

The gig economy and the European platform-to-business regulation

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The article provides several reflections on the extent to which crowdworkers are covered by the new EU Regulation 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, commonly referred to as the “P2B Regulation” (“P2B” standing for “platform-to-business”). To this end, the scope of the P2B Regulation and its main provisions are briefly presented. The Regulation defines a platform as an “online intermediation service”. The suppliers of goods or services who present their offers on the platform are called “business users”. The customers to whom these business users offer goods or services must be consumers. Of the three legal relationships that arise in the triangle between these three groups, the P2B Regulation exclusively regulates the legal relationship between the provider of online intermediation services, i. e. the platform operator, and the business user. The P2B Regulation unilaterally intervenes in this legal relationship in favour of the business user and to the detriment of the provider of online intermediation services, in the sense that, by mandatory law, obligations are imposed on the provider and rights are granted to the business user. The key question is then whether crowdworkers are business users in the sense of self-employed businesses in the meaning of the Regulation and, if so, what rights they may have under it. This question receives the quite surprising answer that, even if a crowdworker is to be regarded as an employee covered by the applicable national labour law, this crowdworker can be regarded as a business user for the purposes of the P2B Regulation. If, however, the provisions of the P2B Regulation and the applicable national labour law come into conflict, then the most favourable provisions should apply in favour of the crowdworker.

Keywords: European Union law, labour law, crowdworker, online intermediation service, platform, fairness, transparency.

1. Protection of crowdworkers by the European Union platform-to-business regulation?

People who have registered on an internet platform on which customers offer “micro-jobs” against payment are often referred to as crowdworkers¹. Numerous such platforms have emerged in recent years, ranging from transport and household services to highly professional services². Customers publish their job offers on a crowdworking platform,

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¹ See, e. g.: *Leimeister J. M., Shkodran Z.* Neue Arbeitsorganisation durch Crowdsourcing: Eine Literaturstudie. Düsseldorf: Hans Böckler Stiftung, 2013. S. 61; *Leimeister J. M., Shkodran Z., Blohm I.* Crowdwork — digitale Wertschöpfung in der Wolke: Ein Überblick über die Grundlagen, die Formen und den aktuellen Forschungsstand // *Crowdwork — zurück in die Zukunft? Perspektiven digitaler Arbeit* / Hrsg. C. Benner. Frankfurt am Main: Bund-Verlag, 2014. S. 17; *Hensel I., Koch J., Kocher E., Schwarz A.* Crowdworking als Phänomen der Koordination digitaler Erwerbsarbeit — Eine interdisziplinäre Perspektive // *The German Journal of Industrial Relations*. 2016. No. 2 (23). P. 164.

² See: *Prassl J.* *Humans as a Service: The Promise and Perils of Work in the Gig Economy*. Oxford: Oxford University Press, 2018. P. 12. — Regarding the increasing importance of internet platforms in gen-

wait to see who contacts them and then select their favourite candidate³. Apps match the customers who need a job done with the — hopefully — best suited people to do it⁴. These apps are often beautifully designed and make it easy for both sides to enter into a transaction⁵. Communication with the crowdworker takes place via functionalities such as interactive maps and real-time chat⁶. This form of economy is aptly referred to as the “gig economy” and thus makes reference to the lives of artists, in which every concert or “gig” is only a one-off task or transaction, with no further obligations on either side⁷. The phenomenon is well known, as are the numerous attempts at definition and demarcation⁸.

One of the larger providers — Freelancer — based in Sydney, Australia, connects almost 50 million customers and crowdworkers from all over the world⁹. On the Freelancer app, among the many jobs on offer are the following: software development, writing texts for articles, translations or ghostwriting, data entry, gathering and managing information, creation of graphics, web design, or marketing via the internet. Prices are competitive, for instance amounting to USD 250 to build a simple website; articles are USD 25 or more. In Germany, it is estimated that nearly five per cent of eligible voters in Germany work as crowdworkers¹⁰.

This form of working offers enormous opportunities, though there are also widespread fears that crowdworkers are left without adequate legal protection¹¹.

There are numerous approaches and considerations as to how crowdworkers could be better protected. For instance, it has been extensively considered the extent to which labour law provisions should be applicable to crowdworkers in order to ensure protection against unfair contract terms and exploitation¹². The EU recently issued Regulation

eral see: *Busch C., Schulte-Nölke H., Wiewiórowska-Domagalska A., Zoll F.* The rise of the platform economy: A new challenge for EU consumer law? // *Journal of European Consumer and Market Law*. 2016. No. 1 (5). P. 3–10.

³ See only: *Leimeister J. M.* Crowdsourcing — Crowdfunding, crowdvoting, crowdcreation // *Controlling & Management Review*. 2012. No. 6 (56). P. 391.

⁴ See: *Mourelatos E., Tzagarakis M., Dimara E.* A review of online crowdsourcing platforms // *South-Eastern Europe Journal of Economics*. 2016. No. 1 (14). P. 60.

⁵ See: *Parker G., Alstynne M. W. van, Choudary S. P.* Platform Revolution: How Networked Markets Are Transforming the Economy and How to Make Them Work for You. New York: Norton & Company, 2016. P. 5; *Stewart A., Stanford J.* Regulating work in the gig economy: What are the options? // *The Economic and Labour Relations Review*. 2017. No. 3 (28). P. 421; *Prassl J.* Humans as a Service. P. 12.

⁶ See: *Prassl J.* Humans as a Service. P. 14–15.

