December 2020, 9 AZR 102/20, ECLI:DE:BAG:2020:011220.U.9AZR102.20.0.
[52] Hans Schulte-Nölke, 'The Gig Economy and the European Platform-to-Business Regulation' (2020) 4 Pravovedenie 496, 503.
[53] ibid 504.
[54] See Case C-47/14, *Holterman Ferho Exploitatie BV ea v Friedrich Leopold Freiherr Spies von Büllesheim* [2015] ECLI:EU:C:2015:574, par. 36.; and more recently Case C-603/17, *Peter Bosworth and Colin Hurley v Arcadia Petroleum Limited and Others* [2019] ECLI:EU:C:2019:310, par 24-25.
[55] In art. 2(2) of the 2011/83/EU Consumer Rights Directive, "trader" is defined as "any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive".
[56] Schulte-Nölke (n 52) 506.

mean that, in the case of national case law granting platform workers an employee status, those platform workers fall under the protective scope of the national labour laws as well as under the P2B Regulation. In this case, the platform employee would be entitled to invoke all more favourable provisions of the applicable national labour law in addition to the P2B Regulation.[57] This interpretation would ensure that national labour classifications do not hinder the Regulation's protective scope, allowing platform workers to benefit from both national labour laws and the P2B Regulation concurrently. This way, the P2B Regulation forms a legal safety net with minimum protections in cases where national labour or case law does not see platform workers as employees. On the downside, this means that when platform workers are considered "business users" for the purposes of the P2B Regulation and simultaneously employees under national law, the P2B Regulation would not bring about a full harmonisation of the relationship between platforms and the platform workers, leaving some leeway for more favourable national labour law.[58]

Secondly, at the end of 2021, a more supranational approach followed when the European Commission recognised this grey zone for many platform workers when it comes to their employment status and published a proposal for a Directive.[59] This recently approved "Platform Work Directive" has the aim of remedying the frequent misclassification of platform workers and the related lack of social rights and protection, by establishing a legal presumption of employment for platform workers if there are facts indicating control and direction. The Platform Work Directive therefore serves as a gateway for self-employed platform workers to gain access to all relevant national labour law protections through national caselaw requalifying them as employees. Even though Member States have time until April 2026 to incorporate the Directive's provisions into their national laws, it is interesting to already think about what the implementation of this Directive could mean against the background of the P2B Regulation. If the term "business user" in the sense of the P2B Regulation were to be interpreted autonomously, this would render national caselaw irrelevant for its application, even when based on a supranational Directive. This would create a peculiar situation in which requalified platform employees benefit from national labour law provisions based on a European presumption of employment, while at the same time being categorised as a "business user" for the purposes of the P2B Regulation. This dual protection highlights the need for clarity to ensure a coherent legal framework for platform workers.

4.1.1.2 The limitations of the "business user" definition

Besides the qualification issue, there are some other concerns that arise when analysing the Regulation's scope. Firstly, in the context of meal delivery platforms that are in a

[57] ibid 507.
[58] ibid.
[59] Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work 2021 [COM/2021/762] 2021/0414/COD.

four-sided relationship with the platform, the consumer and the restaurant, the following question arises: are both the restaurant and the food delivery person captured by the "business user" definition? At first glance, it seems evident that the business user in this quadrilateral relationship would be first and foremost the restaurant who offers the food to consumers.[60] The delivery people, however, merely deliver the food to the consumer and therefore do not really offer any goods to consumers themselves. It could be argued, however, that the delivery people offer their services (i.e. meal delivery) to consumers and therefore still fall within the scope of the P2B Regulation. In this case, the P2B Regulation would then have impact on both the platform-to-restaurant and the platform-to-delivery-person relationship.

A second concern is the fact that the scope of the Regulation explicitly excludes peer-to-peer services in the absence of business users.[61] In this regard, it is relevant and important to discover which platforms are considered to be peer-to-peer, as a lot of labour platforms have originated from the peer-to-peer sharing idea but have evolved to a new business model with commercial users.[62] Furthermore, in some cases of platform work, it is unclear whether platform workers provide the services as private persons or as business users. Many peer platforms allow both commercial providers to operate alongside private peers, which complicates this peer-to-peer exemption.[63] For example, even though Deliveroo is not considered to be a peer-to-peer platform, the Deliveroo platform in Belgium allows workers to deliver meals under two capacities: either as a peer under the peer-to-peer system if you stay under a yearly wage cap, or as a self-employed delivery person. Consequently, the P2B Regulation only applies to Deliveroo and its terms and conditions for its self-employed riders, but not to the people performing the exact same work under a peer-to-peer system. In this regard, it is remarkable that this exemption has resulted in a notable difference in the terms and conditions for Deliveroo couriers in Belgium, depending on whether they provide the services as a peer or as a self-employed courier. This finding will be discussed more under section 4.3 where the terms and conditions of the five selected platforms are discussed based on compliance with the P2B Regulation.

It is important to stress that in the sense of consumer law, seeing peer providers as professional traders – i.e. business users in the context of the P2B Regulation - is often not feasible or fair, considering that peers generally lack the technical and legal skills or

[60] Andreja Schneider-Dörr, 'Die Neue Richtlinie 2019/1152 Und Die P2B-VO 2019/1150 – Ein Dilemma Für Crowd Work' (2020) 68 Arbeit und Recht 358, 363.
[61] Recital (11) P2B Regulation.
[62] Uber started off with its "UberPop" business model where regular individuals without a commercial taxi license or permit could provide taxi services (peer-to-peer). For that reason, UberPop was prohibited and Uber subsequently launched UberX where drivers were required to have a commercial license and insurance (thereby steering away from peer-to-peer services). Freelance platform "Fiverr" also initially focused on small tasks offered by peers for $5, but has now evolved to a wide range of service conducted with many professional freelancers and businesses offering the services at varying price points.
[63] 'Exploratory Study of Consumer Issues in Peer-to-Peer Platform Markets' (n 34) 8.

resources that professional traders have when having to comply with extensive information disclosures, dispute resolution services, etc.[64] However, in the sense of the P2B Regulation, peers would be the *beneficiaries* of its provisions and the related information and transparency rights. For this reason, it would have been feasible to include peer platform workers in the scope of the Regulation, thereby establishing a more level playing field by granting all forms of platform workers, both self-employed and peers, the same baseline protections. In doing so, the P2B Regulation could serve as a minimum harmonisation whose core transparency rights are applicable to *all* platform workers regardless of status. In the case of *peer* platform workers, this could then be complemented by the more extensive unfair term protection as provided by the UCTD.

