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COMPETITION ISSUES IN LABOUR MARKETS

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Abstract

Securing a well-functioning and competitive labour market is essential for economic growth and prosperity. A distorted labour market diminishes the employees' power to bargain regarding their labour rights, including salary amount, working conditions, and social safeguards. However, the problems deriving from a non-competitive labour market go beyond workers' labour rights and welfare, as it leads to inequality in wages, hinders innovation, and suppresses the entire economy.

In this paper we will start with a brief overview of Serbian antitrust regulations and practice of the Serbian Competition Authority, with focus on matters that are relevant for labour markets, and an overview of provisions from the Serbian Labour Law that are significant from an antitrust perspective. We will explore labour related practices that could raise competition concerns, including collective bargaining, effects of mergers on the labour market, non-compete clauses, wage-fixing and no-poaching agreements.

Apart from employees, whose work engagement is regulated by standard employment contracts, the paper will cover the labour market of a non-standard form of employment – digital platform workers. The digital platform economy has steadily grown and changed over the past years, through several mergers and acquisitions, and the establishment of new on-demand delivery platforms. Nevertheless, in Serbia, the status of platform workers is still unregulated, and the current forms of engagement of these workers fail to meet criteria for decent work standards, depriving the workers of a myriad of labour and social security rights. This issue has raised concerns with the Serbian Competition Authority, when conducting the sector analysis of the competition conditions in the field of digital platforms for mediating the sale and delivery of restaurant foods and other products. The paper will include, among other, findings from the mentioned analysis that are relevant for the subject topic.

Finally, we will provide our view on possible solutions, either from the antitrust or labour perspective, that could be useful in securing well-functioning labour markets.

Key words: *competitive labour market, collective bargaining, non-compete clauses, wage-fixing agreements, no-poaching agreements, digital platform workers.*

1. INTRODUCTION

Recently there has been a growing focus on the labour dimension of competition, reflecting a broader recognition of how competitive practices influence various aspects of labour related matters including labour market dynamics, change in wages and other working conditions, workers' productivity and mobility, and whether in the long run this can affect aspects such as innovation and economic growth.

The European Trade Union Confederation ("ETUC") has raised its concerns about the unwillingness of EU competition authorities to address the asymmetry of power between capital and labour, stating that the assessment of the state of competition (either a planned concentration or abuse of dominance) is almost exclusively reviewed from the consumer welfare perspective. They have stressed that competition policies have a significant impact on employment related issues, and that advocating for a reform of competition sources may be considered necessary in the future[1].

With technological developments, the position of workers has been changing for some time, and there are various other work engagement options apart from the basic distinction between standard employment and self-employment. Focus has been placed on the 'false self-employed' persons[2], and it seems to be evident that possible collective bargaining activities by associations of some of these categories of workers, should be shielded from competition rules.

It has been suggested that "employers have acquired market power due to the de-unionisation of the workforce (Benmelech et. Al., 2018). This may reduce the strength of the countervailing power of the employees/suppliers of labour facing monopsony power"[3].

The effect of monopsony on the employers' part has also been of concern when it comes to other labour market related agreements and practices, namely non-

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1 Picard, S., European Trade Union Confederation, *Competition and Labour – A Trade Union Reading of EU Competition Policies*, 2023, pp. 8, 9, 15

2 False self-employment is the situation whereby instead of concluding a standard employment contract with an employer, a person is conditioned to establish their own business as a self-employed person, freelancer etc., but carries out activities as a *de facto* employee, under the authority and subordination of another company.

3 Volpin, C.; Pike, C., Organisation for Economic Co-operation and Development ("OECD"), *Competition Concerns in Labour Markets – Background Note*, 2019, p. 5

compete clauses, wage-fixing agreements and no-poaching agreements. While non-compete clauses are concluded between the employer and employee, and are regulated in most countries, wage-fixing agreements and no-poaching agreements qualify as collusion in the labour market.

The Organisation for Economic Co-operation and Development ("OECD") notes that in order to avoid unlawful collusion in the labour market, companies that might collude could consider merging instead. However, if such a merger would reduce competition in a specific labour market, potentially creating a dominant employer or monopsony, "the merged entity would likely use its market power to reduce employment and wages in that market, similarly to what non-merging colluding companies would do"[4].

Significant attention has been directed toward the status of digital platform workers. While these platforms have been around for some time, their usage has notably surged since the Covid-19 pandemic. Platform workers are often engaged as essentially false self-employed, through intermediary companies or even informally. Certain steps have been undertaken at EU level to regulate the position of digital platform workers and acknowledge their collective bargaining rights. In Serbia, the position of digital platform workers is still unregulated, and they are faced with various challenges that mainly stem from a significant power asymmetry between the digital platform and the digital platform workers.

In light of the above, this paper has been divided into the following sections:

1. Serbian Competition Regulations
2. Collective Agreements
3. Mergers
4. Non-compete Clauses
5. Wage-fixing and No-poaching Agreements
6. Digital Platforms
7. Final Remarks and Conclusions

2. BRIEF OVERVIEW OF SERBIAN COMPETITION REGULATIONS

First regulations in Serbia that address issues of breach of competition date back to the 1920s. The first law to include all the three main elements of competition

[4] OECD, *OECD Employment Outlook 2022: Building Back More Inclusive Labour Markets*, OECD Publishing, Paris, 2022, https://doi.org/10.1787/1bb305a6-en, p. 166

law[5] is the Law on Protection of Competition from year 2005[6]. The mentioned regulation included for the first time provisions regarding supervision of mergers and acquisitions, and established the Serbian Competition Authority ("SCA"). The implementation of this regulation was hindered, mainly due to the fact that the SCA had insufficient authorizations.