⁷ See: *Risak M.* Gig-Economy und Crowdwork — was ist das? // *Arbeit in der Gig-Economy: Rechtsfragen neuer Arbeitsformen in der Crowd und Cloud* / Hrsg. D. Lutz, M. Risak. Vienna: ÖBG Verlag, 2017. S. 18; *Prassl J.* Humans as a Service. P. 2; *Waas B.* Zur rechtlichen Qualifizierung von Beschäftigten in der “Gig Economy” — ein Blick in das Ausland // *Arbeit und Recht*. 2018. No. 12 (66). S. 548; *Stewart A., Stanford J.* Regulating work in the gig economy. P. 421.

⁸ See: *Görög G.* The definitions of sharing economy: A systematic literature review // *Management*. 2018. No. 2 (13). P. 179; *Prassl J., Risak M.* Uber, TaskRabbit, & Co: platforms as employers? Rethinking the legal analysis of crowd work // *Comparative Labor Law & Policy Journal*. 2016. No. 3 (37). P. 622. — For an attempt to classify crowdwork, see also: *Howcroft D., Bergvall-Kåreborn B.* A Typology of crowdwork platforms // *Work, Employment and Society*. 2019. No. 1 (33). P. 21–38.

⁹ Cf.: Freelancer. Available at: www.freelancer.com/about (accessed: 12.01.2021).

¹⁰ Crowdworking Monitor. September 2018 // Bundesministerium für Arbeit und Soziales (BMAS). 2018. Available at: https://www.bmas.de/SharedDocs/Downloads/DE/Meldungen/2018/crowdworking-monitor.pdf?__blob=publicationFile&v=1 (accessed: 01.12.2021).

¹¹ See only: *Stewart A., Stanford J.* Regulating work in the gig economy. P. 421; *Prassl J.* Humans as a Service. P. 4; *Benner C.* Crowdworking gestalten — IG Metall 4.0 // *Selbstständige Unselbstständigkeit — Crowdworking zwischen Autonomie und Kontrolle* / Hrsg. I. Hensel, D. Schönefeld, E. Kocher, A. Schwarz, J. Koch. Baden-Baden: Nomos, 2019. S. 144; *Howcroft D., Bergvall-Kåreborn B.* A Typology of crowdwork platforms. P. 31.

¹² See, e. g.: *Däubler W., Klebe T.* Crowdwork: Die neue Form der Arbeit — Arbeitgeber auf der Flucht? // *Neue Zeitschrift für Arbeitsrecht*. 2015. No. 17 (32). S. 1032–1041; *Kocher E.* Crowdworking: Ein

2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, commonly referred to as the “P2B Regulation” (“P2B” standing for “platform-to-business”). According to the title of the P2B Regulation (the “Regulation”) and its Article 1, it is intended to ensure that business users of online intermediation services are granted appropriate transparency, fairness and effective redress possibilities¹³. As will be explained below, the Regulation also has certain extraterritorial effects, so that it can also be of importance for platform operators outside the EU¹⁴. This article shares some thoughts regarding the extent to which crowdworkers are covered by the Regulation, and what rights they may have under it.

2. The platform-to-business (P2B) Regulation

2.1. Scope of the Regulation

The P2B Regulation came into force in all EU Member States on 12 July 2020. It applies to online intermediation services, which are defined as information society services that facilitate direct transactions between business users and consumers¹⁵. This includes, in particular, online platforms and marketplaces. In terms of the question asked here, it is of interest in which cases crowdworking platforms can fall under the Regulation.

The Regulation applies to providers of online intermediation services regardless of whether they are established in a Member State or outside of the EU, provided that two cumulative conditions are met: firstly, that the business users (e. g. the crowdworkers) are established in the EU and, secondly that, through the provision of the online intermediation service, they (e. g. the crowdworkers) offer, their goods or services to consumers located in the EU¹⁶. When these requirements are met, the P2B Regulation applies irrespective of where the platform operator has its seat, and of the law otherwise applicable to a contract between the platform and its users¹⁷.

Assuming that the geographic requirements are met, whether a crowdworking platform falls under the Regulation consequently depends on two criteria. First, the custom-

neuer Typus von Beschäftigungsverhältnissen? Eine Rekonstruktion der Grenzen des Arbeitsrechts zwischen Markt und Organisation // Selbstständige Unselbstständigkeit — Crowdworking zwischen Autonomie und Kontrolle. S. 173–213. — See also: *Rosin A.* Platform work and fixed-term employment regulation // *European Labour Law Journal*. 2020. Vol. 12 (2). P. 156–176 (providing a brief overview of the discussion next to discussing the applicability of the Fixed-Term Work Directive (1999/70/EC) to crowdworkers).

¹³ See also: *Twigg-Flesner C.* The EU’s Proposals for Regulating B2B Relationships on online platforms — Transparency, fairness and beyond // *Journal of European Consumer and Market Law*. 2018. No. 6 (7). P. 225; *Franzina P.* Promoting Fairness and Transparency for Business Users of Online Platforms: The Role of Private International Law // *Conflict of Laws in the Maze of Digital Platforms* / ed. by I. Pretelli. Zurich: Schulthess, 2018. P. 148; *Cauffman C.* New EU rules on business-to-consumer and platform-to-business relationships // *Maastricht Journal of European and Comparative Law*. 2019. No. 4 (26). P. 474; *Wais H.* B2B-Klauselkontrolle in der Plattform-Ökonomie: Der Kommissionsvorschlag für eine Verordnung über Online-Vermittlungsdienste // *Europäische Zeitschrift für Wirtschaftsrecht*. 2019. No. 6 (30). S. 221–222; *Voigt P., Wiebke R.* Platform-to-Business-Verordnung — Neue Anforderungen für Anbieter von Online-Vermittlungsdiensten und Online-Suchmaschinen ab Juli 2020 // *Multimedia und Recht: Zeitschrift für IT-Recht und Recht der Digitalisierung*. 2019. No. 12 (22). S. 783; *Tribess A.* P2B-Verordnung zur Förderung von Fairness und Transparenz von Online-Diensten // *Gesellschafts- und Wirtschaftsrecht*. 2020. No. 12 (12). S. 233; *Naumann S., Rodenhausen A.* Die P2B-Verordnung aus Unternehmenssicht: Herausforderungen für europäische Plattformen am Beispiel einer Hybrid-Online-Plattform // *Zeitschrift für Europäisches Privatrecht*. 2020. No. 4(28). S. 775.

