



Geographic discrimination against online web-based platform workers in light of ILO Convention No. 111

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Abstract

The paper advocates for the consideration of the ILO's International Labour Standards due to the inadequate national protection mechanisms for cross-border online platform work. Referring to ILO Convention No. 111, the paper addresses discrimination, notably geographical disparities, in online web-based platform work. In this regard two critical categories of cases are identified. The paper argues that the Convention may include cases of geographic discrimination in the context of location-independent platform work by highlighting its broad scope. However, the paper notes the Convention's lack of specificity in proving discrimination. In light of the significant impact of algorithmic decision-making on potential discrimination scenarios, the paper recommends the creation of a novel ILO instrument, drawing inspiration from contemporary legislative efforts such as the EU's Artificial Intelligence Act and Proposal for an EU Directive on Platform Work.

Keywords: geographic discrimination, ILO Convention No. 111, cross-border platform work, decent work in the platform economy, digital labour migration

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1. Introduction

Developments related to platform work have enabled the emergence of a global labour market in which workers compete with each other on a global scale.¹ At first glance, this global participation can be seen as an opportunity to access work even in locations where work opportunities are scarce.²

At the same time, access to this seemingly borderless platform labour market can be restricted by geolocation requirements imposed on platform workers, which can eventually have disadvantages for people from specific regions such as the Global South.³ In particular, such restrictions are imposed by confining the availability of specific tasks on a platform to workers who access the platform with an IP address from a designated country. Such constraints often apply to microtasks, small, repetitive tasks, that can typically be performed without special skills. Today, as platform-based work involving microtasks is routinely being used to drive the improvement and development of artificial intelligence in a wide range of fields⁴, the importance of this type of occupation has increased momentarily on the global labour market.⁵ However, the working conditions that underpin these microtasks are characterised by strong competition between the platform workers who carry out these tasks.⁶

Since the geographic location of a worker can also determine whether specific platforms can render workers' wages in cash or in kind (such as by disbursing vouchers), the remuneration of cross-

¹ Mark GRAHAM – Mohammad Amir ANWAR: The global gig economy: Towards a planetary labour market? *First Monday*, 2019. <https://firstmonday.org/ojs/index.php/fm/article/view/9913/7748>

² Pietari KESKINEN – Heike WINSCHIERS-THEOPHILUS – Shilumbe CHIVUNO-KURIA – Anna MÜLLER – Marko NIEMINEN: Digital microwork as a livelihood strategy in a Namibian informal settlement. *Electronic Journal of Information Systems in Developing Countries*, Vol. 88, No. 1. (2022) 1–15.

³ While empirical data on this issue is limited, a number of surveys conducted among platform workers have suggested that geolocal barriers can exist on digital labour platforms. See Niels BEEREPOOT – Bart LAMBREGTS: Competition in online job marketplaces: towards a global labour market for outsourcing services? *Global Networks*, Vol. 15, No. 2. (2015) 247.; Hernan GALPERIN – Catrìhel GREPPI: Geographic Discrimination in the Gig Economy. In: Mark GRAHAM (ed.): *Digital economies at global margins*. Cambridge (MA)–London (GB), The MIT Press, 2019. 313.; Uma RANI – Marianne FURRER: Digital labour platforms and new forms of flexible work in developing countries: Algorithmic management of work and workers. *Competition & Change*, Vol. 25, No. 2. (2021) 12–13.; Uma RANI – Rishabh KUMAR DHIR – Nora GOBEL: Work on Online Labour Platforms: Does Formal Education Matter? In: Aditi SURIE – Ursula HUWS (eds.): *Platformization and Informality*. Cham, Palgrave Macmillan, 2023. 71–72. As will be shown in this paper, proving discrimination is a key challenge in the context of digital labour platforms. Determining whether a platform worker has been subject to discrimination is not straightforward, making it difficult to obtain specific data on cases of discrimination in platform work. See for a proposal on how to detect discrimination on crowdsourcing platforms Christian SANDVIG – Kevin HAMILTON – Karrie KARAHALIOS – Cedric LANGBORT: Auditing Algorithms: Research Methods for Detecting Discrimination on Internet Platforms. Paper presented to “Data and Discrimination: Converting Critical Concerns into Productive Inquiry,” a preconference at the 64th Annual Meeting of the International Communication Association. Seattle, May 22, 2014. 8.