This was corrected in 2009 when the new Law on Protection of Competition[7] ("LPC") was adopted, replacing the previous piece of legislation from year 2005. This was a major step forward towards harmonization with EU regulations. The LPC is still in force today, with only minor changes that were made in year 2013. It consists of general rules relating to prohibition of restrictive arrangements and abuse of dominant position, that are basically the same provisions as Articles 101[8] and 102[9] of the Treaty on the Functioning of the European Union[10] ("TFEU").

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5 Generally, the main pillars of competition regulation are considered to be the following three elements: 1) prohibition of restrictive agreements and practices; 2) prohibition of abuse of dominant market position; 3) supervision of mergers and acquisitions.

6 Law on Protection of Competition, Official Gazette of the Republic of Serbia, no. 79/2005

7 Law on Protection of Competition, Official Gazette of the Republic of Serbia, nos. 51/2009 and 95/2013

8 Article 101 of the Treaty on the Functioning of the European Union relates to the prohibition of restrictive practices stating: "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

9 Article 102 of the Treaty on the Functioning of the European Union relates to the prohibition of abuse of dominant position, stating: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

10 Treaty on the Functioning of the European Union, OJ C 326/47

The LPC also regulates mergers and acquisitions, and expands the authorizations of the SCA, allowing it, among other, to impose fines and other measures.

There are a total of eight decrees primarily addressing procedural issues and block exemptions, along with several guidance documents. This number of regulations is significantly lower than the average in neighbouring countries and well below the EU level. Consequently, a key question of whether the existing regulations are sufficient, and is the implementation of current legislation by the SCA aligned with European standards, remains open.

It is our perspective that although general rules are harmonized with EU legislation, more detailed competition regulations would be welcome.

Under the Stabilization and Association Agreement[11], Serbian authorities are required to assess competition practices on the basis of criteria arising from the application of EU competition rules and interpretative instruments adopted by EU institutions, in cases where the behaviour in question may affect trade between Serbia and the EU[12]. Although the practice of the SCA may not always be in line with EU competition rules, there are instances where the SCA has made explicit references to EU legislation in its decisions and guidelines for application of domestic competition rules[13].

When it comes to labour related matters, the LPC is very clear, explicitly stating that its provisions do not apply to labour related matters between employers and employees nor labour related matters determined under collective agreements between employees and labour unions[14].

Taking this into account, it is not unexpected that the SCA has not yet dealt with any issues explicitly concerning labour matters. In terms of regular employment, that is regulated by a standard employment contract, the SCA would in fact, be unauthorized to act.

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11 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part [2013] OJ L 278 (Stabilization and Association Agreement)

12 Article 73 of the Stabilisation and Association Agreement

13 See for instance Conclusion of the Serbian Competition Authority ("SCA") instituting proceedings ex officio against Roaming electronics and others [5], no. 4/0-01-177/2021-26, July 2, 2021. The SCA made an explicit reference to the EC Guidelines on Vertical Restraints (2010/C 130/01), while explaining different examples of retail price maintenance.

14 Article 4 of the Law on Protection of Competition, Official Gazette of the Republic of Serbia, nos. 51/2009 and 95/2013

In contrast, it is our assessment that the SCA would be competent to examine restrictions of collective agreements to which an association of self-employed workers is a party to. In Serbia, self-employment is regulated under the Companies Act[15] as entrepreneurship, and once registered, the entrepreneur is regarded as a form of business entity. In terms of competition regulations, it may be expected that entrepreneurs would be considered as undertakings, and any agreements under which an association of entrepreneurs could potentially restrict competition should be examined by the SCA. We further anticipate that the SCA would act upon restrictions that derive from wage-fixing or no-poaching arrangement.

Moreover, the SCA has shown consideration towards workers, namely delivery personnel, in a sector analysis relating to the state of competition on the market of on-demand delivery platforms[16]. The SCA has examined their position and appealed to relevant authorities to further analyse and regulate the situation. This matter will be further elaborated later in this paper under section 6. Digital Platforms.

3. COLLECTIVE AGREEMENTS

In principle, collective agreements do not fall within the scope of EU competition regulations. With the rise of other forms of work engagement, apart from standard employment, this issue has become more perplex. The digitalization of work and the subsequent growth of the 'gig economy'[17] have resulted in new forms of work engagement that cannot be easily classified as either standard employment or independent self-employment. This has prompted a re-evaluation of which forms of collective bargaining should be exempt from competition regulations.

3.1. CJEU Practice regarding Collective Agreements

In the context of collective agreements within EU practices, the Court of Justice of the European Union ("CJEU") took a clear stand by its ruling in case *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*[18] ("Albany case").

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15 Articles 83 – 92 of the Companies Act, Official Gazette of the Republic of Serbia, nos. 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021

16 Serbian Competition Authority, *Sector Analysis on the State of Competition on the Market of Digital Platforms for Mediating in the Sale and Delivery of Mainly Restaurant Food and other Products*, Belgrade, 2023

17 The gig economy refers to a labour market characterized by the prevalence of short-term, flexible jobs, often performed through digital labour platforms.

18 CJEU Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751, par. 59

The CJEU ruled that certain competition restrictions are inherent to collective agreements between organizations representing employers and workers, and are essential for improving working conditions. Consequently, collective agreements designed to enhance working conditions (including wages) fall outside the scope of Article 101 TFEU, which prohibits agreements between undertakings that restrict competition within the internal market, particularly those related to price-fixing or other trading conditions. This has come to be referred to as the "Albany exception".

In another case, a Dutch trade union of workers in arts, information and media, FNV Kunsten Informatie en Media ("FNV"), challenged the stand of the Netherlands Competition Authority that a collective labour agreement establishing minimum fees for independent services is not exempt from the scope of Article 101 TFEU. The Netherlands Competition Authority argued that collective agreements involving employee associations differ fundamentally from those involving associations of self-employed workers.

