# Global Tax Update

**This global tax update article focuses predominantly on changes to occur within the EU, together with a tax update regarding Ireland.**

Whilst not directly tax specific, the EU's Platform Worker proposals could result in significant changes to the tax and social security treatment of individuals working within self-employed contractor models in Europe.

The EU Framework Agreement changes reconsider the social security impact of cross-border teleworkers, whose numbers have swelled during and following the Covid pandemic. Tax authorities around the workd are slowly turning their attention to individual and corporate tax implcations of such teleworkers, and we expect tax rules will change in the future to reflect the modern day reality of international remote working.

## Is the EU Directive on improving working conditions in platform work a threat to the use of self-employed contractor models in Europe?

In February 2023, the European Parliament voted in favour of amendments to the European Commission's Platform Worker Directive that would introduce a legal presumption of employment for self-employed platform workers and greater transparency regarding how artificial intelligence is used in this sector.

The directive does not only apply to platform work companies but may also apply to Employers of Record (EORs)/Agents of Record (AORs), as well as self-employed contractors and gig workers in Europe engaged via staffing companies. Increased remote working following the Covid pandemic has accelerated the use of such alternative 'employment' structures.

Based on the directive, persons currently considered self-employed may qualify as workers and as a result, local employment and tax laws would apply to them. This could mean that entire business models may have to be adapted. Companies may already need to act, considering the potential impact to their business and the time any changes may take to implement.

This article aims to alert companies, enabling them to take timely action, when necessary, by setting out what exactly the directive entails, which companies are or may be covered, what the impact of the directive will be and what steps can (and should) be taken now.

### Timeline

The European Council is expected to approve the proposed directive in early 2024. Once approved, EU member states will have two years to implement the directive into national law.

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### Directive Objectives And Features

The directive primarily aims to improve the working conditions of platform workers. Their employment status must be correctly determined. In addition, the directive introduces more transparency regarding the operation of the algorithms used in platform work.

To ensure that platform workers have the right employment status, the directive introduces a legal presumption that the platform worker has an employment contract and is therefore a worker and not a self-employed person. The platform, however, will first get the opportunity to rebut the legal presumption. To do so, the platform must be able to demonstrate and prove two points:

1. The worker is free from control and direction of the digital labour platform. One indicator of such control, for example, would be the ability to prevent the person performing platform work to work for any other third party.
2. The worker has his or her own business or independent profession, in which he or she normally does the same type of work as he or she does for the platform. To assess whether the person does indeed own a business, one can look at whether investments have been made in the business by, for example, promoting the company's services or buying business equipment.

However, the legal presumption will not have any effect before the date when the member states transpose the directive into national law. Contractual relationships entered into before that date (and still ongoing on that date) are therefore not affected by the legal presumption.

The directive also introduces additional rights and obligations to ensure that more transparency is in place regarding the use of algorithms in platform work. For instance, platforms will be obligated to inform platform workers about the operation and the results of the algorithm being used. The operation of the algorithm on working conditions also must be tested. Platform workers will have to know which actions are monitored, evaluated, and rewarded and on what grounds automatic decisions are generated, e.g., on the distribution of work. Finally, digital labour platforms will be required to report platform work performed in a member state to the competent authority.

## Who Will The Directive Apply To?

The directive covers all persons performing platform work in the European Union, regardless of where the platform is hosted. To assess the existence of platform work, only a contractual relationship between the individual and the digital labour platform is needed, and not necessarily a contractual relationship between the individual and the recipient of the service. Moreover, activities such as processing payments, which companies focused on payroll services perform, can be considered platform work.

A digital labour platform exists when:

- A commercial service is provided, (partly) through electronic means, such as a mobile app or a website
- The recipient of the service requests the commercial service; and
- The commercial service involves the organisation of work, meaning that demand and supply for labour are matched. The location of or the name the contractual relationship is given do not matter.

The definition is very broad; thus, many companies may qualify as digital labour platforms. What are the implications of this broad definition?

### Included (Or Possibly Included) In The Definition

- Providers of a service, such as transport of persons or goods or cleaning, which mainly involves bringing together labour supply and demand.

Well-known companies such as Deliveroo, Just Eat and Uber are likely to fall under the

definition of a digital labour platform, as would companies that have a similar set-up. In such cases, for example, an order is placed via a mobile app, after which the platform designates the nearest rider to pick it up and deliver it to the customer.

- Staffing companies, staffing platforms and (other) intermediaries.

Staffing companies, staffing platforms and other intermediaries also may meet the definition of a digital labour platform. To do so, however, they must provide their services (at least in part) by electronic means. If that is the case, staffing companies and platforms will be labelled a "digital labour platform". This would have significant consequences, particularly for companies that frequently use self-employed consultants through intermediaries, such as in IT or life science industries. Those companies may have to adjust because their staffing costs could rise considerably.