4.1.1.3 Conclusion

In conclusion, it seems that platform workers can fall under the definition of "business user" as long as they are self-employed and offering services to consumers for purposes relating to their trade. The business user definition thereby seemingly excludes platform employees. Given that employees typically enjoy more robust protections under national labour laws, the necessity of the P2B Regulation for this group seems redundant. However, it is still desirable to determine whether the term "business user" in the context of the P2B Regulation has an autonomous interpretation, as is common with most protective EU laws. An autonomous interpretation would ensure that national caselaw does not hinder the Regulation's protective scope, allowing platform employees to benefit concurrently from labour laws on a national level and the P2B Regulation on a European level.

Peer platform workers cannot fall back on the P2B Regulation for unfair term protection since they are not considered "business users" acting for purposes relating to their trade or profession. In this regard, a comprehensive list of true peer-to-peer platforms would provide clarity as to which platforms are excluded from the Regulation's scope, consequently preventing the potential circumvention of the Regulation's provisions through the establishment of purported "peer-to-peer" services. Even though the purpose of the P2B Regulation is to close a gap in protection for platform workers, the exclusion of peer-to-peer services opens up another gap. This is exemplified by the fact that there are notable differences in the terms and conditions for Deliveroo couriers in Belgium, depending on whether they provide the services as a peer or as a self-employed courier (*infra*). Including peer platform workers in the P2B Regulation would create a more level playing field by granting all platform workers, both self-employed and peers, the same fundamental protections, which could be further complemented by the UCTD's unfair term safeguards.

[64] Natali (n 31) 20.

4.1.2 Are all labour platforms "online intermediation service providers"?

The P2B Regulation uses the term "online intermediation service provider" ('OISP') for online platforms, and in order to be considered an OISP, three requirements need to be met. Firstly, it has to be a service which is an information society service as defined in art. 1(1)(b) of the Information Society Services Directive (2015/1535/EU), namely "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".[65] Secondly, the service has to allow business users to offer goods or services to consumers with a view to initiating direct transactions between them, irrespective of where these transactions are ultimately concluded.[66] Thirdly and lastly, the services have to be provided to business users on the basis of contractual relationships between the platform and business users which offer goods or services to consumers.[67] With this definition, the Commission envisioned to capture the entire online platform economy, consisting of approximately 7000 online platforms operating in the EU.[68] If we apply these criteria to labour platforms, it would seem that at first glance, labour platform's services fall under the definition of an information society service, that allows the business users – platform workers – to offer services to consumers which happens on the base of a contractual relationship between the labour platform and the platform worker, consequently fulfilling all three requirements. However, it appears to not be that simple.

4.1.2.1 Elite Spain judgment: transportation platforms excluded?

In 2017, the CJEU investigated whether Uber can be considered to provide 'information society services' (in this case, for the purpose of falling under the e-commerce Directive) or purely services in the field of transport in the *Asociacion Profesional Elite Taxi v Uber Systems Spain* case.[69] This is relevant because in order to be considered an OISP under the P2B Regulation, the services provided by the platform need to be information society services ('ISS'). The CJEU started the judgment by stating that, in principle, an intermediation service that uses a smartphone app to transfer information between the passenger and the driver meets the criteria for classification as an information society service.[70] However, ultimately, the CJEU decided that Uber's app constitutes an integral

[65] Directive (EU) 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services 2015 art 1(1).
[66] Art. 2(2)(b) P2B Regulation.
[67] Art. 2(2)(c) P2B Regulation.
[68] 'Digital Single Market: EU Negotiators Agree to Set up New European Rules to Improve Fairness of Online Platforms' Trading Practices' (*European Commission Press Corner*, 14 February 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1168> accessed 7 December 2023.
[69] Case C-434/1, *Asociación Profesional Élite Taxi v Uber Systems Spain SL* [2017] ECLI:EU:C:2017:981.
[70] ibid para 35.

part of an overall service whose *main* component is a transport service, and therefore, Uber's services cannot and must not be classified as information society services.[71]

It can be assumed that the (potentially undesired) consequence of this judgment is the fact that Uber and more importantly, its drivers are excluded from the protective scope of the P2B Regulation. In distinguishing whether Uber is a 'mere' provider of ISS, or instead more directly involved in providing the underlying services, the Court found Uber's far-reaching algorithmic control of crucial importance. The 'level of control' exercised by a platform through *inter alia* algorithms, including the setting of prices, are therefore amongst the key criteria in deciding whether the platform provides ISS or not.[72] Therefore, it might be unlikely that platforms which exercise considerable algorithmic employer control over its workforce would fall within the scope of the P2B Regulation.[73] As most labour platforms exercise decisive levels of control over their platform workers, it is uncertain whether they are considered to provide ISS and whether the P2B Regulation applies. This would result in a precarious situation: the more control platforms exercise over their platform workers, the less likely it gets that the P2B Regulation applies. Thus, the more platform workers experience employer-like control and are unable to set their own prices, the less protection they likely receive under the P2B Regulation.

Moreover, since the *Elite Spain* judgment, some doctrine has assumed that the court's reasoning entails that platform services in the field of transport are not to be considered information society services.[74] Even though the CJEU has not rendered judgments on meal delivery platforms, it can be speculated that if we were to extend the Court's line of reasoning, meal delivery platforms could also be seen as a form of organising transport and therefore also fall outside the definition of an ISS. This depends on whether the CJEU would consider the transport and home-delivery of the food as the *main* component of meal delivery platform's services.[75]

However, it is plausible that the CJEU in the *Elite Spain* judgment only considered the way Uber's services are perceived by the *consumer*, rather than by Uber's business users, ie the Uber drivers. When looking at the platform-worker-to-consumer relationship, it is logical that the main component of that service is transportation. Nevertheless, when considering the platform-to-platform-worker relationship and the underlying service provision, it would not be accurate to say that Uber provides its drivers with transportation services. Consequently, when taking a platform-worker-centric approach, there is room

[71] ibid para 40.
[72] Jeremias Adams-Prassl, 'Regulating Algorithms at Work: Lessons for a "European Approach to Artificial Intelligence"' (2022) 13 (1) European Labour Law Journal 16.
[73] ibid.
[74] Pieter van Cleynenbreugel, 'Will Deliveroo and Uber Be Captured by the Proposed EU Platform Regulation? You'd Better Watch Out…' (*European Law Blog*, 12 March 2019) <https://europeanlawblog.eu/2019/03/12/will-deliveroo-and-uber-be-captured-by-the-proposed-eu-platform-regulation-youd-better-watch-out/> accessed 20 December 2023.
[75] Jan Blockx, 'Welke Richting Op Met de Deeleconomie? Open Vragen Bij de "Uber" Arresten' (2018) 119 Droit de la consommation 73, 74.

for arguing that Uber does provide its drivers with ISS, thereby potentially warranting inclusion within the scope of the P2B Regulation.