The CJEU ruled[19] that self-employed workers are undertakings, therefore the collective agreements that associations of self-employed workers enter into should be considered as inter-professional agreements, meaning that the provisions of Article 101 of the TFEU would apply in this case. The CJEU also clarified the position of service providers who are 'false self-employed persons'. Taking into account that their situation is similar to that of an employee, the Albany exception would be applicable in case it is determined that a collective agreement involves 'false self-employed' service providers.

3.2. EU Guidelines regarding Collective Agreements

In a press release from June 2020[20], the European Commission acknowledged the challenges in defining the scope of self-employed persons who need to participate in collective bargaining, due to the wide range and diversity of activities they perform, and changes in their situation over time.

Particularly due to the rapid expansion of digital platforms during the past years, "…the concept 'worker' and 'self-employed' have become blurred. As a result, many individuals have no other choice than to accept a contract as self-employed.

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[19] CJEU Case C413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014], ECLI:EU:C:2014:2411, par. 27, 31

[20] European Commission – Press release, *Competition: The European Commission launches a process to address the issue of collective bargaining for the self-employed*, Brussels, 30 June 2020

We therefore need to provide clarity to those who need to negotiate collectively in order to improve their working conditions[21]."

The European Commission announced that it is assessing whether it is necessary to adopt measures at EU level in order to address the above-mentioned issues and improve the conditions of these individuals. This resulted in their publication of the Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons[22] ("Guidelines") in September 2022. The Guidelines strive to establish a balance between allowing collective bargaining to improve working conditions of solo self-employed persons and preventing anti-competitive practices. They determine when agreements concluded because of collective negotiations between solo self-employed persons and other undertakings, may be exempt from competition rules, in particular TFEU Article 101.

The Guidelines consider the following categories of solo self-employed persons to be in a situation comparable to that of employees and that collective agreements negotiated and concluded by them should fall outside the scope of TFEU Article 101:

- Economically dependent solo self-employed persons – these persons provide their services exclusively or predominantly to one counterparty. Due to this, they are more likely to be in a situation of economic dependence, since they do not determine their conduct independently and are likely to receive instructions from said counterparty on how their work should be carried out.
- Solo self-employed persons working 'side-by-side' with workers – these persons work side by side to workers and perform the same or similar tasks as workers for the same counterparty. They provide their services under the direction of the counterparty and have insufficient independence in performing their activities.
- Solo self-employed persons working through digital labour platforms – these persons may be dependent on digital platforms, especially for the purpose of reaching customers. They may often face 'take it or leave it' work offers, with little or no scope to negotiate their working conditions, including their remuneration.

3.3. Serbia

As mentioned above, the LPC explicitly states that it does not apply to labour related matters, including those deriving from collective agreements. In its practice,

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21 European Commission – Press release, *op. cit.,* note 20, par. 3

22 Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons [2022] OJ C 374/02

the SCA has not dealt with any issues concerning collective agreements, to which a party is a labour union in terms of the Serbian Labour Law[23] ("Labour Law" or "LL"), as it would not be authorized to do so. The SCA has neither dealt with any collective agreements to which a party is an association of workers who are not employees in terms of the LL.

4. MERGERS

The OECD observes that, in general, the impact of mergers on the labour market has received limited attention. One of the possible reasons for this could be the difficulty in identifying the relevant market[24]. David Arnold noticed that there is insufficient empirical evidence and little guidance on how to perform competition analysis in labour markets. He has found that "mergers with small impacts in local labour market concentration do not have significant impacts on workers' earnings. However, mergers that generate large shifts in concentration have economically meaningful and statistically significant effects. These effects are larger in already concentrated markets, are consistent in tradable industries, and are consistent in a sample of national mergers that are likely not driven by local economic conditions"[25]. Additionally, he found "evidence of spillovers in the labour market, with other firms in the labour market decreasing wages in response to merger activity"[26]. OECD has also noticed that the merging of companies that operate in the same industry and production level (horizontal mergers) have a significant effect on the labour market, even when the employer does not acquire a dominant position.

It can be concluded that the impact of mergers on the labour market, both present and potential, requires further research to establish comprehensive guidance for analysing this aspect of competition.

4.1. Serbia

The Labour Law includes several articles that regulate the rights of employees in the event of change of employer[27]. The provisions largely align with Council Di-

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23 Labour Law of the Republic of Serbia, Official Gazette of the Republic of Serbia, nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017 and 95/2018

24 OECD, *op. cit.,* note 4, p. 166

25 Arnold D., *Mergers and Acquisitions, Local Labour Market Concentration, and Worker Outcomes*, 2021, p. 30

26 Arnold D., *op. cit.,* note 25, p. 30

27 Articles 147 – 151 of the Labour Law, Official Gazette of the Republic of Serbia, nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017 and 95/2018

rective 2001/23/EC[28]; however, they are somewhat basic and may be considered insufficient.

The successor employer is required to assume all employment agreements and employer's general acts (the employment rulebook or collective agreements) from the predecessor employer, which must be maintained by the successor employer for a minimum of one year. The predecessor employer is required to fulfil transparency obligations by providing complete and accurate information to the successor employer regarding the rights and duties outlined in the employer's general acts and employment agreements, as well as information related to the transfer of employees' contracts. Both the predecessor and successor employers must inform the representative labour union, or directly inform the employees if no union exists, about the transaction at least 15 days prior to its execution. The predecessor and successor employers must collaborate with the representative labour union to implement measures at least 15 days before the change of employers, aimed at mitigating the social and economic impacts on employees.

In May 2020, the Serbian Government adopted the Action Plan for harmonizing with EU legislation for Chapter 19, which pertains to Social Policy and Employment. The plan indicates that the Labor Law is only partially aligned with Council Directive 2001/23/EC.

For full harmonization, the Labor Law would need to incorporate definitions of key terms related to the change of employer, including 'undertaking', 'transfer of an undertaking', 'transferor', and 'transferee'. Additionally, it should include provisions concerning employee notification, protection against redundancy, and compliance with the provisions of the law regarding transnational/multinational companies[29].