⁴ Florian Alexander SCHMIDT: Crowdsourced Production of AI Training Data: How Human Workers Teach Self-Driving Cars How to See. *Hans Böckler Stiftung Working Paper*, No. 155., 2019. 8–18. https://www.boeckler.de/fpdf/HBS-007247/p_fofoe_WP_155_2019.pdf; Mary L. GRAY – Siddharth SURI: *Ghost work: how to stop Silicon Valley from building a new global underclass*. Boston–New York, Houghton Mifflin Harcourt, 2019. IV–XXXI.

⁵ Antonio CASILLI – Paola TUBARO – Clément LE LUDEC – Marion COVILLE – Maxime BESEVAL – Touhfat MOUHTARE – Elinor WAHAL: Le Micro-Travail en France: Derrière l'automatisation, de nouvelles précarités au travail? *Rapport Final Projet DiPLab «Digital Platform Labor»*, 2019. 17. <https://hal.science/hal-02139528/document>. Although reliable figures on the prevalence of online work on web-based platforms are difficult to obtain for technical reasons, estimates are available; data from the Online Labour Index show that the growth of supply and demand for work on digital labour platforms has shown a positive trend in recent years. See *World Employment and Social Outlook 2021. The role of digital labour platforms in transforming the world of work*. Geneva, ILO, 2021. 46–57. <https://rb.gy/tgxojq> [hereinafter: ILO (2021)]

⁶ Arindrajit DUBE – Jeff JACOBS – Suresh NAIDU – Siddharth SURI: Monopsony in Online Labor Markets. *American Economic Review: Insights*, Vol. 2, No. 1. (2020) 44–45.

border online web-based platform⁷ workers also raises potential issues related to discrimination. One potential risk of the phenomenon of location-independent web-based platform work, consequently, is that restrictions on access to this work and its financial compensation in wages could serve as a gateway to discrimination.

Given the limited scope of domestic protection mechanisms for cross-border online web-based platform workers,⁸ it is worth considering the international labour standards of the International Labour Organization (hereinafter: ILO) in this regard. If an ILO member state has ratified one of the organization's fundamental conventions, it is obliged to incorporate it into its respective national law.⁹ Within the framework of ILO labour standards, one of these fundamental conventions, Convention No. 111 (Discrimination (Employment and Occupation) Convention),¹⁰ stipulates protection of workers against discrimination in employment and occupation.¹¹

This article analyses the scope of Convention No. 111 (hereinafter: C111), examining whether geolocation restrictions on work opportunities via web-based platforms constitute discrimination within the Convention's scope and whether there are regulatory gaps in the ILO's standard-setting framework. This analysis coincides with the ILO's consideration of whether the regulations adequately protect platform workers so that they can achieve decent work in the platform economy.¹²

⁷ Based on the terminology "online web-based platform", which is applied in the ILO's flagship report on platform work, the expression "online web-based platform work" refers to platform work which can "[...] be outsourced globally across borders and [...] which [...] can be performed remotely from any location." See ILO (2021) op. cit. 73–75.

⁸ Janine BERG – Uma RANI: Working conditions, geography and gender in global crowdwork. In: Julieta HAIDAR – Maarten KEUNE (eds.): *Work and labour relations in global platform capitalism*. Cheltenham–Northampton, Edward Elgar Publishing, 2021. 94. A major area of concern in platform work is that the classification of these workers is unclear. However, the protection mechanism of labour law is for the most part tailored to employees. In the absence of a clear, legal classification, platform workers are often not integrated into the national protection mechanism of labour law norms and standards and are thus sometimes exposed to precarious working conditions. In this context see Valerio DE STEFANO: The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the «gig-economy». *Conditions of work and employment series*, No. 71. (2016) 6–9.