4.1.2.2 Study on the Evaluation of the P2B Regulation: transportation platforms included?

In September 2023, the European Commission published a Study on the evaluation of the P2B Regulation in which it *inter alia* collected data from 300 sets of terms and conditions of 300 selected platforms to evaluate compliance.[76] For this Study, the Commission chose a representative sample of 300 OISPs in terms of size and type of platforms. One could assume that the Commission would only evaluate a platform's terms and conditions when the P2B Regulation is relevant and applies to the platform. Evidently, this reasoning does not work the other way around, the absence of certain platforms in the Study does not mean that they would fall outside the scope of the P2B Regulation. The Study made a representative categorisation of chosen platforms, including e-commerce marketplaces, social media platforms, search engines, but more importantly for this article: transportation and delivery platforms. Out of the five investigated platforms in this article, only the terms and conditions of AMT and Deliveroo were assessed in this Study. When it comes to online platform work, very little other crowdsourcing platforms other from AMT were included in the Study, though Upwork does get mentioned in the Study when it discusses the social media channels used to post about the P2B Regulation.[77] Even though Uber's terms were not assessed, similar transportation platforms like Bolt, Heetch and FREE NOW were assessed. Uber, however, does get mentioned as an example in the categorisation of platforms used in the Study, under "specialised service platforms, eg Uber".[78] The fact that Deliveroo and similar meal delivery and transportation platforms[79] were included in the Study suggests that the Commission generally assumes that meal delivery and transportation platforms fall within the scope of the P2B Regulation. This raises questions about whether the *Elite Spain* case did in fact successfully preclude Uber from the scope of the P2B Regulation or not, while other similar transportation platforms still fall under the Regulation. Strangely enough, among the five assessed platforms, Uber is the only platform whose website has a separate and dedicated tab with information and links to the P2B Regulation that allows business users to file a complaint regarding any alleged non-compliance.[80] If Uber would in fact be

[76] European Commission and others, *Study on Evaluation of the Regulation (EU) 2019/1150 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (the P2B Regulation) – Final Report* (Publications Office of the European Union 2023).
[77] ibid 23.
[78] ibid 15.
[79] Examples of other meal delivery platforms included in the Study are UberEats, Foodora, Thuisbezorgd, Glovo, CoopCycle, etc.
[80] Uber P2B regulation at <https://help.uber.com/driving-and-delivering/article/platform-to-business-P2B Regulation - business-user-contact-form?nodeId=eff934bc-17c5-466e-bef7-e37f5c3f4539> accessed 26 September 2023.

successfully precluded from the scope of the Regulation, it seems Uber itself is not aware of this fact.

4.1.2.3 Conclusion

Since the CJEU decided that Uber's services cannot and must not be considered to be ISS in the *Elite Spain* judgment, it is likely that Uber and its drivers are excluded from the scope of the P2B Regulation. Some doctrine has assumed that the court's reasoning in the *Elite Spain* judgment entails that platform services in the field of transport are not to be considered information society services, and more generally, that platforms which exercise considerable algorithmic employer control over its workers fall outside the scope of the P2B Regulation.[81] It is thus not clear whether transportation platforms and labour platforms in general fall under the definition of online intermediation service provider and therefore within the scope of the P2B Regulation.

The fact that transportation platforms are assessed in the Commission's Study evaluating the P2B Regulation could mean that there is a discrepancy between the Commission and the CJEU based on whether transport platforms fall under the definition of 'information society services'. Thus, while the Commission clearly intended to target all European online platforms, there seems to be some unclarity about the full reach and limitations of the P2B Regulation. This unclarity and gap should be resolved through a broader definition of online intermediation services that include all online platforms and goes beyond the 'information society service' definition. This will help ensure legal certainty for platform workers using labour platforms to provide services.

4.2 Geographical scope

Article 1 of the P2B Regulation states that it applies to "online intermediation services" that are provided to business users that have their place of establishment in the Union and that offer goods or services to consumers located in the Union. From this, a two-fold test can be derived: firstly, the business users (in this context: the platform workers) need to have their establishment or residence in the EU and those platform workers need to offer goods or services to consumers who are located in the EU. The Regulation further clarifies that since digital platforms have a global dimension, the Regulation applies to platforms regardless of whether they are established in a Member State or outside the EU. In summary, this means that the platforms need to have both a European consumer and a European worker base.

Disregarding the material scope, there is no doubt that Uber and Deliveroo fall under the geographical scope of this Regulation as these platform services are location-bound and consequently offered to European customers and performed by EU-based platform

[81] Adams-Prassl (n 72) 16.

workers. The other platforms, Clickworker, Upwork and AMT are all microtasking platforms with a global reach that allow platform workers to perform the tasks purely online. Clickworker asserts on its website that its worker community comprises "more than 4.5 million people from all of the world", with 30% originating from Europe[82] while Upwork states it has a "network of global freelancers in over 180 countries" including many European ones.[83] On top of their European supplier market, both Clickworker and Upwork allow European consumers to order tasks from their platform workers, thereby rendering the P2B Regulation fully applicable. Lastly, AMT states on its website that European consumers are allowed to register, though offers very little transparency on its worker demographics. Upon trying to register as a "Turker" both from Belgium and Germany, a rejection email was received stating that it was "not permitted to work on Mechanical Turk at this time" and to "please note that Customer Support is unable to change this decision and cannot share insight into invitation criteria." However, a study from 2018 continuously monitors the worker demographics of AMT through an ongoing survey that uses geolocalisation.[84] These results show that the top-20 countries of AMT workers in 2018 included Germany, France and Italy, that were ranked 7th, 8th and 9th, accounting for a little over 1% of workers. Despite the vast majority (over 90%) of Turkers being American, this could mean that there is in fact a European worker base. Since the P2B Regulation does not require a 'substantial amount' of EU-based platform workers, this 1% could still trigger the full applicability of the Regulation. Furthermore, the fact that AMT was included in the Study evaluating the P2B Regulation could be an assumption of the Commission that AMT falls under the Regulation's scope. As the Regulation does not require any compulsory data sharing, this raises a concern about platforms' ability to potentially circumvent European legislation by not providing transparent data about worker demographics or residency. Without making any statement as to the potential applicability and solely for the purposes of this article, AMT's terms and conditions are evaluated against the P2B-provisions in the next chapter.