Indeed, in practice, it can be challenging to determine whether a transaction qualifies as a 'change of employer' under the Labor Law, particularly in cases involving the transfer of businesses or parts of undertakings. Clarifications from lawmakers on this matter would be beneficial, while measures to protect against redundancy would help ensure social stability by preventing sudden unemployment and safeguarding vulnerable workers.

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[28] Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L082

[29] Government of Serbia, Ministry of Labour, Employment, Veteran and Social Affairs, *Action Plan for Chapter 19 – Social Policy and Employment*, 2020, p. 70

The LPC and the current Merger Notification Regulation[30] do not mandate the submission of data necessary for analysing the labour aspects of mergers. Similarly, in its merger control practice, the SCA has not addressed the possible impacts mergers may have on labour markets and workers.

5. NON-COMPETE CLAUSES

Non-compete clauses (NCAs) are designed to prevent employees from working for competing businesses or starting their own ventures that would compete with their employer. The primary purpose of these restrictions is to protect the employer's confidential information, trade secrets, know-how, and client relationships. Typically, NCAs are limited in three aspects:

- Duration: NCAs may be effective for the duration of employment and, if mutually agreed upon, for a specified period after termination, typically not exceeding 24 months.
- Geographical Scope: The geographic range of the restriction may encompass a specific town, region, country, or beyond. This scope should be reasonably defined in relation to the employer's business interests.
- Scope of Activities: The activities that the employee is prohibited from engaging in should be clearly and reasonably defined, considering the intended purpose of the NCA.

The OECD has noted[31] that some employers habitually use non-compete clauses, including when employees do not have access to confidential information or know-how. Even if such clauses lack the necessary elements to be enforceable, they are often included to deter uninformed employees from pursuing opportunities with competitors. Should an employee choose to challenge the clause, they may find it unenforceable in practice, but the mere presence of the clause can still serve as a discouragement.

The advantages and disadvantages of non-compete clauses, particularly concerning their practical impacts are debatable. It can be argued that NCAs restrict employee mobility and discourage market entry and entrepreneurship. This, in turn, could lead to a more concentrated labour market, which may negatively affect both employees and competition. On the other hand, non-compete clauses can be considered to encourage employers to invest in intangible assets, including employee education and training. Some argue that this positive effect could also

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30 Regulation on the Content and Manner of Submitting Notification on Concentration, Official Gazette of the Republic of Serbia, no. 5/2016

31 OECD, *op. cit.,* note 4, p. 164

be achieved through alternative measures, such as requiring employees to repay training costs[32].

It is undisputable that if NCAs are not prohibited, they should be regulated and their use monitored by relevant authorities to prevent potential abuse.

At EU level, non-compete clauses in employment are not specifically addressed and the matter is left to be regulated at national level.

5.1. Serbia

The Labour Law explicitly allows for the possibility of including non-compete clauses in employment agreements[33]. The clause may be established for the duration of employment and for up to two years after termination. In the latter case, the clause should specify the amount of compensation that the employer will provide to the employee during the non-compete period after termination of employment. This remuneration is intended to compensate for the lost earnings resulting from the employee's inability to pursue certain jobs during the non-compete period.

Non-compete clauses can be determined only in the event that the employee is in position to acquire new, especially important technological knowledge, wide span of business partners or become acquainted with important business information and secrets. The geographic scope of the non-compete clause and the scope of prohibited activities must also be specified.

In practice, non-compete clauses that last for the duration of employment are quite common, regardless of the employee's role or whether they have access to any know-how, contacts, or confidential business information. If a non-compete clause extends beyond the duration of employment and does not specify the amount of remuneration, or if the employer fails to provide this payment, the clause is null and void. Given that most employers are reluctant to incur this expense, non-compete clauses that last after the termination of employment are rare, either because they are not established initially or are ultimately rendered void.

In conclusion, while the Labour Law provides a clear framework for implementation of non-compete clauses, their frequent inclusion without a valid basis, suggests a potential misuse that could undermine employee mobility and market competition.

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[32] Zekić, N., *Non-compete clauses and worker mobility in the EU*, Wolters Kluwer, https://global-workplace-law-and-policy.kluwerlawonline.com/2022/11/30/non-compete-clauses-and-worker-mobility-in-the-eu/, Accessed 28 September 2024

[33] Articles 161 and 162 of the Labour Law, Official Gazette of the Republic of Serbia, nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017 and 95/2018

This emphasizes the necessity for greater awareness and guidance for employers regarding compliance with the Labour Law. Additionally, strengthening oversight by the relevant inspectorate would be advantageous.

6. NO-POACHING AND WAGE-FIXING AGREEMENTS

In May 2024, the European Commission ("EC") published the Competition policy brief for Antitrust in Labour Markets ("Policy Brief")[34], delving into the issues of no-poaching agreements and wage-fixing agreements. Both mentioned practices bring distortion to labour markets.

Wage-fixing agreements refer to arrangements in which employers collectively agree to set wages or other forms of compensation and benefits. These agreements essentially create a monopsony effect, resulting in lower wages and reduced benefits due to diminished labour demand, which in turn leads to decreased labour input. This reduced input contributes to lower output in downstream markets, ultimately driving up prices for consumers. Consequently, such practices negatively impact both employees and consumers.

In no-poaching agreements, employers consent to refrain from recruiting each other's employees. The Policy Brief clarifies that the term 'employees' includes both employees in the strict sense of the word, as well as 'false self-employed' persons, and service providers. No-poaching agreements include a) no-hire agreements, in which employers commit to refrain from actively or passively hiring employees of another participating employer, and b) no-solicit agreements, where employers agree only to refrain from actively reaching out to employees of another employer involved in the agreement.

By liming employee mobility, no-poaching agreements, like wage-fixing agreements, also lead to lower wages. This practice contributes to an inefficient labour market, ultimately resulting in decreased overall productivity, reduced innovation, and hindered economic growth.