⁹ Jean-Michel SERVAIS: *International Labour Law*. The Netherlands, Wolters Kluwer, 2022. Margin No. 1187. Moreover, fundamental conventions are binding on ILO member states even without ratification. This follows from the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which stipulates that the International Labour Conference "[d]eclares that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions [...]" ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. International Labour Conference, 86th Session and amended at the 110th Session. Geneva, ILO, 2022. 9. <https://tinyurl.com/2n75zfvj>

¹⁰ The Convention was adopted on 25 June 1958 by the International Labour Conference in its 42nd session. It entered into force on 15 June 1960. See ILO: C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 111). *Normlex: Information System on International Labour Standards*. <https://tinyurl.com/y4hvkdfc> In addition to the convention, a corresponding recommendation was also adopted. The Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111) was adopted by the International Labour Conference on June 25th 1958. See ILO: R111 – Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111). *Normlex: Information System on International Labour Standards*. <https://tinyurl.com/2gaoy6lk> Unlike conventions, recommendations are not legally binding under international law, but rather serve as a reference document for ILO member states, which can provide guidance on national implementation. SERVAIS op. cit. Margin No. 193–198.

¹¹ Convention No.111 is one of the ten fundamental ILO Conventions, which apply irrespective of ratification by an ILO member state. See Adalberto PERULLI: The Declaration of Philadelphia. In: Edoardo ALES – Mark BELL – Olaf DEINERT – Sophie ROBIN-OLIVIER (eds.): *International and European Labour Law*. Baden-Baden, Nomos, 2018. 364. par. 5.; International Labour Conference adds safety and health to Fundamental Principles and Rights at Work. Press release. 10th June 2022. <https://tinyurl.com/2lfx53zo>

¹² See: Report of the Meeting of Experts on decent work in the platform economy. Doc. No. GB.346/POL/2. Geneva, ILO, 2022. [hereinafter: ILO (2022a)]. With the ILO Governing Body placing a standard-setting item on decent work in the platform economy on the agenda of the 113th session of the International Labour Conference in June 2025, the ILO will soon be discussing the possible adoption of such an instrument, see Minutes of the 347th Session of the Governing Body of the International Labour Office, Doc. No. GB.347/PV(Rev.). Geneva, ILO, 2023. par. 876.

In order to visualise the relationship between discrimination and geographic dependency, this paper identifies two categories of cases that are critical for online web-based platform work. By putting special emphasis on the extensive scope of application of C111, it argues that the Convention, in both its personal and substantive scope, applies to these cases arising from geographic discrimination in the context of platform work.¹³ Furthermore, this paper elucidates how, by requiring ILO member states to take countermeasures to ensure compliance with international labour standards, C111 provides basic safeguards against discrimination for affected platform workers so they can achieve decent work in a digitalised world of work. It also points out, however, that the Convention does not sufficiently specify how to prove discrimination against online web-based platform workers.

2. The ILO, the gig economy and online web-based platform work

The ILO has been addressing how non-standard forms of employment and in particular the emerging gig economy are affecting labour for some time.¹⁴ It has become apparent that in addressing these impacts the ILO draws a distinction between platform workers who undertake location-based tasks¹⁵ and those who undertake location-independent tasks.¹⁶ Via the Internet, location-independent tasks can usually be executed across borders, and they vary from more complex design, writing or programming tasks that are assigned to selected individuals to tasks that do not require any special skill, such as data verification or data annotation. The latter are distributed to a “crowd” on a platform.¹⁷

The ILO’s strong interest in these fields of work is additionally reflected in the fact that the ILO Centenary Declaration, adopted on 21 June 2019, in paragraph III C (v), explicitly refers to “platform work” as a “[...] [challenge and an opportunity] in the world of work relating to the digital transformation of work [...]”.¹⁸

In 2022 an ILO expert panel met to review the impact of the platform economy and determine a way for the ILO to move forward in promoting decent work in it. However, it reached no consensus

¹³ While there are intersectional links between gender distinctions and the location of the person performing web-based online platform work, especially in terms of payment, this paper will focus exclusively on restrictions linked primarily to geolocation, independently of gender. For studies that address the gender dimension, see e.g. BERG–RANI op. cit. 93–110.; Isabell HENSEL: *Genderaspekte von Plattformarbeit: Stand in Forschung und Literatur. Expertise für den Dritten Gleichstellungsbericht der Bundesregierung*. 2020. <https://tinyurl.com/y1txaek3>; European Institute for Gender Equality: *Artificial intelligence, platform work and gender equality*. Luxembourg, Publication Office of the European Union, 2021.; Decent work in the platform economy: Reference document for the Meeting of experts on decent work in the platform economy. Doc. No. MEDWPE/2022. Geneva, ILO, 2022. 31. [hereinafter: ILO (2022b)]

¹⁴ DE STEFANO (2016) op. cit.; see also Janine BERG – Marianne FURRER – Ellie HARMON – Uma RANI – M Six SILBERMAN: *Digital labour platforms and the future of work: Towards decent work in the online world*. Geneva, ILO, 2018.; ILO (2021) op. cit.