¹⁴ See, e. g.: *Wais H.* B2B-Klauselkontrolle in der Plattform-Ökonomie. S. 222.

¹⁵ Article 1 paragraph 2 of the P2B Regulation.

¹⁶ Article 1 paragraph 2 as well as Recital 9 of the P2B Regulation; see also: *Tribess A.* P2B-Verordnung zur Förderung von Fairness und Transparenz von Online-Diensten. S. 234.

¹⁷ See: *Ibid*; *Wais H.* B2B-Klauselkontrolle in der Plattform-Ökonomie. S. 222.

ers who receive the crowdworkers' services must be consumers in the sense of EU law, thus acting for purposes that are outside their trade, business, craft or profession. Examples given above for jobs that are offered on the Freelancer platform, such as software development or web design, will often not be covered by the Regulation, as such services are typically only requested by businesses. Pure business-to-business online intermediation services, i. e. those that are not targeted at consumers, are excluded from the scope of the Regulation¹⁸. However, in the case of passenger transport services or household or craft services, for example, there will often be consumers among the customers, meaning that platforms on which such services are offered may fall under the Regulation.

Secondly, the crowdworker offering their work or service on the platform must qualify as a "business user" in the sense of the Regulation. The key question is, therefore, whether the crowdworkers who offer their services on a crowdworking platform should actually be regarded as independent businesses in the sense of the Regulation. Often, their overall social, economic and legal situation is much more similar to the situation of dependent employees than to that of independent contractors. Under some national laws, even the labour law may be applicable to the relation between platform operators and crowdworkers. The aim of this article is to contribute to this question. The basic hypothesis is that this question cannot be answered from the perspective of the applicable national labour law, but that the P2B Regulation requires an autonomous classification of crowdworkers for the purposes of this Regulation, which can deviate from or contradict any qualification under the applicable labour law.

2.2. Key points covered by the P2B Regulation

In order to be able to better assess why this question is important, it is worth taking a quick look at the main content of the Regulation.

2.2.1. Core approach of the P2B Regulation

The key terminology and purpose of the Regulation are as follows. The Regulation defines a platform as an "online intermediation service"¹⁹ and the operator of a platform as a "provider of online intermediation services"²⁰. The suppliers of goods or services who present their offers on the platform are called "business users"²¹. As stated, the customers to whom these "business users" offer goods or services must be "consumers" in the meaning of the definitions under EU consumer law. Of the legal relationships that arise in the triangle between these three groups, the Regulation exclusively regulates the legal relationship between the "provider of online intermediation services", i. e. the platform operator, and the "business user"²². The Regulation unilaterally intervenes in this legal relationship in favour of the "business user" and to the detriment of the provider of on-

¹⁸ See: *Tribess A.* P2B-Verordnung zur Förderung und Transparenz von Online-Diensten. S. 234; *Voigt P., Wiebke R.* Platform-to-Business-Verordnung. S. 784; *Wais H.* B2B-Klauselkontrolle in der Plattform-Ökonomie. S. 222.

¹⁹ Article 2 No. 2 of the P2B Regulation; *Twigg-Flesner C.* The EU's Proposals for Regulating B2B Relationships on online platforms. P. 225.

²⁰ Article 2 No. 3 of the P2B Regulation; see also *Tribess A.* P2B-Verordnung zur Förderung von Fairness und Transparenz von Online-Diensten. S. 234.

²¹ Article 2 No. 1 of the P2B Regulation; *Twigg-Flesner C.* The EU's Proposals for Regulating B2B Relationships on online platforms. P. 225–226.

²² Article 1 paragraph 2 of the P2B Regulation; see also: *Busch C.* Mehr Fairness und Transparenz in der Plattformökonomie? Die neue P2B-Verordnung im Überblick // *Gewerblicher Rechtsschutz und Urheberrecht.* 2019. No. 8 (121). S. 789; *Twigg-Flesner C.* The EU's Proposals for Regulating B2B Relationships on online platforms. P. 225.

line intermediation services, in the sense that, by mandatory law, obligations are imposed on the provider and rights are granted to the business user²³. The Regulation does not affect the other legal relationships, i. e. the relationship between the provider of online intermediation services and the “consumer”, or any contracts between “business users” and “consumers”; these legal relationships are determined exclusively by the applicable national law.

2.2.2. Requirements for terms and conditions

Among other things, the P2B Regulation sets out the requirements for the terms and conditions applicable to the contractual relationship between business users and the online intermediation service²⁴. The purpose of this is to enable business users to become aware of the conditions for the use, termination and suspension of the online intermediation service²⁵. To achieve predictability regarding their business relationship, providers of online intermediation services must ensure that their terms and conditions comply with strict requirements, including that the terms and conditions are drafted in plain and intelligible language, that they are easily available to business users at all stages of their commercial relationship and that they set out the grounds for decisions to suspend or terminate the commercial relationship or to impose any other kind of restriction on the business user²⁶. Moreover, any changes to those terms must be notified on a durable medium to the business users concerned within a notice period of at least 15 days²⁷.

The sanction for violating these rules is drastic. Article 3 paragraph 3 of the P2B Regulation regulates that non-compliant terms and conditions are invalid, meaning that they are deemed never to have existed, with general and retroactive effects²⁸.