The EC considers both wage-fixing agreements and no-poaching agreements as agreements that, in general, restrict competition under Article 101 TFEU. Moreover, it concludes that these practices qualify as restrictions by object[35], taking the stand that it is unlikely that they would generate sufficient pro-competitive effects to satisfy the conditions for an exemption under Article 101(3) TFEU.

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[34] Aresu, A.; Erharter, D.; Renner-Loquenz, B, *Competition Policy Brief - Antitrust in Labour Markets*, European Commission, 2024, pp. 1-7

[35] Restrictions by object are practices that are considered anti-competitive by their nature, unlike restrictions by effect that do not restrict competition *per se*, but once their impact on the market is examined, they may turn out to have an anti-competitive effect.

In fact, any pro-competitive effects of these agreements are unlikely and with a disputable result. The Policy Brief states that, in principle, no-poaching agreements could be a solution to 'investment hold up'[36] problems, as they may encourage employers to offer training to employees. Conversely, they may suppress the employee's incentive to invest in their own training. It is deduced in the Policy Brief that any potential pro-competitive effects could be better achieved through less restrictive alternatives, such as requiring employees to repay training costs, implementing compliant non-compete clauses, utilizing non-disclosure agreements, and gardening leaves.

Since wage-fixing and no-poaching agreements essentially represent collusive practices, employees are often unaware of their existence. Unlike in the case of non-compete agreements, employees are not in position to negotiate any terms which *de facto* impact their labour rights.

As of the time of writing this paper, the European Commission is investigating cases related to the subject arrangements, but no decisions have yet been made.

6.1. Possible exceptions[37]

The EC Merger Regulation[38] states that "Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases[39]." In its Notice on restrictions directly related and necessary to concentrations[40] (hereinafter "Notice on Restrictions"), the EC provides guidance on interpreting the concept of restrictions that are directly related to and necessary for the implementation of a concentration, commonly referred to as 'ancillary restraints'.

Restrictions which are considered to be directly related to the concentration, are those that are objectively closely linked and economically related to the main transaction, with the intent of allowing a smooth transition to the new company structure after the concentration. Further, restrictions are deemed necessary for

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36 Investment hold-ups are circumstances under which one party is reluctant to invest, due to the risk that the other party may later profit more from the situation.

37 Volpin, C.; Pike, C., *op. cit.*, note 3, pp. 20, 21

38 Council Regulation on the control of concentrations between undertakings [2004] OJ L 24 (the EC Merger Regulation)

39 EC Merger Regulation, par. 21

40 Commission Notice on restrictions directly related and necessary to concentrations [2005] OJ C 56/24 (the Notice on Restrictions)

the implementation of a concentration if, without them, the concentration could not be executed or would only be achievable under significantly more uncertain conditions, at much higher costs, over extended timeframes, or with considerably greater difficulty[41].

The Notice on Restrictions specifically evaluates in detail non-competition clauses, as ancillary restrains, and explicitly states that non-solicitation clauses have a comparable effect and should therefore be evaluated in a similar manner[42].

In addition to the above, the Remedies Notice[43] provides guidance on modifications to concentrations when the EC decides to clear a concentration following such modifications, either before or after the initiation of proceedings. These modifications specifically pertain to commitments that the parties involved in the concentration must undertake, commonly referred to as 'remedies', since their aim is to address and eliminate any competition concerns identified by the EC. Such remedies include the divestiture of a viable and competitive business, the scope of which needs to include all the assets and personnel which are necessary to ensure the business' viability and competitiveness. The Remedies Notice explicitly provides that a non-solicitation commitment with regard to the key personnel needs to be included in the remedy. Key personnel, providing essential functions for the business, could include for instance R&D staff, information technology staff, management and similar.

6.2. Serbia

At the time this paper was prepared, the SCA had not yet addressed issues related to wage-fixing and no-poaching agreements. Given the generally restrictive nature of these agreements, it is expected that they are often informal, may not be documented, and could be kept confidential, making them difficult to detect. Nevertheless, we anticipate that the SCA would respond appropriately if made aware of any such arrangements.

6.3. Regional developments

Several national competition authorities in EU countries, have already dealt with cases relating to no-poaching agreements, including Croatia, France, Hungary, the

41 Notice on Restrictions, par. 12 and 13

42 Notice on Restrictions, par. 26

43 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C 267/1

Netherlands, Portugal and Spain[44]. Below, we take a closer look at two cases from neighbouring countries.

6.3.1. Croatia – Gemicro case[45]

In 2014, the Croatian Competition Authority ("CCA") accepted the initiative of market participant Modulus Information Technology, and initiated the procedure for determination of abuse of dominant position against company Gemicro, active on the market for provision of specialised IT support services to companies dealing with leasing and other forms of financing. The procedure was supposed to determine whether Gemicro is preventing leasing companies to which they provide IT support services, to hire former Gemicro employees.

The CCA carried out an investigation, reviewing documents and comments requested from Gemicro, the leasing companies and Modulus Information Technology. It was established that the contracts entered into by Gemicro and the leasing companies included provisions whereby the parties agreed not to hire each other's employees at any time during the term of the contract.

Gemicro promptly offered to delete the disputable provision from all contracts and committed to not include it in any future contract. The leasing companies also provided explicit statements confirming that they did not refuse to hire other service providers.

Gemicro's swift cooperation and the limited impact of the disputed provision (evidenced by the termination of only three employees over the previous five years) were all mitigating circumstances in this case.

Once Gemicro provided the relevant evidence on fulfilment of its commitments to the CCA, no further proceedings were initiated.

6.3.2. Hungary – HR consulting agencies

In December 2020, the Hungarian Competition Authority ("HCA") announced a breakthrough in dismantling of cartel operations relating to price-fixing and no-poaching practices.