4.3 Three years after the P2B Regulation: are platforms' terms and conditions in compliance?

4.3.1 Provisions relevant for labour platforms

Overall, the P2B Regulation contains rules that are not really designed to protect workers from the power of the platform, but are rather designed to enable a certain

[82] Clickworkerc community page <https://www.clickworker.com/clickworker-crowd/> accessed 14 September 2023.
[83] Upwork eligibility page <https://support.upwork.com/hc/en-us/articles/211067778-Eligibility-to-Join-and-Use-Upwork> accessed 14 September 2023.
[84] Djellel Difallah, Elena Filatova and Panos Ipeirotis, 'Demographics and Dynamics of Mechanical Turk Workers', *Proceedings of the Eleventh ACM International Conference on Web Search and Data Mining* (Association for Computing Machinery 2018) <https://doi.org/10.1145/3159652.3159661> accessed 7 August 2023.

minimum level of entrepreneurship, such as the transparency of ranking criteria, access to data and portability of reputational data.[85] While the P2B Regulation might not have been specifically designed for labour platforms, it does contain certain provisions that are relevant for digital labour platforms.[86] The Regulation imposes requirements as to the clarity, the content and the modification of terms and conditions used by online platforms, which are relevant for platform workers. The phrase "terms and conditions" is broadly defined to cover all terms and conditions or specifications, irrespective of their name or form, which are unilaterally determined by the platform and govern the contractual relationship between the platform and its business users.[87] The requirement that the terms are "unilaterally determined by the platform" is different than the UCTD, which applies to "terms which have not been individually negotiated". The deviation of the negotiation requirement could be to avoid situations where platform operators create "pretend negotiations" to try and remove the terms from the ambit of the Regulation.[88]

While it contains some specific requirements for platforms' terms and conditions, it does not set out legal criteria for generally assessing the potential unfairness of terms like the UCTD. Specifically, article 3(1) of the Regulation requires *inter alia* that terms and conditions need to be, 'drafted in plain and intelligible language', 'easily available to business users at all stages of their commercial relationship, including in the precontractual stage' and 'set out the grounds for decisions to suspend or terminate the provision of their online intermediation services to business users'. Further, article 3(2) requires platforms to notify any proposed changes of the terms and conditions to the business users, on a durable medium such as e-mail. This notification must take place at least 15 days before implementing the envisaged changes, but in general the notice period must be reasonable and proportionate to the nature and extent of the envisaged changes and to the consequences for the concerned business users.

Apart from mandatory notice periods and statements of reasons, the Regulation contains no clear substantive limitations on the platform's use of unilateral variation clauses. The Regulation does however illustrate that certain predictability and transparency requirements are placed upon platform businesses as a condition for market access. These provisions demonstrate the Regulation's focus on procedural fairness, laying out detailed procedural requirements. These systemic expectations limit the platform's space for one-sided commercial manoeuvring enabled by unilateral variation clauses.[89]

For the purposes of this article, the terms and conditions of the five chosen platforms were analysed against the background of the previously mentioned provisions of the P2B Regulation that proscribe rules for fair and transparent terms.

[85] Eva Kocher, 'Reshaping the Legal Categories of Work: Digital Labor Platforms at the Borders of Labor Law' (2021) 3(3) Weizenbaum Journal of the Digital Society w1.1.2, 18.
[86] ibid.
[87] Art 2(10) P2B Regulation.
[88] Twigg-Flesner (n 12) 10.
[89] Hansen and Ritchie (n 15) 946.

4.3.2 Overview of platform's compliance

More than three years post-implementation, it seems that definitely not all platforms comply with the provisions of the P2B Regulation. Before diving into a more in-depth analysis of compliance in the subsections below, Table I below provides a general schematic overview that illustrates which platforms comply with which of the previously discussed provisions.

Table I. Schematic overview of compliance with the P2B Regulation

Based on the author's research into the five aforementioned platforms' terms and conditions, Table I provides a schematic overview that signals which platforms comply with certain provisions of the Platform-to-Business Regulation. The provisions were selected based on their relevance specifically in the context of digital labour platforms and platform work.

A question mark in *Table I* signals that there is either not enough information to judge compliance on or that it is uncertain whether the terms (fully) comply with the provision, e.g. when the terms specify that business users are informed in advance of changes but no time period is specified while the P2B Regulation requires a notice period of at least 15 days.

	Uber	Upwork	AMT	Deliveroo	Clickworker
Country of origin	*U.S.A.*	*U.S.A.*	*U.S.A.*	*U.K.*	*Germany*
Drafted in plain & intelligible language	?	✓	?	?	?
Easily available to business users at all stages of commercial relationship	✗	✓	✓	✗	✓
Set out grounds for decisions to suspend or terminate services to a business user	✓	✓	✗	✗	✓
Notify the business users concerned of any proposed changes of their terms	?	✓	✗	?	?

Uber, Upwork and AMT have been strategically placed next to each other as these are platforms with an origin in the U.S.A., while Deliveroo and Clickworker - platforms with a European origin – are placed on the right. This overview makes clear that the geographical origin of the platform has little impact on its compliance or familiarity with the P2B Regulation. The only platform out of five whose terms and conditions consistently complied with the provisions of the P2B Regulation, is American platform Upwork. Second-best is German platform Clickworker, that complies with 2 out of 4 investigated provisions and potentially complies with the other two. It is rather curious that while Uber is the only platform with a separate tab on its website for P2B-related complaints, it only certainly complies with only one of the discussed provisions, violates another, and leaves its compliance with the remaining two uncertain. The two lowest-scoring platforms are Deliveroo and AMT that fragrantly violate 2 out of the 4 investigated provisions, which is

striking as the former was founded in Europe (the U.K.), targets European consumers and platform workers and has Europe-specific terms, while the latter is American-based and targets its services mostly to Americans, combined with only one set of terms for all users.