- EOR or AOR

An EOR/AOR is an organisation that serves as an individual's legal employer for tax purposes while the individual performs work at a third-party company. They deal with payroll services, for example. Does an EOR/AOR match supply and demand for labour so it can be said that they "organise the work performed by individuals"? They are less likely to play a role in bringing together the supply and demand of labour. However, not only the contractual name given to the relationship but also the actual situation is considered in determining if a platform is a 'digital labour platform'.

### Not Included In The Definition

- Providers of non-profit services
- Providers of a service whose primary purpose is to exploit or share assets.

In this respect, the directive names short-term rental of accommodation or reselling goods. Companies such as Airbnb, Booking.com or Vinted are likely not to fall under the definition.

- Online platforms that merely provide means for contacting service providers.

An online platform that provides the means by which the service providers can reach the end-user, for example, by advertising offers or requests for services or displaying available service providers in a specific area, without any further involvement, is not a digital labour platform. This type of online platform does not match supply and demand for labour. This applies, for example, to a platform that only displays the details of carpenters available in a specific area, thereby allowing customers to contact the carpenters to use their services on demand.

### What Is The Directive's Impact?

When the directive enters into effect, it is likely to have the following consequences:

- All digital labour platforms must be properly managed and keep a proper business administration to comply with the explanation and information obligations
- Every person performing platform work is entitled to claim the legal presumption of an employment relationship unless the digital platform can successfully rebut this presumption. Upon successfully establishing an employment contract, the worker will be entitled to all benefits offered by local employment law, including employment protection, a minimum wage, certain minimum rights, entitlement to minimum vacation days, etc.
- Classifying a person as a worker instead of a self-employed individual would also have other impactful consequences, including for social security contributions and work permits
- If an individual is considered a worker, the digital labour platform must comply with a significant number of additional EU regulations, such as the directive on transparent and predictable working conditions, the directive on work-life balance for parents and carers and the working time directive
- If the digital labour platform works with large numbers of people who have been misclassified as self-employed, the platform's business model will have to be significantly adjusted if the platform intends to work only with genuinely autonomous persons
- Digital platform operators will be considered employers and hence will need to comply with all relevant tax and social security formalities. This includes, but is not limited to, first-day notifications of the employees in the country of work and the registration of the company as an employer. Depending on the legislation of the country where the activities are performed, the platform may also need to start deducting withholding taxes as well as employee social security contributions on the amounts payable to the workers. In addition, they may also be liable to pay employer social security contributions. When the workers perform their activities in more than one country, the implications will need to be evaluated on a case-by-case basis.

The directive also has other, less direct but equally serious consequences. For instance, digital labour platforms may be reluctant to disclose any information about the algorithms they use for competition-related reasons. After all, these algorithms are often at the heart of their business model. In addition, because of the broad definition of a digital labour platform, it may not be easy to adapt the business to an employee-only model. For staffing companies, this could mean that they would be better off providing their commercial services other than through digital means.

### BDO Comment

Companies should give this directive due consideration as soon as possible, given that the timeline for its implementation is relatively short and that the time needed to make significant adjustments to business models, as well as preparing for other likely consequences, such as applying for work permits, may be considerable.

BDO can work with you to determine to what extent the directive may impact your business and to proactively prepare for the changes that are likely to come. Some initial questions we can help you with include:

1. Does my organisation meet the definition of a digital labour platform?
2. Does my organisation meet the criteria to rebut the legal presumption?
3. What are the financial, legal and tax consequences for my organisation if the directive enters into effect?

## EU Framework Agreement On Cross-Border Telework Finalised

Telework during the COVID-19 pandemic led to an increase in the amount of employee telework on a structural basis for many companies, including cross-border telework. However, habitual cross-border telework can result in a shift of the social security legislation applicable to a teleworker.

To address this issue, the EU's Administrative Commission for the Coordination of Social Security Systems in April 2023, agreed on a framework agreement to determine the applicable social security legislation for certain cross-borders teleworkers in the EU. The framework agreement provides a system, based on Article 16 of Regulation (EC) No. 883/2004 on the coordination of social security systems, whereby teleworking in an employee's residence state will not be taken into account when determining the applicable social security legislation if it accounts for less than 50% of the employee's working time.

The agreement will enter into force on 1 July 2023 in those countries that sign it before that date. The 27 EU member states, as well as Norway, Iceland, Liechtenstein, Switzerland, and the UK have been invited to sign the framework agreement.

### Cross-Border Telework During The COVID-19 Pandemic

During the COVID-19 pandemic, a neutralisation period was introduced during which teleworking days were not taken into account when determining the applicable social security legislation of cross-border workers. Thus, for cross-border workers who worked more than 25% of their working time in the residence state, the applicable social security legislation did not shift to the home state based on the general principles of Regulation (EC) No. 883/2004.