These provisions have a certain similarity to labour law, which — including through EU Directives²⁹ — imposes an obligation on the employer to inform the employee precisely and comprehensively about the conditions of the employment relationship.

2.2.3. Conditions to restrict, suspend or terminate the provision of services

A provider of online intermediation services can have legitimate — or less legitimate — reasons to restrict, suspend or terminate the provision of its services to a given business user. Examples of such measures are the delisting of individual services or not

²³ See: *Cauffman C.* New EU rules on business-to-consumer and platform-to-business relationships. P. 474–475; *Tribess A.* P2B-Verordnung zur Förderung von Fairness und Transparenz von Online-Diensten. S. 233; *Naumann S., Rodenhausen A.* Die P2B-Verordnung aus Unternehmenssicht. S. 777.

²⁴ Article 3 of the P2B Regulation; *Franzina P.* Promoting Fairness and Transparency for Business Users of Online Platforms. P. 148. — See also *Voigt P., Wiebke R.* Platform-to-Business-Verordnung. S. 785.

²⁵ Recital 15 of the P2B Regulation; see also: *Wais H.* B2B-Klauselkontrolle in der Plattform-Ökonomie. S. 225.

²⁶ Article 3 paragraph 1 of the P2B Regulation; see also: *Tribess A.* P2B-Verordnung zur Förderung von Fairness und Transparenz von Online-Diensten. S. 235; *Twigg-Flesner C.* The EU’s Proposals for Regulating B2B Relationships on online platforms. P. 226–227; *Voigt P., Wiebke R.* Platform-to-Business-Verordnung. S. 785–786; *Wais H.* B2B-Klauselkontrolle in der Plattform-Ökonomie. S. 225.

²⁷ Article 3 paragraph 2 of the P2B Regulation; see also: *Twigg-Flesner C.* The EU’s Proposals for Regulating B2B Relationships on online platforms. P. 227; *Wais H.* B2B-Klauselkontrolle in der Plattform-Ökonomie. S. 226; *Tribess A.* P2B-Verordnung zur Förderung von Fairness und Transparenz von Online-Diensten. S. 235.

²⁸ Recital 20 of the P2B Regulation; see also: *Wais H.* B2B-Klauselkontrolle in der Plattform-Ökonomie. S. 226–227.

²⁹ See only: Commission Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union. 21 December 2017. COM (2017) 797 final // European Commission. 2017. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0797> (accessed: 01.12.2021).

displaying search results³⁰. Short of being suspended, online intermediation service providers may also restrict the individual listings of business users (e. g. by downgrading or by negatively affecting the appearance on the platform).

Since such decisions can significantly affect the interests of the business users concerned, the P2B Regulation requires providers of online intermediation services to take certain protective measures. Among other things, before or at the time when the restriction or suspension takes effect, the provider generally has to provide the business user with a statement of reasons for that decision based on the grounds that the provider had set out in advance in its terms and conditions³¹. It must include a reference to the relevant specific circumstances, i. e. third party notifications leading to the decision in the case³². Where a provider of online intermediation services decides to terminate the provision of all its online intermediation services to a given business user, it must provide the business user, at least 30 days prior to the termination taking effect, with a statement of reasons for that decision³³. Moreover, the provider of online intermediation services must give the business user the opportunity to clarify the facts and circumstances in the framework of an internal complaint-handling process³⁴.

There is also a distant similarity to labour law, in that it not only provides notice periods, but also requires the employer to state the reasons for termination in a notice of termination.

2.2.4. Algorithmic transparency of rankings

Ranking means the relative prominence of the offers of business users as presented, organised or communicated by providers of online intermediation services, resulting from the use of algorithmic applications. Providers of online intermediation services must set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters³⁵. The required descriptions must be sufficient to enable business users to obtain an adequate understanding of whether and to what extent the ranking mechanism takes account of such things as the characteristics of the goods and services offered to consumers, and the relevance of those characteristics for consumers³⁶. Providers of online intermediation services are not required to disclose the detailed functioning of their ranking mechanisms, including algorithms³⁷.

³⁰ See Recital 22 of the P2B Regulation.

³¹ Article 4 paragraph 1 and Article 3 paragraph 1 letter c) of the P2B Regulation; see also: *Twigg-Flesner C.* The EU's Proposals for Regulating B2B Relationships on online platforms. P.227; *Tribess A.* P2B-Verordnung zur Förderung von Fairness und Transparenz von Online-Diensten. S. 236.

³² Article 4 paragraphs 1 and 5 of the P2B Regulation.

³³ Article 4 paragraph 2 of the P2B Regulation; see also: *Twigg-Flesner C.* The EU's Proposals for Regulating B2B Relationships on online platforms. P.227; *Voigt P., Wiebke R.* Platform-to-Business-Verordnung. S. 785.

³⁴ Article 4 paragraph 3 and Recital 22 of the P2B Regulation; see: *Voigt P., Wiebke R.* Platform-to-Business-Verordnung. S. 785.

³⁵ Article 5 paragraph 1 of the P2B Regulation; see: *Tribess A.* P2B-Verordnung zur Förderung von Fairness und Transparenz von Online-Diensten. S. 236. — See also: *Twigg-Flesner C.* The EU's Proposals for Regulating B2B Relationships on online platforms. P.227–228; *Voigt P., Wiebke R.* Platform-to-Business-Verordnung. S. 786.

³⁶ Article 5 paragraphs 1 and 5 of the P2B Regulation.

³⁷ Recital 27 of the P2B Regulation; see also: *Tribess A.* P2B-Verordnung zur Förderung von Fairness und Transparenz von Online-Diensten. S. 236; *Twigg-Flesner C.* The EU's Proposals for Regulating B2B Relationships on online platforms. P.228.