¹⁵ Such tasks may consist of food delivery, ride hailing or household-related services.

¹⁶ A comprehensive illustration of the classification of digital labour platforms within these two broad sub-areas is beyond the scope of this paper. The landscape of labour platforms is highly heterogeneous, diverse and subject to constant change. For details see: ILO (2021) op. cit. 71–97.

¹⁷ BERG–FURRER–HARMON–RANI–SILBERMAN op. cit. 3–5.

¹⁸ *ILO Centenary Declaration for the Future of Work*. 108th session of the International Labour Conference. Geneva, ILO, 2019. <https://tinyurl.com/y2s8kphq>

on further action by the ILO on platform work.¹⁹ According to a report of the meeting, it also did not make any remarks on the possible discrimination scenarios of platform work, let alone on unequal treatment based on a platform worker's geolocation. Surprisingly, a reference document prepared for the meeting addresses only gender-specific forms of discrimination in the context of platform work.²⁰ Neither the report of the expert panel's meeting nor the reference document refers to C111. Despite this, a normative gap analysis carried out by the ILO following the meeting of experts suggests, among other issues, that C111 is applicable to discrimination occurring in the context of platform work.²¹ However, the analysis lacked a detailed examination of this aspect. This also applies to the consideration of whether restrictions based on geolocation can constitute discrimination under the ambit of C111. Therefore, the following sections delve into this issue in more detail.

3. Unequal treatment in online web-based platform work based on geolocation

Online web-based platform work is characterised by stigmatisation of workers based on a worker's geolocation.²² In particular, platform workers from the Global South face the perception that the quality of their work may be rated lower than that of workers from the Global North.²³ There is, however, no indication of discriminatory practices with regards to geography and earnings. Rather, the level of earnings is largely influenced by the prevailing local market rates of the country where the platform worker is operating from.²⁴

Digital labour platforms, such as Appen²⁵, Amazon Mechanical Turk²⁶ (hereinafter: AMT) or Clickworker²⁷, which offer microtasks, apply algorithms in their organisation and decision-making.²⁸

¹⁹ ILO (2022a) op. cit. 6.

²⁰ ILO (2022b) op. cit. 31. The document refers to the Equal Remuneration Convention, 1951 (No. 100) of the ILO and stresses that gender-related pay differentials can also be the subject of research in the future.

²¹ ILO: A Normative Gap Analysis on Decent Work in the Platform Economy. 347th Session of the Governing Body, 2023. <https://tinyurl.com/yqqg5n7q>

²² GALPERIN–GREPPI op. cit. 313. In areas of web-based online platform work that rely on freelance market platforms rather than on the centralised assignment of microtasks, discrimination on the basis of nationality, for example, is not uncommon. On freelance market platforms such as Fiverr or Upwork, clients can post jobs directly on the platforms, and they write the job description themselves, which is naturally a major gateway for discrimination. See in the case of the platform oDesk, Upwork's predecessor: BEEREPOOT–LAMBREGTS op. cit. 247. As digital labour platforms such as Upwork or Fiverr do not represent microwork, discrimination on these platforms will not be the focus of this paper.

²³ Vili LEHDONVIRTA: *Cloud Empires: How Digital Platforms Are Overtaking the State and How We Can Regain Control*. Cambridge (MA)–London (GB), The MIT Press, 2022. 79–81.; Matheus Viana BRAZ: Heteromação e microtrabalho no Brasil. *Sociologias*, Vol. 23, No. 57. (2021) 158–160.

²⁴ Vili LEHDONVIRTA – Isis HJORTH – Helena BARNARD – Mark GRAHAM: Global earnings disparities in remote platform work: liabilities of origin? In: Julieta HAIDAR – Maarten KEUNE (eds.): *Work and labour relations in global platform capitalism*. Cheltenham, Northampton, Edward Elgar Publishing, 2021. 123.