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[44] Von Eitzen Peretz, J.; Zalewska, A., *Competition law and no-poach agreements: developments in Europe*, Hausfeld Competition Bulletin, 20 May 2022, https://www.hausfeld.com/fr-fr/what-we-think/competition-bulletin/competition-law-and-no-poach-agreements-developments-in-europe/, Accessed 29 September 2024

[45] OECD, *Competition Issues in Labour Markets – Note by Croatia*, 22 May 2019, DAF/COMP/WD (2019) 41

The procedure was initiated against the Association of Hungarian HR Consulting Agencies ("Association"), and 23 other undertakings. The HCA determined that the internal rules of the Association included provisions that fix minimum fees and prohibit members from soliciting and hiring employees who had previously worked for another member of the Association. Such practices continued for a period of seven years, not only restricting competition among members, but harming employees as well.

The Association was fined in the amount of HUF 1 billion[46], with the HCA stating in its decision that if the fine could not be covered by the Association, its members would be liable jointly and severally in proportion to their revenues in the previous year[47].

7. DIGITAL LABOUR PLATFORMS

The platform economy in general has rapidly increased since its emergence, significantly due to technological developments, such as access to smartphones, high-speed internet and cloud computing[48]. The International Labour Organization ("ILO") has documented a significant increase in the number of digital labour platforms (defined below), from 193 in 2010 to 1,070 in 2023[49, 50].

Three broad categories of digital platforms are:

- those that provide digital services and products to individual users, such as social media;
- those that mediate exchange of goods and services, such as e-commerce or business-to-business (B2B) platforms;
- those that mediate and facilitate labour exchange between different users, such as businesses, workers and consumers, i.e. digital labour platforms.

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46 Approximately EUR 2,8 million, according to the official exchange rate EUR-HUF of the European Central Bank, as at 18 December 2020.

47 Hungarian Competition Authority – press release, *The GVH cracked down on a cartel and imposed a fine of HUF 1 billion on HR consultants*, 18 December 2020, https://www.gvh.hu/en/press_room/press_releases/press-releases-2020/the-gvh-cracked-down-on-a-cartel-and-imposed-a-fine-of-huf-1-billion-on-hr-consultants, Accessed 30 September 2024

48 Zoltan J. Acs et al., *The Evolution of the Global Digital Platform Economy: 1971–2021*, Small Business Economics 57, pp. 5, 6

49 International Labour Office, *Realizing Decent Work in the Platform Economy*, International Labour Organization, Geneva, 2024, p. 15. This publication is a report drafted by the International Labour Office, Geneva, in preparation for the annual International Labour Conference that is to take place in June 2025.

50 ILO notes that the figures were obtained from the Crunchbase database, which is self-reporting and covered 98 countries around the world, which could mean that some active platforms, particularly in low-income countries, were not listed.

Digital labour platforms can further be differentiated as: a) online web-based platforms, where work is outsourced through an open call to a geographically widespread crowd, and the work can essentially be performed from any location via internet, referred to as 'crowdwork' or 'cloudwork', and b) location-based platforms which allocate work to individuals in a specific geographical area, typically to perform local, service-oriented tasks such as driving, food delivery, running errands or cleaning houses, often referred to as 'gig work' platforms.

7.1. Characteristics of Digital Labour Platforms

In its publication from January 31, 2024, Realizing Decent Work in the Platform Economy ("ILO Report"), ILO has described several characteristics of digital platforms that are relevant from the competition perspective[51].

7.1.1. Competitive advantages

ILO states several competitive advantages of digital platforms:

- They reduce transaction costs in the provision of goods and services;
- They reduce information asymmetries in the market, considering that the user can compare the price of various goods and services before deciding;
- They benefit from economies of scale. Once the platform's initial structure is established, the cost of each additional unit decreases because of high transaction volumes, so that the value added by the platform increases with scale, which in turn draws more participants to the intermediated transactions ('network effect'). The larger the platform, the more likely it is to continue to grow at little or no cost;
- Regulatory ambiguity that digital platforms enjoy in some jurisdictions is another competitive advantage stated by ILO. However, it is important to emphasize that such ambiguity results in legal uncertainty for digital platforms, complicating compliance efforts and potentially stifling innovation.

7.1.2. Market power

ILO notes that digital platforms may be in position to exercise significant market power, due to the fact that they may act both as a monopsony and monopoly. On the demand side, monopsony may be exercised by unilaterally tightening access conditions, increasing financial commissions or demanding exclusivity. In case of monopolistic behaviour, platforms may increase user fees on the supply side.

[51] International Labour Office, *op. cit.,* note 49, pp. 12, 13, 19

A fall in market prices may be observed in an economic sector upon the entry of a platform into that sector. However, depending on the market power of platforms within each sector, a decrease in costs might either mainly benefit consumers, through lower prices, or result in higher profit margins for the platform itself, allowing it to capture the savings. This concentration of wealth among leading platforms gives them the ability to influence innovation, shape digital infrastructure, and create barriers to entry.

7.1.3. Low entry barriers for new workers

Low entry barriers for new workers are a significant feature of digital labour platforms. Most of the platform jobs don't require a substantial investment, and in the majority of cases it is sufficient if the worker possesses a smartphone and internet connection. Due to this, certain categories such as people with disabilities, people in rural areas, migrant workers and refugees, who otherwise may be subject to employment difficulties, are in position to find work.

7.1.4. Use of algorithms

The role of algorithms is significant in digital platforms for two reasons. Algorithms are used to monitor and supervise work, and in many cases tasks and services are offered and assigned by algorithms. They are also used to define working time, calculate remuneration, and perform rating and ranking. Without human supervision of algorithms, employees can be faced with unjust decisions concerning their employment and labour rights.

Further to the above, digital platforms process a very large amount of data, beside that which relate to workers, and algorithms play an important role in this aspect. Algorithms can determine when there is a rise in demand, signalling to suppliers the best time and place to make their services available. They also enable the implementation of dynamic pricing, as platforms can adjust prices in real time for products or services based on the current market demands.