2.2.5. Differentiated treatment

Where a provider of online intermediation services itself offers certain goods or services to consumers through its own online intermediation service, that provider, when competing directly with other business users of its online intermediation service, must include in its terms and conditions a description of any differentiated treatment that it gives in relation to goods or services offered by that provider itself. This description must refer to the main economic, commercial or legal considerations for the differentiated treatment³⁸.

2.2.6. Access and use of data

The question of who can access and use data, including personal data, is highly relevant for value creation in the platform economy, both for the business users and the online intermediation services involved³⁹. In particular, the provider of online intermediation services is in a position to monetise data under commercial considerations. Under the P2B Regulation, providers of online intermediation services must include in their terms and conditions a description of the technical and contractual access of business users to personal data or other data that business users or consumers provide for the use of the online intermediation services, or which are generated through the provision of those services⁴⁰. In particular, business users must be made aware of any data shared with third parties that occurs for purposes that are not necessary for the proper functioning of the online intermediation services⁴¹.

2.2.7. Dispute resolution

Online intermediary service providers must provide an internal system for handling complaints from business users. The internal complaints system must be based on principles of transparency and equal treatment in order to ensure that a significant number of complaints can be resolved bilaterally within a reasonable period of time. Such a complaint-handling system must enable business users to lodge complaints directly with the relevant provider regarding issues such as alleged non-compliance by that provider with obligations in the P2B Regulation affecting the business user, technological issues that directly relate to the provision of online intermediation services, or measures taken by that provider that directly relate to the provision of the online intermediation services and affect the complainant⁴². Online intermediation service providers must provide in their terms and conditions all relevant information regarding access to and the functioning of their internal complaint-handling system. Moreover, providers of online intermediation services must facilitate mediation, in particular by identifying at least two public or private mediators with which they are willing to engage⁴³.

³⁸ Article 7 paragraph 1 of the P2B Regulation; see also: *Tribess A.* P2B-Verordnung zur Förderung von Fairness und Transparenz von Online-Diensten. S. 236.

³⁹ Recital 33 of the P2B Regulation; *Tribess A.* P2B-Verordnung zur Förderung von Fairness und Transparenz von Online-Diensten. S. 237.

⁴⁰ Article 9 paragraph 1 of the P2B Regulation; see also: *Cauffman C.* New EU rules on business-to-consumer and platform-to-business relationships. P. 475.

⁴¹ Article 9 paragraph 2 letter d) of the P2B Regulation.

⁴² Article 11 of the P2B Regulation; see also: *Twigg-Flesner C.* The EU's Proposals for Regulating B2B Relationships on online platforms. P. 229; *Voigt P., Wiebke R.* Platform-to-Business-Verordnung. S. 784.

⁴³ Article 12 paragraph 1 of the P2B Regulation, see: *Cauffman C.* New EU rules on business-to-consumer and platform-to-business relationships. P. 475; *Voigt P., Wiebke R.* Platform-to-Business-Verordnung. S. 785.

3. Key question: Are crowdworkers self-employed businesses for the purposes of the Regulation?

As we have seen, the question of whether crowdworkers fall under the Regulation boils down to whether, for the purposes of the Regulation, they are to be regarded as “business users”, i. e. self-employed contractors, or as employees⁴⁴. This question is divided into sub-questions: firstly, whether EU or national law determines whether a crowdworker is regarded as an employee or as self-employed, and secondly, what the criteria are by which this is determined.

3.1. Autonomous interpretation of the P2B Regulation or reference to national law?

The question whether crowdworkers are to be regarded as employees or self-employed requires an assessment of the applicable national labour law as well as the P2B Regulation. Moreover, national labour law and the P2B Regulation may, as the case may be, come to the same result or offer contradicting answers. An example of this could be a platform on which consumers can book transport services, and which refers the consumers to private drivers with their own cars (e. g. Uber Pop). Some national labour laws tend to qualify the drivers as employees (of the platform operator, e. g. Uber)⁴⁵. In contrast to this, it is quite imaginable that under the P2B Regulation the drivers are to be regarded as self-employed, i. e. as “business users” falling under the Regulation (for more detail on this question, see immediately below under point 3.2). Similar questions may occur on platforms that arrange delivery or courier services, or household services, among others.

At first glance, the two possibilities seem to be mutually exclusive, because an employee is not self-employed and therefore cannot be a “business user”. Moreover, a duplication of protection also seems unnecessary, because employees do not usually need the protection of the P2B Regulation, since the protection under the applicable national labour law is a better fit to their contractual role and, in a welfare state, will usually be more favourable than the rights under the P2B Regulation.

However, it should be borne in mind that the question of whether crowdworkers who offer their services on a platform (e. g. drivers from Uber Pop) qualify as employees (or as employee-like persons known as “parasubordinates”, who enjoy the same protection) is ruled by the applicable national law, which is determined by Private International Law. In the EU, this would usually be Article 8 of the Rome I Regulation⁴⁶, which, if there is no choice of law, refers to the law of the state in which the employee has to perform the work according to the contract. In cases where the question of the applicability of the P2B Regulation arises, this will often, but by no means always, be an EU member state, since business users protected by the Regulation must be domiciled in the EU.

In terms of the topic of this article, the first important decision is whether, for the application of the P2B Regulation, the term “business user” is to be interpreted in a uniformly European manner, or whether it is determined by reference to national law. This decision is to be made according to the purpose of the P2B Regulation. Its purpose is to grant —

⁴⁴ See also: *Twigg-Flesner C.* The EU’s Proposals for Regulating B2B Relationships on online platforms. P.223.

⁴⁵ E. g. Spain, see *Juzgado de lo Social Valencia 1.6.2018*, ECLI:ES:JSO:2018:1482.