Overall, these five investigated platforms manage to tick only 8 out of 20 boxes in *Table I* with certainty. These findings are in line with the conclusions in the Commission's Study of the P2B Regulation, that also alerted a rather low level of compliance with the P2B Regulation and associated this issue with the lack of responsible enforcement authorities (*infra*, section 4.4 on enforcement).[90]

4.3.3 Drafted in plain and intelligible language

To ensure that the terms and conditions enable business users to determine the conditions for the use, termination and suspension of the platform work and to achieve predictability, article 3(1)a of the P2B Regulation requires that terms and conditions should be drafted in plain and intelligible language. The Commission clarified that where the terms are vague, unspecific or lack detail on important commercial issues and thus fail to give business users a reasonable degree of predictability, they are not considered to be plain and intelligible.[91]

While this remains a mostly subjective criterion, it urges platforms to provide the terms and conditions in accessible language. Out all five platforms, there was only one platform that seemed to have made an active effort to help business users understand its terms and conditions. Upwork's Terms of Use give the reader the option to click an icon that gives a simple summary of each section. Furthermore, in its User Agreement, it is explicitly stated that "to make these terms a little easier to understand, we capitalize certain terms and capitalizing them means they have a special meaning."[92] In today's reality where less and less people take the time to read terms and conditions[93], this is a great initiative to help guide the readers through lengthy documents and offer them a quick overview of their duties and rights. Upwork effectively does this while simultaneously still stressing that it is advised to read the sections completely to get all the details of what you are agreeing to. The terms of the other four platforms remained rather standard, with no apparent efforts to make the terms more intelligible for its business users, without being particularly unintelligible. Subsequently, it seems that Upwork is the only platform that can be said to *certainly* comply with article 3(1)a of the Regulation, while the other four potentially comply.

[90] Directorate-General for Internal Market and others, *Executive Summary of Study on evaluation of the P2B Regulation* (Publications Office of the European Union 2023) 7.
[91] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services l (15).
[92] See Upwork's User Agreement <https://www.upwork.com/legal#useragreement> accessed 12 June 2024.
[93] In the EU, four out of five respondents say that they only sometimes or never read the terms and conditions as can be read in European Union Agency for Fundamental Rights (FRA) (2020), *Your rights matter: Data protection and privacy, Fundamental Rights Survey*.

4.3.4 Easily available to business users at all stages of their commercial relationship

Pursuant to article 3(1)b of the P2B Regulation, business users need to be able to easily find the terms and conditions in all stages of the commercial relationship, including the precontractual stage so they are aware of the rules that (would) apply to them. So, from the moment that business users decide to offer their services through the labour platform, they should be able to access and refer to the terms.

Starting with the two location-based platforms, a striking conclusion after researching Deliveroo's terms and conditions is the fact that no worker-specific terms and conditions can be found on the website, and not immediately after signing up to be a rider either. The only "terms of service" on the website are specifically tailored towards consumers, demonstrated by the consumer-specific phrasing to "please read these Terms carefully before ordering any items from our Application" and that "our [Deliveroo's] objective is to link you to the restaurants we partner with and allow you to order items for delivery by a delivery rider."[94] Even though there is a separate website for Deliveroo riders[95], clicking on the "legal" tab redirects you to the general terms of service tailored towards consumers. Deliveroo is the only platform out of five whose website or rider-application process does not provide any worker-specific terms and conditions. The Study evaluating the P2B Regulation stated that a platform that only makes available its business-user-specific terms and conditions *after* registering on the platform, fails to comply with Article 3(1)b.[96] Thus, since business users are not able to find, let alone easily find, the terms and conditions that would apply to them in the precontractual stage, it seems that Deliveroo fragrantly violates article 3(1)b of the P2B Regulation.

Uber has made the terms and conditions for consumers easily available on its website, organised per country and in multiple languages.[97] However, similarly to Deliveroo, these terms and conditions are only applicable to Uber consumers ordering rides. In order for prospective Uber drivers to access the applicable terms and conditions (so-called "Uber Community Guidelines"), multiple steps had to be undertaken such as applying to become an Uber driver and completing information forms with details including your full name, address, car's brand and license plate before finally gaining access to these Community Guidelines. This difference in availability for consumers and business users proves the imbalance between different platform actors. Furthermore, it enables Uber to gather a lot of personal information before business users can even assess whether they agree to these terms, causing a precontractual information asymmetry. Compared to Deliveroo's complete lack of availability, even this multi-step process could be considered an improvement. However, following the same reasoning as with Deliveroo, Uber too violates

[94] See preface and article 2 of Deliveroo Terms of Service <https://deliveroo.be/nl-be/legal> accessed 12 June 2024.
[95] Site of the Deliveroo <https://riders.deliveroo.be/> accessed 12 June 2024.
[96] European Commission and others (n 76) 30.
[97] See Uber's General Terms of Use <https://www.uber.com/legal/nl/document/?name=general-terms-of-use&country=belgium&lang=en> accessed 12 June 2024.

article 3(1)b of the P2B Regulation by only making the business-user-specific terms available after registering on the platform.[98]

Thus, the platforms with location-based services do not seem too eager to clearly share or make available the terms and conditions for their business users. The three assessed crowdworking platforms generally performed better at making the terms and conditions easily available. Out of all five platforms, Clickworker is the only one to make a very clear distinction in its terms and conditions based on both location (North-America and 'rest of world') and type of user (clients and workers) on its website.[99] Upwork has the "Upwork Terms of Service" available on its site which is comprised of over 18 different documents including the User Agreement, Terms of Use and Direct Contract Terms.[100] Throughout these documents, the terms differentiate depending on the "account type" (client or freelancer), making it possible for business users to discern the relevant terms that apply to them. Lastly, AMT has an easily accessible "participation agreement" that states that references to "you" and "your" may apply to either requesters, or workers, or both.[101] While this certainly complicates the business users' ability to easily see which terms do or do not apply to them, the terms are easily accessible on the website which seems to comply with the P2B Regulation.

4.3.5 Set out grounds for decisions to suspend or terminate services to a business user

In order to provide business users with legal certainty, article 3(1)c of the P2B Regulation requires the platform to set out the grounds for potential decisions that can lead to a suspension or termination of a business user's account in advance. This provision is particularly important as the restriction, suspension or termination of user accounts – especially without giving any prior warning or providing meaningful reasons - is one of the most severe measures a platform worker can receive.