7.2. Legal Regulation of Digital Labour Platforms

In several European countries, including Belgium, Croatia, France, Italy and Portugal, platform work is regulated by amending existing labour legislation to include platform work[52].

[52] International Labour Office, *op. cit.*, note 49, p. 37

At EU level, in April 2024, the European Parliament has adopted the new Platform Work Directive[53]. Once the text is formally adopted by the European Council and published in the EU Official Journal, member states will have two years to incorporate the provisions of the directive into their national legislation.

The most significant novelty introduced by the Platform Work Directive is the presumption of employment, that shall exist when facts indicating control and direction are present, according to national law and collective agreements, and taking into account EU case law. Employees are to be protected from negative consequences of automated systems, i.e. algorithms, such as dismissal or other sanctions, by ensuring adequate human monitoring and review. Personal data protection is also prioritized. Digital labour platforms are forbidden from processing any personal data concerning platform workers that are not strictly necessary for the performance of work, in particular, data on the emotional or psychological state of the platform worker[54].

As already elaborated above under section 2. Collective Agreements, in 2022 the European Commission adopted the Guidelines[55] that permit collective bargaining for certain self-employed workers. The Guidelines explicitly state that "collective agreements between solo self-employed persons and digital labour platforms relating to working conditions fall outside the scope of Article 101 TFEU[56]", thus permitting collective bargaining for digital platform workers.

7.3. Digital Labour Platforms in Serbia

While platform work is widespread in Serbia, it remains largely unregulated by current legislation. This section will focus on location-based digital platforms, with an emphasis on delivery services.

Platform work is typically structured through 'partnership agreements' between digital platforms and limited liability companies or entrepreneurs. These entities then establish employment relationships with delivery workers, hire them on sea-

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53 News European Parliament, *Parliament Adopts Platform Work Directive*, 24 April 2024, https://www.europarl.europa.eu/news/en/press-room/20240419IPR20584/parliament-adopts-platform-work-directive, Accessed 28 September 2024

54 European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work*, COM(2021) 762 final, 2021/0414(COD), Brussels, 9 December 2021

55 Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons [2022] OJ C 374/02

56 Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons [2022] OJ C 374/02, par. 31

sonal or additional work basis through contracts outside of employment, or engage them as self-employed individuals.

In their 2023 Serbia Ratings[57] ("Fairwork Serbia Ratings"), Fairwork[58] notes that platforms do not consider workers their employees. As a result, the engagement of these workers often falls short of fair work standards. This lack of recognition leads to the deprivation of essential labour rights, including sick leave, compensation for work-related injuries, unemployment benefits, and annual leave. Moreover, according to information gathered by ILO, two thirds of platform workers in Serbia report working informally[59]. It is noteworthy that most workers interviewed for the Fairwork Serbia Ratings expressed a preference for short-term financial gains over the social welfare and other rights associated with standard employment. Workers reported observing a significant increase in the number of delivery personnel, indicating that platforms provide similar conditions, which they are in position to dictate. This dynamic arises from the understanding that workers who refuse these terms can be easily replaced. Consequently, this situation has contributed to a decrease in the earnings of delivery workers.

Various organizations have called upon the need for legal regulation of the position of digital platform workers, including labour unions. The United Branch Union "Nezavisnost", has advocated for the regulation of digital platform workers' rights. They have outlined several proposed steps to improve the situation, including suggestions for potential legislative amendments[60].

7.3.1. Sector Analysis of the Serbian Competition Authority

The need for legal regulation of digital labour platforms was also addressed by the SCA in its Sector Analysis on the State of Competition on the Market of Digital

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57 Andjelkovic, B. et al., *Delivering Discontent: Dynamic Pricing and Worker Unrest – Fairwork Serbia Ratings 2023*, Fairwork, 2023, pp. 3-27

58 Based on information provided on their official website (https://fair.work/en/fw/about/faqs/), Fairwork evaluates the work conditions of digital labour platforms across various countries and scores the platforms based on the five principles of fair work: fair pay, fair conditions, fair contracts, fair management and fair representation. It is a project based at the Oxford Internet Institute, University of Oxford and the WZB Berlin Social Science Center, financed by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) and commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ). The project is conducted in collaboration with partner organisations around the world and in Serbia they partner with the Public Policy Research Centre (https://publicpolicy.rs/CENTAR).

59 International Labour Office, *op. cit.*, note 49, p. 27

60 Todić, S. et al., *Basis for the Strategy of the United Branch Union 'Nezavisnost' on Labour Union Organising and Protection of Platform Workers' Rights (Osnova za strategiju UGS Nezavisnost o sindikalnom organizovanju i zaštiti radnih prava platformskih radnika)*, Public Policy Research Centre, pp. 10-14

Platforms for Mediating in the Sale and Delivery of Mainly Restaurant Food and other Products[61] ("Sector Analysis"). The SCA initiated this analysis in response to the rapid growth of the digital on-demand delivery platform market and the frequent changes in ownership among market participants. Additionally, the SCA acknowledged the importance of examining the partnership and contractual relationships between digital platforms and their partners, as well as various service providers, including delivery workers.

The Sector Analysis revealed that the market of on-demand delivery platforms is highly concentrated. While the analysis covers the period of years 2020 and 2021, the more recent Fairwork Serbia Ratings indicate that there have been no significant changes in the market dynamics, with two dominant platforms (Glovo and Wolt) continuing to maintain their positions as key players[62].

The SCA has stated that there are no significant legal barriers for entering the market of on-demand delivery platforms. However, it has identified that substantial investment in areas such as platform development and marketing can create significant economic entry barriers.

The Sector Analysis determined that digital on-demand delivery platforms exert a considerable influence on related markets and significantly impact delivery workers.