⁴⁶ The question, which is not easy to answer, as to whether the law applicable to employee-like persons is also determined according to Article 8 of the Rome I Regulation, or according to the general rule for contracts in Article 3 and 4 of the Regulation, can remain open for the purposes of this Article, as a certain national labour law is applicable in any case.

under directly applicable EU law — business users of platforms a certain level of protection against platform operators⁴⁷.

A model for an autonomous interpretation of protective EU law can be seen in labour law. There has long been no question that, for the purposes of the Treaty on the Functioning of the European Union (hereinafter TFEU) and for EU labour law regulations, the concept of a worker or employee must, solely and uniformly for the entire EU, be determined autonomously from EU law, independently and regardless of the national law applicable to the employment contract⁴⁸. Examples are the interpretation of Article 8 of the Rome I Regulation and Articles 20 to 23 of the Brussels Ia Regulation⁴⁹. Wherever EU law stipulates that national law should decide the question of whether a person is an employee, this is expressly set out in EU law⁵⁰.

These guiding principles can be transferred to the P2B Regulation. The Regulation itself determines the group of entities it protects. Consequently, the P2B Regulation should be interpreted autonomously and cannot take into account whether, for example, an Uber driver is an employee under the applicable national labour law⁵¹. Furthermore, the legal situation in individual national laws can differ greatly from one another, especially since the transitions between the classification as a labour law relationship, an employee-like relationship, bogus self-employment or self-employment are fluid and subject to constant change in legal policy. For the purposes of the P2B Regulation, the doctrine and case law must therefore develop an autonomous qualification of the term “business user” within the meaning of the definition of this in its Article 2 no. 1.

3.2. Definitions of “business user” and “trader” in EU law

The meaning of the term “business user” in the P2B Regulation becomes clearer when compared with the strikingly similar definition of the term “trader” in EU consumer law.

According to the definition in Article 2 no. 1 of the P2B Regulation, the term “business user” means “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”.

According to Article 2 no. 2 of the Consumer Rights Directive, which is probably the most modern definition of the term “trader” in EU consumer law, “trader” means “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”.

⁴⁷ Recital 7 of the P2B Regulation; see also: *Cauffman C.* New EU rules on business-to-consumer and platform-to-business relationships. P.474; *Twigg-Flesner C.* The EU’s Proposals for Regulating B2B Relationships on online platforms. P.225.

⁴⁸ European Court of Justice (hereinafter ECJ), Judgement of 10 September 2015, *Holterman Ferho*, C-47/14, ECLI:EU:C:2015:574, paragraph 37; more recently ECJ, Judgement of 11 April 2019, *Bosworth and Hurley*, C-603/17 ECLI:EU:C:2019:310, paragraph 24; see also: *Junker A.* Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes — Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs // *Europäische Zeitschrift für Arbeitsrecht*. 2016. No. 2 (9). S. 186.

⁴⁹ It should only be pointed out that there are exceptions to this principle of autonomous interpretation in labour law in specific directives, which are expressly regulated in these directives, e. g. 91/533/EEC, 94/33/EC, 2008/104/EC.

⁵⁰ See: *Kocher E.* *Europäisches Arbeitsrecht*. Baden-Baden: Nomos, 2016. S. 54.

⁵¹ On this issue see very recently *Uber BV and others v Aslam and others* [2021] UKSC 5, deciding that Uber drivers can be considered as “workers”.

It is particularly noticeable that the definition in the P2B Regulation uses the same sequence of descriptive nouns (i. e. “trade, business, craft or profession”) as the definition in the Consumer Rights Directive to identify the commercial purpose of the activity in question. The linguistic differences compared to Article 2 no. 2 of the Consumer Rights Directive (e. g. “private individual” instead of “natural person”, the lack of reference to legal entities under public law) are too small and insignificant in terms of content to suggest that the legislator here wanted to express deviations. It seems to be merely a matter of editing errors or coordination errors. This shows that the definition of “business user” in the P2B Regulation is based on the definitions of the term “trader” in consumer law. For consumer law, it has meanwhile been clarified that the definitions of the term “trader”, which differ only slightly in the individual pieces of legislation, are to be understood as a uniform term that overarches the individual directives and regulations⁵². It can be assumed that the EU legislator also wants the term “business user” in the P2B Regulation to be understood in the same way as the term “trader”.

Therefore, it becomes clear that the legislator wanted to make case law and literature on the consumer-law term “trader” also applicable to the term “business user” in the P2B Regulation. This encounters certain limits, however, because the direction of protection is reversed, and, therefore, the purpose of the term “business user” in the P2B Regulation may have a different content than the term “trader” in the consumer directives. In the P2B Regulation, “business users”, i. e. the businesses that offer their services on platforms, are the protected persons in whose favour the freedom of contract is interfered with. This is the other way around in consumer law; there, the “traders” are those on whom obligations towards the consumers are imposed⁵³. Both the consumer directives and the P2B Regulation are based on Article 114 of TFEU, so they serve to create the internal market⁵⁴, for example by having a fully harmonising effect (in the case of directives) or by creating uniform law (in the case of regulations). However, this does not change the fact that the P2B Regulation imposes obligations on the providers of online intermediation services in favour of “business users”, whereas the consumer directives, in contrast, impose obligations on “traders”. This reversed direction of protection must be considered when transferring law and literature on the consumer-law term “trader” to the interpretation of the term “business user” in the sense of the P2B Regulation.