Uber and Clickworker's terms and conditions both clearly set out the grounds for a potential suspension or termination. In Uber's Community Guidelines, the different grounds that can cause you to lose access to the Uber platform are set out in a detailed manner and are mostly related to violating any terms of the agreement including violence, sexual misconduct, discrimination, etc.[102] Similarly, Clickworker's terms stated that the platform has a right to terminate the contract if the worker violates the terms and

[98] European Commission and others (n 76) 30.
[99] See Clickworker's Terms & Privacy Policy <https://www.clickworker.com/terms-privacy-policy/> accessed 12 June 2024.
[100] See Upwork's Terms of Service <https://www.upwork.com/legal#terms> accessed 12 June 2024.
[101] See preface of Amazon Mechanical Turk's Participation Agreement <https://www.mturk.com/participation-agreement> accessed 12 June 2024.
[102] See section "How Uber enforces our guidelines" in Uber's Community Guidelines <https://www.uber.com/ug/en/drive/basics/uber-community-guidelines/> accessed 12 June 2024.

conditions or other contractual obligations.[103] Next, Upwork's Terms of Use state that it can take away the platform worker's right to use its services at any time, and further concretises that the access to Upwork can be taken away in case of violation of the Terms of Use.[104] Since all three sets of terms set out the expected behaviour of its workers and connect the grounds for termination to this conduct, these terms seem to be in accordance with article 3(1)c of the P2B Regulation.

Contrastingly, Deliveroo has a contractual provision that grants Deliveroo the right to terminate the agreement with the business user at any time and for any reason, with one week's written notice.[105] This is in clear violation of the Regulation that requires the platform to set out the grounds to terminate the platform services. The same goes for AMT, whose Participation Agreement states that the agreement and the business user's account can be terminated or suspended immediately, without notice and for any reason.[106] This leaves the platform workers with a very uncertain and unpredictable work environment, which is exactly what the Regulation wants to remedy.

4.3.6 Notify the business users concerned of any proposed changes of their terms and conditions

As discussed before, unilateral variation clauses grant platforms the right to update and change the contractual terms that apply to the platform worker. The sudden introduction of changes without (sufficient) notice can take the business user by surprise and lead to unwanted effects.[107] To avoid this, article 3(2) of the P2B Regulation regulates this use of unilateral variation clauses by requiring that business users are notified of any proposed changes with a notice period reasonable and proportionate to the nature of the envisaged changes, which is in any case at least 15 days before implementing the changes. Within this period, the business user has the right to terminate the contract with the platform. It is important to note that the Regulation does not specify in what situations a unilateral change or variation is permissible, meaning that platforms preserve the freedom to unilaterally change the terms as long as the required period of notice is adhered to.

As discussed before, all five platforms contain unilateral variation clauses in their terms and conditions. Against the background of the P2B Regulation, however, it is important to verify whether the required notice period is adhered to. Uber, Upwork and Clickworker all have provisions in their terms stating that platform workers get informed of upcoming changes. Upwork concretely states there is 30 days' notice though only for "substantial

[103] See article § 3.1 of Clickworker's Terms and Conditions <https://workplace.clickworker.com/en/agreements/10123> accessed 12 June 2024.
[104] See section 4.1 of Upwork's Terms of Use <https://www.upwork.com/legal#terms-of-use> accessed 12 June 2024.
[105] Article 9.2 of Deliveroo's Model Service Provision Agreement for self-employed couriers (not publicly available).
[106] See section 11 of Amazon Mechanical Turk's Participation Agreement <https://www.mturk.com/participation-agreement> accessed 12 June 2024.
[107] Twigg-Flesner (n 12) 13.

changes"[108], while Clickworker and Uber remain more vague, stating the business users will respectively "be informed in advance" and "within a reasonable time period".[109] As long as Upwork makes sure business users get informed at least 15 days in advance, also for non-substantial changes, it seems that this is in compliance with article 3(2) of the Regulation. Uber and Clickworker potentially comply with the Regulation, although it is advisable that they specify a minimum notice period of 15 days is given to ensure compliance.

In light of the previous discussion on how peer-to-peer platform services are excluded from the Regulation's scope, an interesting finding occurred when comparing Deliveroo's terms for peer delivery couriers with the terms for self-employed couriers. For peers, the terms contain a provision that gives Deliveroo the right to modify the terms at any time by giving a mere notification.[110] On the other hand, the terms for the self-employed couriers make no mention of Deliveroo's right to change or update the terms and therefore no longer contain a unilateral variation clause. This exemplifies the gap in protection of the P2B Regulation, where peer platform workers can still legally be confronted with a lot of uncertainty. It is unsure whether Deliveroo complies with the legal notice period for its self-employed couriers as the terms make no mention of unilateral changes or a notice period. Interestingly, the terms and conditions for Deliveroo customers also contain a unilateral variation clause that grants Deliveroo the right to change these terms from time to time.[111] This demonstrates that these three different forms of platform users, all have different terms and conditions applied to them depending on the distinct regulatory frameworks that govern their interactions with the platform (*infra*, section 5). In the unlikely case that Deliveroo simply did not grant itself that contractual variation right and consequently never unilaterally changes or updates the terms to the agreement, article 3(2) would be redundant.

Lastly, AMT states that they may modify, suspend or discontinue their website at any time and without notice, and that the continued use of the website constitutes the acceptance of the modified terms.[112] In other words, AMT puts the burden on the platform workers to regularly check and notice whether the terms and conditions have changed. Not only is this in violation of article 3(2) of the Regulation, it also opens the door for a lot of unfair terms.

[108] See section 15.2 of Upwork's User Agreement (n 92).
[109] See section 16.1 of Uber's General Terms and Conditions (n 97) and section § 1.3 of Clickworker's General Terms and Conditions (n 99).
[110] Article 3.4 of Deliveroo's Model Service Provision Agreement for peer couriers (not publicly available).
[111] See article 14 of Deliveroo Terms of Service (n 94).
[112] See section 12(b) of Amazon Mechanical Turk's Participation Agreement (n 106).