The influence on the related restaurant market is reflected in the fact that restaurants listed on digital platforms compete for visibility and ranking within the platform rather than focusing on competing with other restaurants by enhancing their menu quality. Additionally, the SCA found that while restaurants formally have the option to negotiate the commercial terms of their contracts with the platforms, they struggle to secure more favourable conditions due to their limited negotiating power in comparison to that of the platforms.

The SCA also found that the agreements and general commercial terms submitted to them contain provisions that may raise competition concerns. These provisions seem aimed at eliminating other platforms and discriminating against restaurants through the application of unequal business conditions. Furthermore, certain clauses could be considered to restrict technical development.

Regarding their relationship with delivery workers, the SCA finds that platforms have a substantial impact on all relevant aspects. They influence the setting of de-

[61] Serbian Competition Authority, *op. cit.,* note 16, pp. 1-38

[62] Andjelkovic, B. et al., *op. cit.*, note 57, p. 3

livery fees, while their algorithms determine which delivery person is assigned to a specific order, as well as supervising and evaluating work performance.

As previously mentioned, the SCA also notes that delivery workers do not have a direct relationship with the platforms. Delivery workers are free to switch between platforms, and the entry barriers for new workers are low, requiring only a smartphone with internet access and GPS. Algorithms play a crucial role in this dynamic, as they determine which delivery worker is assigned to a specific task, as well as supervise and evaluate their performance. The SCA expressed concern that this could indicate a complex system of subordination between the digital platforms and the delivery workers. Regarding the determination of delivery fees, most delivery partners reported that various factors are considered, such as the distance between the restaurant and the delivery worker, prevailing market conditions, and the amounts consumers are willing to pay for delivery. It can be concluded that the platforms largely dictate these fees, leaving delivery workers with little influence over their determination.

In light of the above, the SCA has identified the need the examination of current labour legislation, with the aim of resolving the question whether digital platforms can be classified as employers of delivery workers. The SCA has recommended that the relevant Ministry of Labour investigates this issue, especially considering that most delivery workers experience inadequate work safety, lack the ability to collectively address disputes, and do not have payment protection.

7.3.2. Dynamic Pricing and Lack of Algorithm Transparency[63]

A new trend affecting delivery workers, highlighted in the Fairwork Serbia Ratings, emerged at the beginning of 2023: dynamic pricing. As previously mentioned, dynamic pricing can be considered a competitive advantage of algorithm use. It is a strategy that continually adjusts prices and delivery fees based on the current market demands, which are monitored in real time. Although delivery workers can benefit from surges in delivery fees, there is also a downside. As it can be difficult for workers to predict when the surges will occur, consequently, it is difficult for them to predict their income. This is especially damaging for delivery workers whose only or primary source of income is delivery. In addition, the sudden increases in demand can also lead to increased stress and affect the workers safety as they are more likely to rush to complete deliveries.

[63] Andjelkovic, B. et al., *op. cit.*, note 57, pp. 7, 8, 26

Apart from dynamic pricing, it seems that the transparency of algorithms has been questioned when it comes to work assignment as well. A delivery worker interviewed by Fairwork has pointed out several instances when his colleague would receive delivery offers and he would not, even though they were sitting together at the exact same location. This leads to doubt of the algorithm's transparency and fairness.

This lack of transparency can limit the workers' ability to make informed choices, and clearly signals to an asymmetry of power, and untimely could lead to an exploitative relation. Such practices create an uneven playing field by undermining fair competition, and overall harm the labour market.

Fairwork states that throughout 2023, delivery workers have approached labour unions and civic organizations in search for collective action or advice in dealing with pressures that come from platforms. Researching for this paper, we have not found information that those appeals resulted in any progress.

It may be concluded that delivery workers in Serbia often face precarious conditions and that there is an urgent need for protective measures through appropriate regulation and oversight.

8. FINAL REMARKS AND CONCLUSIONS

This paper has aimed for an exhaustive approach to understanding competition issues in labour markets, encompassing various dimensions of the subject topic. By including a wide array of practices, the paper seeks to illuminate their varied impacts on labour market dynamics, worker conditions, labour rights and technical development.

The topics have been analysed and discussed in the context of EU regulations and practices, alongside an examination of the situation in Serbia pertaining to the same matter.

The overall conclusion is that the EU has either already regulated in some way or is developing legislation or relevant practices across the presented topics. However, the Policy Brief[64] notes that an OECD-led study revealed that labour markets in numerous EU Member States are moderately to highly concentrated concluding that it is likely that many employers enjoy market power. Therefore, it is likely that the topic of competition issues in labour markets will continue to be of interest and further explored. It also follows that attention should be drawn to the prac-

[64] Aresu, A.; Erharter, D.; Renner-Loquenz, B, *op. cit.,* note 34, 2024, p. 7

tices that influence the labour market, with a focus on further enhancing regulations and improving implementation.

On the other hand, Serbia currently lacks adequate regulatory frameworks for many of the practices mentioned in this paper.

While the existing competition regulations are generally clear and largely conform to EU standards, they may not effectively address emerging and unique competition issues, particularly in relation to labour markets and the collective bargaining rights of false self-employed individuals.

The Serbian Competition Authority's proactiveness in assessing the competitive landscape of digital platforms, especially concerning delivery workers, illustrates an awareness of the growing interest in the competition-related aspect of some labour issues. This initiative indicates an evolving strategy that could establish the foundation for more detailed regulations and enhanced oversight of the various practices mentioned in this paper, in the future.

Furthermore, the necessity for regulating the status of digital platform workers from a labour perspective is undeniably clear. The lack of formal regulation in this area undermines access to essential labour rights for these workers. Establishing regulations would likely reduce the power imbalance between digital labour platforms and their workers. Without such measures, the current situation is likely to continue harming both the workers and the labour market.

Ultimately, proactive regulatory action is essential to ensure fair practices and foster a more balanced and sustainable labour market in Serbia. Addressing these issues will not only benefit workers but also contribute to a healthier economic environment.

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