If, in spite of this contrary direction of protection, one carefully transfers case law and literature on the term “trader” under consumer law, the decisive criterion for a “business user” is the connection between the use of the online intermediation service and a commercial or professional purpose of this use. When determining the purpose of transactions carried out, it is not a question of the person’s self-assessment or the inner direction of its will, but of objective criteria and circumstances⁵⁵. Commercial activity means the perma-

⁵² ECJ, Judgement of 4 October 2018, Kamenova, Case C-105/17, ECLI:EU:C:2018:808, paragraphs 25–35; *Kohler C., Seyr S., and Puffer-Mariette J.-C.* Unionsrecht und Privatrecht: Zur Rechtsprechung des EuGH im Jahre 2018 // Zeitschrift für Europäisches Privatrecht. 2020. No. 2 (28). S. 381–382.

⁵³ E.g. concerning transparency requirements regarding rankings on platforms see: *Schulte-Nölke H.* Plattformverträge und Vertrauensschutz // Vertrauensschutz im digitalen Zeitalter / Hrsg. U. Blau-rock, F. Maultzsch. Baden-Baden: Nomos, 2020. P. 186.

⁵⁴ Similarly (although regarding Directives 2011/83 and 2005/29) see ECJ, Judgement of 4 October 2018, Kamenova, Case C-105/17, ECLI:EU:C:2018:808, paragraph 28.

⁵⁵ Bundesarbeitsgericht (hereinafter BAG) (German Federal Labour Court), Judgement of 12 December 2013, 8 AZR 829/12, paragraph 26; Bundesgerichtshof (hereinafter BGH) (German Federal Court of Justice), Judgement of 15 November 2007, III ZR 295/06, paragraph 11; ECJ, Judgment of 4 October 2018, Kamenova, Case C-105/17, ECLI:EU:C:2018:808, paragraph 37 (“...classification as a ‘trader’ requires a ‘case-by-case-approach’”); *Micklitz H.-W.* Commentary on § 14 of the German Civil Code (BGB) // Münchener Kommentar zum Bürgerlichen Gesetzbuch / Hrsg. F.-J. Säcker, R. Rixecker, H. Oetker, B. Limperg. München: C. H. Beck, 2021. paragraph 23.

ment, independent and planned offering of services for remuneration on the market⁵⁶. An intention to make a profit is not required⁵⁷. Just as insignificant is a merchant status or entry in the commercial register; small businesses or a subordinate commercial activity may form a “trader” in consumer law, and consequently also a “business user” under the P2B Regulation. In the case of mass sales by private individuals via internet auction platforms (known as “power sellers”), commercial activity is affirmed for the purposes of consumer law⁵⁸. The purpose of this is to make consumer law applicable in favour of consumers who buy from power sellers. It is precisely for this reason that it appears right under the P2B Regulation to affirm the applicability of the Regulation to power sellers and to allow its protective instruments to benefit them. The legal position of power sellers may form a model for the evaluation of micro-traders for the purposes of the P2B Regulation.

3.3. Broad and subjective interpretation of the term “business user”

From the direction of protection of the P2B Regulation and the comparison with the interpretation of the term “trader” in consumer law, it can be concluded that the term “business user” should be interpreted broadly in order to extend the circle of protected persons. Another example is the term “worker” under EU law, which shows that the circle of protected persons tends to be drawn broadly rather than narrowly when it comes to not whether a person is protected, but how he or she is protected⁵⁹. It is clear that the purpose of the P2B Regulation is to close a gap in protection, since those persons who offer services on platforms have so far not been adequately protected in national and EU law⁶⁰. To the extent that persons are protected as employees or persons similar to employees under national law, it is not the purpose of the Regulation to reduce this protection. The principle of *effet utile* also requires that a legal act intended to protect certain persons must be interpreted in such a way that it closes gaps in protection, rather than opening any up⁶¹.

In order to achieve the intended wide circle of persons protected by EU law, it is proposed here to interpret the term “business user” in a subjective way. This would lead to a very broad understanding of the term “business user”.

The main reason is that the Union legislature cannot rely on national labour law taking over, should the P2B Regulation not be applicable, in particular in cases in which the distinction between employees and self-employed businesses is fluid, because then it is doubtful whether national labour law is even applicable. Since the P2B Regulation only protects the self-employed, the term “business user” should be interpreted broadly for the purposes of this Regulation in order to form a safety net also for cases in which the national labour law has a narrow scope and does not qualify crowdworkers as employees, and protect them accordingly as employees.

⁵⁶ Micklitz H.-W. Commentary on § 14 of the German Civil Code (BGB). paragraph 20.

⁵⁷ BGH (German Federal Court of Justice), Judgement of 29 March 2006, VIII ZR 173/05, paragraphs 15–19 (regarding § 14 of the German Civil Code).

⁵⁸ See, e. g.: LG Berlin (District Court of Berlin), Judgement of 9 September 2006, O 75/06 2007, 10 MMR 401 (on 93 sales of second-hand children’s clothes and household items within one month); on the demarcation in such cases see also ECJ, Judgment of 4 October 2018, Kamenova, Case C-105/17, ECLI:EU:C:2018:808.

⁵⁹ ECJ, Judgement of 3 July 1986, Lawrie-Blum, Case 66/85, ECLI:EU:C:1986:284, paragraph 16; Risak and Dullinger 2018, 40.

⁶⁰ See: *Cauffman C.* New EU rules on business-to-consumer and platform-to-business relationships. P.474.

⁶¹ See similarly ECJ, Judgement of 17 November 2016, Betriebsrat der Ruhrlandklinik gGmbH, Case C-216/15, ECLI:EU:C:2016:518, Opinion of AG Saugmandsgaard Øe, paragraph 34; *Schulze R., Zoll F.* European Contract Law. Baden-Baden: Nomos, C. H. Beck, Hart, 2018. P. 139.