4.4 Enforcement of the P2B Regulation

In order for the P2B Regulation to achieve its goal of providing a baseline of transparency and procedural fairness, effective enforcement needs to be ensured. The Regulation relies on a mix of both public and private enforcement, combined with some collective enforcement elements – leaving the choice of how to ensure effective enforcement to the Member States.[113] This entails that Member States are not required to create new enforcement bodies to ensure public enforcement. The Commission associated the issue of low compliance, as demonstrated in the previous section, with the lack of responsible enforcement authorities.[114] In Member States that relied on private enforcement via courts, the effectiveness of the P2B Regulation proved to be very limited. One of the risks of using private enforcement, especially in situations of a power asymmetry, is the fact that business users are often reluctant to initiate legal action against the powerful (platform) business as they fear costly and lengthy litigation, or potential retaliation from platforms.[115]

The Commission's Study showed that public enforcement through monitoring, investigations and proactive communication was the most effective way to ensure compliance with the P2B Regulation.[116] Public authorities could launch monitoring exercises and initiate *ex officio* investigations, as well as develop guidelines that facilitate compliance for platforms.[117] In Member States that opted for private enforcement, this approach has resulted in the absence of bodies responsible for monitoring platforms' terms and conditions in order to detect non-compliance.[118] A lack of (pro)active monitoring makes the enforcement of the Regulation merely complaint-based, which only works if there is sufficient awareness with platform business users about their rights. The Study shows, however, that this was not the case as there was a major lack of awareness among the business users about the existence of the Regulation, let alone their rights.[119] This lack of awareness further contributed to the lack of compliance on the platform side, as it appeared that large numbers of platforms were not yet aware of the P2B Regulation, even three years post-implementation. For these reasons, Member States that have opted for private enforcement should consider establishing dedicated enforcement authorities. This shift to public enforcement would ensure a more effective application of the P2B Regulation.

[113] Christoph Busch, 'Platform Regulation beyond DSA and DMA: Which Role for the P2B Regulation?' (2024) 12 (2) Journal of Antitrust Enforcement 201.
[114] Directorate-General for Internal Market and others (n 90) 7.
[115] Recital (44) Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.
[116] 'Commission Staff Working Document Accompanying the Report on the First Preliminary Review on the Implementation of Regulation (EU) 2019/1150 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services' (European Commission 2023) SWD(2023)300 23.
[117] Busch (n 113).
[118] Directorate-General for Internal Market and others (n 90) 7.
[119] ibid.

4.5 Sanctions of non-compliance

With regards to the sanctions, the P2B Regulation is rather light on or unclear about the consequences of non-compliance by the platforms. The Regulation merely states in article 3(3) that any terms and conditions which do not comply with its provisions shall be null and void.

For some provisions, this sanction is self-explanatory, e.g. for article 3(2) that imposes the mandatory notice period before implementing unilateral changes to the terms, the failure to give notice would result in the ineffectiveness of that variation. However, for other provisions, it is uncertain how exactly this sanction would take effect in practice. For example, not complying with article 3(1)c of the Regulation that requires to set out the grounds for a potential suspension or termination could mean that any decision that the platform makes to suspend or terminate the service on the basis of the insufficiently specific term, would be ineffective. However, it is unclear whether the requirement in article 3(1)c of the Regulation is merely a transparency obligation or whether it would effectively preclude the suspension or termination of the platform worker's access to the platform.[120]

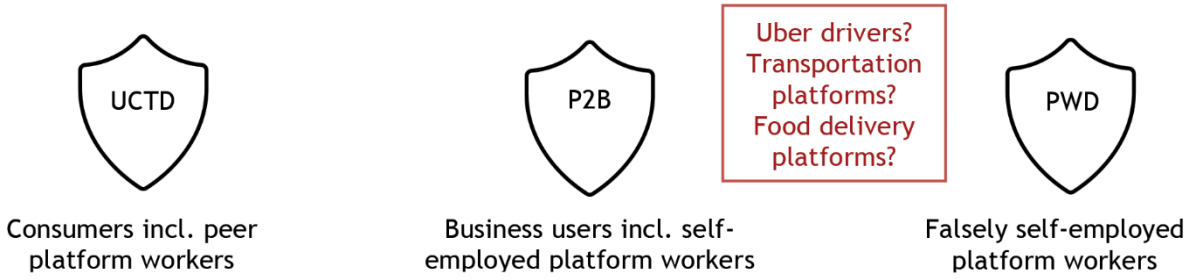
Thus, it remains unclear what the consequence would be for a failure to suspend or terminate a business user's account on objective grounds, even though that is one of the most far-reaching measures for business users. Because the Regulation does not specify a consequence for some cases of non-compliance, the only route to challenge the platform is either through its own internal dispute resolution procedures, or through legal action.[121]

5 Overview: diverse legal protections for various platform users

Today, the legal landscape for platform workers is fragmented, with different protections applying to various categories of platform users, such as self-employed platform workers, peer platform workers, platform employees and consumers. This section and *Figure I* below provide a brief overview of the existing legal shields that protect these groups of platform users and highlight the gaps and/or inconsistencies that arise from this fragmented approach.

[120] Twigg-Flesner (n 12) 12.
[121] ibid 21.

Figure I. Different shields of protection for platform workers



This Figure illustrates three existing legal instruments that have the ability to shield different categories of platform workers from unfair terms imposed by digital labour platforms.

Firstly, consumers and peer platform workers are shielded by the UCTD against unfair terms imposed by platforms. Despite the *ratio legis* being a form of weaker party protection, the UCTD's scope is limited to B2C contracts, thereby excluding the majority of platform workers as they are self-employed under B2B contracts.

Secondly, self-employed platform workers could rely on the P2B Regulation for unfair term protection and procedural fairness in their relationship with the platform. While the UCTD contains more substantive rules on what is unfair and not, the P2B Regulation has more formal and transparency requirements. However, the *Elite Spain* judgment of the CJEU has raised serious doubts about whether Uber drivers and by extension, other labour platforms fall within the scope of the P2B Regulation. Following the Court's reasoning, platforms that exercise considerable employer control over their workers might be excluded from the P2B Regulation, leaving those platform workers without its protections.

Either way, neither the UCTD nor the P2B Regulation tackles other crucial issues for platform workers such as fair wages, health safeguards and the risk of discrimination. Beyond the contractual power imbalance and unfair terms, these issues are of paramount importance for the overall well-being of platform workers and can therefore not be left unaddressed. This is where the third instrument, the Platform Work Directive, has the ability to offer an indirect avenue to address these critical issues by establishing a presumption of employment when factors indicating control and direction are found. This creates the potential for falsely self-employed platform workers to be reclassified by national courts and thereby gain access to national labour laws that include protections for fair minimum wages, health and safety standards, as well as anti-discrimination measures.