²⁵ <https://appen.com/>

²⁶ <https://www.mturk.com/>

²⁷ <https://www.clickworker.com/>

²⁸ Alex J. WOOD – Mark GRAHAM – Vili LEHDONVIRTA – Isis HJORTH: Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy. *Work, Employment and Society*, Vol. 33, No. 1. (2019) 70–71.

There is no guarantee in this context that the use of algorithms will not result in unequal treatment of a platform worker.²⁹

Thus, it is reasonable to consider that stigmatizing certain groups of platform workers could result in differentiation, which may be linked to a platform worker's geolocation. Two distinct categories can be discerned in this scenario.

3.1. Restricted access to work opportunities due to geolocation

For online web-based platform work, restrictions on access to work opportunities can be closely linked to the location from which the platform worker accesses the Internet.

There are two main areas of concern. First, access to a work platform may be restricted in general. There have been indications that individuals accessing the Internet from certain regions or countries may not be permitted to create a user account on a platform at all.³⁰ Although a platform may not specify a reason for rejecting an attempt to register a user account³¹, geographical restrictions linked to a certain country's or region's internet protocol addresses (hereinafter: IP addresses) are technically feasible. An IP address is the individually identifiable address of a device that identifies it on a network such as the Internet. The IP address lets sites ascertain which country a person is accessing the Internet from. This may lead to an automatic check of the geolocation by the platform during the registration process, which can determine whether a person obtains access to the platform. The ability to participate in accessing jobs on a platform for these persons may therefore be made completely impossible by the platform operator.³² Since the platform's decision-making process for granting access may take place automatically and with the support of algorithms, it will be difficult for declined applicants to prove that the decision was made based on their geolocation.

Yet there are methods to bypass these barriers. Geographically "legitimate" user accounts that have already been activated can be shared via social media groups, e.g., Facebook, or within a family.³³ Using this account's credentials, a worker can then access the platform from an "officially unauthorised" location. However, this method will often violate the platforms' terms of use, which is

²⁹ Teresa COELHO MOREIRA: Algorithms, Discrimination and Collective Bargaining. In: José María MIRANDA BOTO – Elisabeth BRAMESHUBER (eds.): *Collective bargaining and the gig economy. A traditional tool for new business models*. Oxford–New York, 2022. 154–166.; ILO (2022b) op. cit. 33.

³⁰ Elvis MELIA: African jobs in the digital era: Export options with a focus on online labour. *Discussion paper of the German Development Institute*, No. 3. (2020) 43.

³¹ BERG–FURRER–HARMON–RANI–SILBERMAN op. cit. 100–101.

³² Mira WALLIS: Digitale Arbeit und soziale Reproduktion: Crowdwork in Deutschland und Rumänien. In: Moritz ALTENRIED – Julia DÜCK – Mira WALLIS (eds.): *Plattformkapitalismus und die Krise der sozialen Reproduktion*. Münster, Dampfboot, 2021. 243–245.

³³ WALLIS op. cit. 243.; RANI–KUMAR DHIR–GOBEL op. cit. 73–74.

a factor because the platforms can suspend conspicuous user accounts.³⁴ So, to circumvent country-specific restrictions, some platform workers therefore also deploy software to create a virtual private network (hereinafter: VPN), which is supposed to hide their IP address with the result that their actual location cannot be identified.³⁵ However, if the platform detects the application of such VPN services, this approach can again lead to blocking of the user profile on the work platform. As a consequence, users of VPN software at any time risk temporarily or permanently exclusion from the platform.³⁶

The second area of concern relates to the range and quantity of tasks to be performed, rather than the registration of a user account that is limited to certain regions or countries. These country-specific access restrictions may again be set by the platform operator or by its clients and linked to the IP address of a person's device.³⁷ As a result, a person with an "unsuitable" IP address cannot receive and process the task.³⁸ This approach becomes problematic if the geographical restriction generally excludes online web-based platform workers from certain regions or countries from taking on a task and it is conceivable that this disadvantage is based on nationality.³⁹ Although users can attempt to bypass such restrictions through VPN software, platforms can apply countermeasures to detect the use of such software and prevent circumvention.