The protective purpose of the Regulation also suggests that the term “business user” should be understood subjectively rather than objectively. Subjective interpretation means, in this context, that the provider of an online intermediation service, who designed the business model and formulated the terms and conditions, should be held to its conduct. If a provider of a platform, for example transport services, classifies the drivers as self-employed in its terms and conditions, then the protective purpose of the P2B Regulation speaks in favour of affirming its applicability to the driver solely because the provider of the online intermediary service stated so, irrespective of whether the driver actually is self-employed under the applicable national law according to the objective circumstances of employment.

4. Relationship between EU law and national labour law

If the term “business user” is interpreted subjectively and as broadly as is suggested here, then the P2B Regulation may come into conflict with national law. Such conflicts must be resolved by interpretation. For example, the provisions in Article 4 of the P2B Regulation on termination may conflict with the rules that protect employees against dismissal under the applicable national labour law. If Article 4 of the P2B Regulation had priority over an applicable national labour law that offers more favourable protection against dismissal, the broad and subjective interpretation of the term “business user” advocated here would have the undesirable consequence that the P2B Regulation would lower the level of protection of national labour law. However, it follows from Article 1 paragraph 4 of the P2B Regulation that the Regulation will not affect national civil law, in particular contract law, such as the rules on the validity, formation, effects or termination of a contract, in so far as the national civil law rules are in conformity with EU law, and to the extent that the relevant aspects are not covered by the Regulation.

The P2B Regulation does not regulate questions of labour law. Should the case arise that a natural person — according to Article 2 no. 1 of the P2B Regulation — is to be regarded as a business user and at the same time — according to the applicable national labour law — as an employee, then the conflict of rules must be solved in a way that takes into account the purpose of the P2B Regulation and the employee’s protective interests. A model for such a solution is offered by the philosophical underpinning of Article 8, paragraph 1 of the Rome I Regulation. According to this, a comparison of the benefits of the P2B Regulation and national labour law would have to be made. The P2B Regulation would be applicable in favour of the business user who is also an employee. In addition to the provisions of the P2B Regulation, the employee would also be entitled to invoke all more favourable provisions of the applicable national labour law.

This solution would do justice to the protective purpose of the P2B Regulation. However, it would have the disadvantage that, in the event that the P2B Regulation conflicts with more favourable protective provisions of an applicable national labour law, the P2B Regulation would not bring about a full harmonisation of the legal relationship between the crowdworking platforms and their “business users”. Platform operators would have to expect that a national labour law applicable to this legal relationship provides better protection in favour of crowdworkers. In this respect, there would be no level playing field. Rather, the P2B Regulation would only bring about a de facto minimum harmonisation, which leaves the national legal systems leeway for further protection of crowdworkers through national labour law or contract law.

Conclusions

The considerations made here are still very preliminary on the basis of the highly innovative P2B Regulation that has just come into force, for which there is hardly any literature and no case law. The line of thought and the argumentation certainly need discussion and deepening. Nevertheless, the preliminary findings and suggestions are summarised here in short theses, in the hope that they will contribute to the discussion:

- the term “business user” in the P2B Regulation must be interpreted autonomously. Its content is determined solely from EU law, regardless of the applicable national law;
- even if, under the applicable national law, a crowdworker is to be regarded as an employee falling under labour law, this crowdworker can be regarded as a business user (i. e. as self-employed) for the purposes of the P2B Regulation;
- if the operator of a crowdworking platform designs its business model and terms and conditions in such a way that crowdworkers are referred to as self-employed businesses, then the protective purpose of the P2B Regulation requires the operator to adhere to its conduct. The crowdworkers are then to be regarded as business users because the operator termed them that. The term “business user” in the P2B Regulation is to be interpreted subjectively in this sense;
- if the provisions of the P2B Regulation and the applicable national labour law come into conflict, then the most favourable provisions should apply in favour of the business user.

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Экономика свободного заработка и Европейский регламент для отношений бизнеса с посредническими платформами

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В статье представлены некоторые размышления о том, в какой степени на краудворкеров распространяется новый Регламент ЕС 2019/1150 от 20.06.2019 о поощрении честности и прозрачности для бизнес-пользователей услуг онлайн-посредничества, обычно называемый Регламентом P2B (platform-to-business, «платформа для бизнеса»). С этой целью кратко описана сфера применения Регламента P2B и охарактеризованы его основные положения. Регламент определяет платформу как услугу онлайн-посредничества. Поставщики товаров или услуг, которые представляют свои предложения на платформе, называются «бизнес-пользователями». Клиенты, которым эти бизнес-пользователи предлагают товары или услуги, должны быть потребителями. Из трех правоотношений, возникающих между этими тремя группами, Регламент P2B регулирует исключительно отношения между поставщиком услуг онлайн-посредничества, т. е. оператором платформы, и бизнес-пользователем. Регламент P2B в одностороннем порядке вмешивается в эти правовые отношения в пользу бизнес-пользователя и в ущерб поставщику услуг онлайн-посредничества в том смысле, что императивными нормами на поставщика возлагаются обязательства, а бизнес-пользователю предоставляются права. Тогда ключевой вопрос заключается в том, являются ли краудворкеры бизнес-пользователями в смысле самозанятых бизнесменов по смыслу регламента, и если да, то какие права они могут иметь в соответствии с ним. На этот вопрос получен довольно неожиданный ответ: даже если краудворкера следует рассматривать как работника, на которого распространяется применимое национальное трудовое законодательство, этот краудворкер может рассматриваться как бизнес-пользователь для целей Регламента P2B. Однако если положения Регламента P2B и применимого национального трудового законодательства вступают в противоречие, то в пользу краудворкера должны применяться наиболее благоприятные для него положения.

Ключевые слова: право Европейского союза, трудовое право, краудворкер, сервис онлайн-посредничества, платформа, честность, транспарентность.

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