None of these three legal instruments makes a distinction or uses a separate regulatory approach based on the physical or online nature of the platform work. It seems undesirable that general fairness mechanisms such as the UCTD and P2B Regulation differentiate based on the precise nature of the platform work, as fairness and transparency should be equally

afforded to all sorts of platform users. However, the practical impact of the Platform Work Directive may be different based on whether the platform work happens physically or online. As discussed under section 4.1.1.1, national caselaw rarely requalifies online crowdworkers as employees, with the first (and only) judgment being rendered in Germany in 2020. Therefore, the presumption of employment – that applies equally to all platform workers, both physically and in the online realm – could be particularly impactful and make a difference for falsely self-employed crowdworkers. This way, the Platform Work Directive could tilt the balance of national caselaw that has almost exclusively reclassified location-bound platform workers. The Directive's uniform application, both across the EU and types of platform work, has the ability to mitigate the existing disparities in protection that arise from differing national approaches.

In conclusion, while various legal instruments act as protective shields for platform workers, the misalignment of these shields due to regulatory gaps leaves certain platform workers vulnerable and at risk of unfair terms. If these shields do not align seamlessly, the protections intended to safeguard workers fall short, exposing them to significant risks.

6 Conclusion

The rise of digital labour platforms utilising self-employed "platform workers" to provide services to consumers has disrupted the traditional labour market. In order to gain access to the platform, all platform users are required to accept and adhere to the predetermined contractual terms outlined in the terms and conditions, often called 'adhesion contracts'. In today's modern contracting world, the efficiency of adhesion contracts is an indispensable feature. Subsequently, it is not desirable that each individual platform contract would have to be negotiated. However, the lack of bargaining power of platform workers vis-à-vis the platform poses a risk for the unilateral imposing of unfair contract terms and causes a power imbalance. Hence, the status quo of unilateral and potentially unfair contracts is not attainable either. Therefore, there is need for a legislative intervention that tackles these unfair terms and the subsequent power imbalance. As labour law is mostly inapplicable to self-employed platform workers and is considered a *lex specialis* of general contract law, this article looked at whether and to what extent contract law solutions could remedy the contractual power imbalance and the related risks of unfair terms.

While there are various legal instruments that offer protection to different categories of platform users (*supra*, section 5), the overall framework is not always consistent and leaves significant gaps, particularly for self-employed platform workers. Since the UCTD's scope is limited to B2C contracts, it only protects consumers and peer platform workers acting for purposes outside their profession. Consequently, the majority of platform

workers are unable to benefit from its unfair term protection as they are self-employed and outside the consumer protection *acquis*.

Further, there is the P2B Regulation that attempted to tackle unfair and untransparent terms in the entire European platform economy. Even though the P2B Regulation is a first brave step towards interfering in B2B contracts at a supranational level, its intervention is rather limited and does not interfere too heavily in the contractual relationships between a platform and its business users.[122] In relation to its scope of application, the requirement that platforms need to provide 'information society services' makes the P2B Regulation fall short in protecting all platform workers comprehensively. Furthermore, there is an apparent discrepancy between the European Court of Justice and the European Commission as to whether transportation platforms can be considered to provide 'information society services'. In 2017, the CJEU excluded Uber from the ISS definition in its *Elite Spain* judgment, while the Commission now included Uber in its Study on the P2B Regulation, which only applies to platforms that provide ISS. Firstly, the P2B Regulation could resolve this unclarity about whether or not transportation platforms provide 'information society services' by adopting a broader definition of 'online intermediation services' without limiting them to providers of information society services. Secondly, for more legal certainty within the European Union, these two essential European bodies should find common ground and take a clear stance on this. This modification would further be in line with the vision of the European Commission to capture *all* European online platforms in the scope.

The potential exclusion of Uber from the P2B Regulation after the *Elite Spain* judgment raises questions about whether platform workers may be excluded from the P2B Regulation depending on the level of control exercised by the platform. Since these self-employed platform workers are simultaneously excluded from the UCTD, this exclusion creates a critical gap where the platform workers who experience significant employer-like control and therefore need the protection the most, are left without sufficient legal safeguards. This lack of a unified approach results in a non-level playing field, with different categories receiving varying levels of protection against the platform. Since the actions of platforms affect *all* ecosystem actors, regardless of capacity, this necessitates a more streamlined legislative initiative that treats all ecosystem actors with an equal and appropriate degree of fairness and transparency. Thus, there is a growing need for a more holistic approach towards online platforms, in which a legal framework is developed that ensures that *all* platform actors, no matter business users, peers or consumers, are protected against actions taken by the online platform. In this regard, the P2B Regulation could adopt a more general concept of a "platform user" rather than solely focusing on business users and excluding peers working through platforms. Adopting a supranational

[122] ibid 25.

definition of "platform user" would include all forms of platform workers and also consumers that could consequently benefit from the Regulation's baseline of protection.

Furthermore, the questions remains whether the P2B Regulation's transparency-based approach will be particularly effective in remedying the power imbalance in labour platforms. Transparency and information obligations have long been the hallmark of EU consumer laws, but this approach has been widely criticised for overestimating the consumer's ability to process such information in full.[123] Consequently, as many of the intended 'business users' are regular individuals who have taken on the self-employed role in order to perform platform work, the outcome here may be similar to that in the consumer field.

When it comes to enforcement of and compliance with the P2B Regulation, it appears that more than three years after implementation, there are rather low levels of compliance by the platforms. Empirical research of the terms of Uber, Deliveroo, Upwork, Clickworker and AMT demonstrated that only one out of five platforms, i.e. American platform Upwork, consistently complied with all investigated provisions while others fragrantly violate them. These findings align with the conclusions drawn in the Commission's Study of the P2B Regulation, which similarly highlighted low levels of compliance with the P2B Regulation. In order for the P2B Regulation to achieve its desired impacts and higher levels of compliance, a public enforcement authority needs to be established to ensure compliance by responding to complaints from business users, launch administrative investigations, and generally raise awareness about the provisions of the P2B Regulation.[124] Following the general idea that rules envisioning a change are only as strong as their enforcement, a lack of (pro)active enforcement stands in the way of an effective societal change. Without more effective mechanisms of (public) enforcement, there will be less meaningful consequences for tackling the power imbalance and information asymmetries in the platform economy.

[123] Anne-Lisse Sibony and Genevieve Helleringer, 'EU Consumer Protection and Behavioural Sciences: Revolution or Reform?' in Alberto Alemanno and Anne-Lisse Sibony (eds), *Nudge and the Law : A European Perspective* (2015).
[124] Directorate-General for Internal Market and others (n 90) 8.