3.2. *Payment of wages*

Distinctions based on the specific location of a web-based platform worker may have implications that go beyond restricted access to work opportunities. The method of payment of wages may also depend on the worker's location, resulting in disadvantageous pay-out terms for workers from certain regions of the world. The regulations concerning disbursement of earnings at one of the largest online labour platforms, AMT, are a particularly stark illustration of this. Workers on this platform, not only from the US but also from primarily European countries, can have their remuneration transferred to a bank

³⁴ For example, the Participation Agreement of the platform AMT stipulates in its No. 11: "We may terminate this Agreement, terminate or suspend your account and access to the Site, or remove any Task listings immediately without notice for any reason. Upon any termination or suspension of this Agreement, your right to use the Site will cease, and you will not be able to retrieve any information related to your account." Consequently, if the platform operator finds that the agreement has been breached, the workers have little opportunity to defend themselves. The use of another person's account could thus violate No. 1 (a) of the agreement, which states: "When you register for the Site, you must provide complete and accurate information and ensure that such information (as well as any additional information we may require to, among other things, verify your identity) is complete, accurate, and up-to-date at all times." See AMT: Participation Agreement. 2020. Accessed on 19. 12. 2023 <https://www.mturk.com/participation-agreement>

³⁵ ILO (2021) op. cit. 150–151.

³⁶ ILO (2021) op. cit. 151.

³⁷ ILO (2021) op. cit. 150.

³⁸ In addition, the task descriptions may also require a platform worker to have certain language skills in order to be able to take on the task. This requirement may be indirectly discriminatory, but it may also be justified if the language is essential to complete the task and the task cannot be completed without a certain level of knowledge. These cases do not fall within the concept of geographical discrimination.

³⁹ BERG–RANI op. cit. 10.3; RANI–FURRER op. cit. 12–13.; Mark GRAHAM – Isis HJORTH – Vili LEHDONVIRTA: Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods. *Transfer*, Vol. 23, No. 2. (2017) 148–149.

account – as long as they have a bank account in a country that the platform is cleared to remit bank payments to.⁴⁰ Workers in other countries are limited to receiving Amazon vouchers as compensation for their work.⁴¹

This is particularly problematic for workers in countries where Amazon does not offer services or offers only limited international shipping options.⁴² In other words, the extent to which these workers can redeem the vouchers they have received as remuneration is limited. For this reason, it is customary for these workers to sell their vouchers at online auctions, which risks generating less money than the actual value of the voucher.⁴³ There is a close relationship in such cases between the pay the worker receives and the worker's country of origin.

4. The adaptability of a 65-year-old (convention) – The ambit of ILO Convention No. 111

The principles embodied in international conventions such as C111 are rooted in fundamental human rights principles.⁴⁴ These principles, including the right to equal treatment and non-discrimination, are universal and should apply regardless of technological advances of a time.⁴⁵ Otherwise, the rights would already be outdated at the moment of their creation. Due to the abstract nature of such rights their regulatory content must be determined through interpretation.

4.1. *Origins of the Convention and interpretative authority*

An autonomous general convention on protection of workers against discrimination did not exist before the adoption of C111 into the ILO framework. Before then, the ILO focused on implementing regulations in specific fields of labour policy without a concentration on anti-discrimination regulations.⁴⁶ Addressing protection against discrimination has nevertheless been central to the ILO's

⁴⁰ AMT: Amazon Mechanical Turk Workers in 25 countries outside of the US can now transfer their earnings to bank accounts. *Happenings at MTurk*, 2019. Accessed on 19. 12. 2023. <https://tinyurl.com/2h76m5x9>

⁴¹ AMT: FAQs – How do I get paid? Accessed on 19. 12. 2023. <https://tinyurl.com/2g3xjahy>

⁴² Amazon: AmazonGlobal: Export Countries and Regions. Accessed on 19. 12. 2023. <https://tinyurl.com/y8c2fsg3>

⁴³ BRAZ op. cit. 157.

⁴⁴ See Tzehainesh TEKLE: ILO Convention 111 Discrimination (Employment and Occupation) Convention, 1958 (No. 111). In: Edoardo ALES – Mark BELL – Olaf DEINERT – Sophie ROBIN-OLIVIER (eds): *International and European Labour Law*. Baden-Baden, Nomos, 2018. 615–616.

⁴⁵ Virginia MANTOUVALOU: Are Labour Rights Human Rights? *European Labour Law Journal* Vol. 3, No. 2. (2012) 168–169.; with a more general point of view see Carol C. GOULD: Labor Rights as Human Rights. In: Mahmood MONSHIPOURI (ed.): *Why Human Rights Still Matter in Contemporary Global Affairs*. London–New York–Routledge, 2020. 178–187.