The neutralisation period ended on

30 June 2022, and was followed by a new period (the transition period) during which similar principles were observed for cross-border telework up to 40% of the working time. Both periods included an exemption for the request for an A1 certificate. However, the formalities based on the posted workers directive continue to apply (e.g., the obligation to request a Limosa certificate in Belgium).

The transition period, and therefore the possibility to set aside the general principles set out in EU Directive No.883/2004, ends on 30 June 2023.

### Framework Agreement

As a response to structural cross-border telework after the COVID-19 pandemic, the Administrative Commission unveiled the framework agreement in April. According to the agreement, the applicable social security legislation in a cross-border telework situation can remain the legislation of the state where the employer's registered office is located, provided the amount of telework in the employee's residence state is less than 50% of the employee's total working time.

## Conditions

The new agreement will apply if both member states involved have adopted the framework agreement, and only if the following conditions are met:

- The employee has one employer or multiple employers with a registered office in the same member state
- The employee habitually works in the member state of the registered office of the employer and teleworks in the residence state; and
- The employee's teleworking time is less than 50% of his or her total working time.

If the conditions are met, the social security legislation of the member state of the employer's registered seat would continue to apply.

## Application And Procedure

To apply the framework agreement, a request must be submitted in the member state where the employer has its statutory seat. Requests can be filed only for future periods, not retroactively.

However, if social security contributions have already been paid in the state where the employer has its statutory seat, the framework agreement provides an exception to the 'pro futuro' requirement. In this situation, a request may be filed for a past period if:

- The period isn't longer than three months; or
- Specifically for the period from 1 July 2023 to 30 June 2024, a request can be submitted for a past period up to 12 months but may not include a period before the entry into force of the framework agreement.

**Example 1:** An employee has been teleworking two days a week while paying social security contributions in the state where the employer's statutory seat is situated. The employer wants to apply the framework agreement for the period from 1 July 2024 to 1 July 2026, and a request is filed on 1 November 2024. The framework agreement cannot be applied because the request concerns a period more than three months in the past and it doesn't concern the specific period mentioned under (2).

**Example 2:** An employee is planning on teleworking two days a week. Currently, he is subject to the social security legislation of the state where the employer's statutory seat is situated. The employer wants to apply the framework agreement for the coming two years. The framework agreement applies in this situation because it deals with a request for a future period.

As soon as the member states reach an agreement to apply the social security legislation of the member state where the employer has its registered office, they will issue a corresponding A1 document (the document that states the applicable social security legislation). Note that this agreement, and therefore the A1 document, are limited in time, to a maximum of three years. An extension is possible providing that a new request is filed.

### BDO Comment

As indicated above, the principles set out in the framework agreement apply only if both member states involved have signed the agreement. Belgium was actively involved in the preparation of the framework agreement and has already confirmed that it intends to sign the agreement.

## IRELAND

*Recent guidance issued on tax equalisation arrangements*

Global mobility has become an area of increased interest for the Irish Revenue, and they have focused on resourcing this area in recent months. Consequently, they have recently begun to issue detailed guidance specific to global mobility, including a list of risk areas in this space.

In February 2023, the Irish Revenue Commissioners on 27 February issued a Revenue brief, which provides guidance on tax equalisation arrangements, for personal income taxation of employees assigned from abroad under non-Irish contracts of employment.

While the list of topics covered is quite extensive, some of the areas of particular focus for Revenue will be the operation of the pay-as-you-earn (PAYE) system on a real-time basis, the audit trail from income and benefits stated on the assignment letter to the home country payroll and on to the Irish shadow payroll, the correct treatment of trailing bonuses, and the taxing and reporting of share remuneration attributable to the Irish assignment.

### Funding Of Foreign Payroll Withholding Tax Liability

The Irish tax authorities recently updated their position in cases where an employee is assigned temporarily to a foreign jurisdiction with which Ireland has entered into a double tax agreement (DTA) during a tax year and the employer funds the foreign payroll withholding tax liability by not seeking payment of the liabilities from the employee during the year. After the year end, the employee files their Irish income tax return and makes a claim for foreign tax relief. The subsequent tax refund is then paid by the employee to the employer.

Revenue's position now, is that the employer has effectively provided a loan to the employee to fund their income tax liability in the foreign DTA jurisdiction whilst carrying out employment duties there. Effective 1 January 2023, an employee who enters such an arrangement with their employer is considered to be in receipt of a preferential loan until the amounts are repaid to the employer. The taxable value of a preferential loan is currently 13.5% per annum.

The updated guidance is silent on whether the funding of Irish payroll tax liabilities via a shadow payroll would also give rise to a preferential loan.

### BDO Comment

Given the amount of updated guidance being issued by Revenue in this area, together with the data being collected through the PAYE real time reporting, there is a strong expectation that Revenue interventions will follow.

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