⁴⁶ Discrimination in the Field of Employment and Occupation. Report VII (1). International Labour Conference, 40th Session. Geneva, ILO, 1957. 3–4. [hereinafter: ILO (1957a)]

agenda since the Declaration of Philadelphia of 1944.⁴⁷ Article II (a) of the Declaration incorporates the sentiment that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”⁴⁸. This statement indicates that the ILO has adopted a comprehensive approach to tackling discrimination and has applied it universally, to all people. For this reason, the regulations that were included in C111 seek to accommodate the notion of a comprehensive approach by contextualising it in the world of labour.⁴⁹ That being said, adapting to contemporary labour issues requires interpreting the Convention to accommodate the shifts associated with the emergence of new forms of work in the world of labour, such as platform work.

It is characteristic of the tripartite structure of the ILO that drafting the text of a convention demands consideration of the interests of different groups, and various terms and phrases of a convention require further interpretation.⁵⁰ Pursuant to Article 37 par. 1 of the ILO Constitution, the interpretation of conventions is subject to the jurisdiction of the International Court of Justice, which can be called upon by member states to answer questions on the interpretation of conventions and the ILO constitution. So far in the history of the ILO, this jurisdiction has not been exercised. The same applies to the appointment of a specialised court by the ILO Governing Body, which is responsible for the interpretation of conventions under Article 37 par. 2 of the ILO Constitution.⁵¹ In the absence of an existing practice of interpretation in formal conformity with the ILO constitution, the effectiveness of ILO conventions, and the understanding of their regulatory content, would be severely compromised. Such an outcome cannot have been the intention of establishing effective international labour standards, and it is therefore preferable to avoid such a vacuum of interpretation through recourse to existing, already configured methods of evaluating the meaning of the ILO Conventions. The statements and reports of the ILO Committee of Experts on the Application of Conventions and Recommendations (hereinafter: CEACR), as well as the work of other convention-specific committees that analyse the application of ILO standards in the member states’ national law, provide a comprehensive basis for this.⁵²

That said, some caution should be exercised when relying on interpretations by ILO’s Committee of Experts. Interpretation by it and the other committees as such is not formally anchored or mandated in the ILO Constitution. As a result, some authors have challenged the legal validity of interpretations of

⁴⁷ The ILO Constitution additionally contains the principle of equal pay for work of equal value since 1919. See TEKLE op. cit. 612.

⁴⁸ International Labour Conference: Declaration of Philadelphia, adopted on 10 May 1944. <https://tinyurl.com/2fsndw8b>

⁴⁹ ILO (1957a) op. cit. 29–32.

⁵⁰ Reingard ZIMMER: Wirkungsweise, Auslegung und Implementierung von ILO-Standards. In: Wolfgang DÄUBLER – Reingard ZIMMER (eds.): Arbeitsvölkerrecht. Baden-Baden, Nomos, 2013. 34.

⁵¹ ZIMMER (2013) op. cit. 36–37.

⁵² Ibid. 37–39.

the conventions in CEACR reports.⁵³ But in international treaty law it is nonetheless recognised that the pronouncements of CEACR can be consulted for the interpretation of ILO Conventions.⁵⁴

Still, to avoid doubts regarding the binding nature of the committees' interpretations, statements by the committees should not be the only sources consulted for the interpretation of ILO conventions; rather, it is advisable to consider other ILO documents in addition to the committee statements.

For this purpose, the preparatory work of a convention can be of assistance as these documents depict the process behind a new convention's creation in detail and can provide information on what the ILO bodies had in mind at the time. Recourse to these documents is also consistent with international law, as Article 5 of the Vienna Convention on the Law of Treaties stipulates that the peculiarities of the respective international conventions must also be considered.⁵⁵

Therefore, when interpreting C111, it is essential to take into account the preparatory work of the Convention and its interpretation by the CEACR.

4.2. A tricky question: Determining the personal scope of C111

When considering platform work from an employment law perspective, whether in a national, European or international framework, it is necessary to discuss the legal classification of platform workers. In labour law, employee status unlocks a door to a number of protective mechanisms that generally only apply to employees. Since the concept of an employee is shaped by the peculiarities of the respective legal system⁵⁶, most notably at the national level, inconsistencies persist as to whether platform workers are also covered by the concept of an employee. In many cases, platform workers are – wrongly or not – already classified as self-employed by the platforms themselves, in their terms and conditions. This classification implies that labour rights might not be accessible to these workers. Online web-based platform work is no exception.

It is thus worth examining how the legal classification of these platform workers in the ILO framework is to be carried out at the international level. Since interpretation of the personal scope of

⁵³ See for example Martin HENSSLER: *Arbeitskampf in Deutschland – Wie geht es weiter? Brauchen wir ein Arbeitskampfgesetzbuch?* *Zeitschrift für Arbeitsrecht*, No. 3. (2010) 403.; SERVAIS op. cit. Margin No. 137–166.; Manfred WEISS – Achim SEIFERT: *Der Streik im Recht der Internationalen Arbeitsorganisation*. In: Thomas DIETERICH – Martine LE FRIANT – Luca NOGLER – Katsutoshi KEZUKA – Heide PFARR (eds.): *Individuelle und kollektive Freiheit im Arbeitsrecht*. Baden-Baden, Nomos, 2010. 137. In contrast, it is argued that the interpretative jurisdiction of the ILO committees, which is approved by all participants within the tripartite structure of the ILO, is sufficiently pronounced through its independent and long-standing practice in order to become legally binding. See Monika SCHLACHTER: *Beamtenstreik im Mehrebenensystem*. *Recht der Arbeit*, Vol. 64, No. 6. (2011) 345.

⁵⁴ Markus KRAJEWSKI: *Entstehung und Wirkung von Standards der Internationalen Arbeitsorganisation aus völkerrechtlicher Sicht*. *Soziales Recht*, Vol. 10, No. 1. (2020) 11–12.

⁵⁵ Valerio DE STEFANO: *Not as simple as it seems: The ILO and the personal scope of international labour standards*. *International Labour Review*, Vol. 160, No. 3. (2021) 395.

⁵⁶ Accordingly, the ILO framework does not include a definition of the term “employee”. This includes the Employment Relationship Recommendation, 2006 (No. 198), which merely suggests to member states which characteristics may constitute an employment relationship.

a convention's application varies individually from convention to convention, it remains challenging to make a comprehensive evaluation of all ILO standards in this regard.⁵⁷ Therefore, the following statements refer only to Convention C111.

The Convention contains no explicit reference to a personal scope of application. Instead, it stipulates in Article 1, 1 (a), (b) and Article 1, 3 of C111 that it applies to “employment or occupation” situations. Given the reference to “employment”, it could be argued that the scope of application only covers employment relationships, which would imply that only employees are personally covered under its protective scope. This assumption appears to be supported by the fact that other ILO conventions explicitly differentiate between self-employed and employed workers.⁵⁸ Convention C111 does not provide for this explicit distinction. Consequently, it would be reasonable to conclude that ILO conventions such as C111 that do not explicitly refer to “employees” and to the “self-employed” have a limited scope, and such an understanding would in turn imply that the C111 does not apply to platform workers who are classified as self-employed.

However, this approach would at the same time ignore the term “occupation”, which is mentioned in Article 1, 1 (a), (b) and Article 1, 3 of C111 alongside the word “employment”. For determining the scope of application, the conjunction “or” illustrates that the reference to “occupation” is an alternative to “employment”. Being in an “occupation” does not necessarily mean that an employment contract must have been concluded for this purpose. That is why the wording of Article 1 of C111 strongly suggests a broad understanding of this convention's personal scope of application, covering both dependent workers in an employment relationship and independent workers.⁵⁹ This position is also supported by the CEACR, which concluded, in its own interpretation of the Convention, that self-employed persons are also covered by the Convention's ambit.⁶⁰ Additionally, this interpretation corresponds to a broad understanding of “employment” that had already emerged within the institutions of the ILO.⁶¹

⁵⁷ DE STEFANO (2021) op. cit. 387–406.

⁵⁸ Article 1 of the Home Work Convention, 1996 (No. 177) draws a distinction between “homeworker” and “independent worker”. Article 1 Nr. 3 of the Safety and Health in Construction Convention, 1988 (No. 167) states that the “Convention also applies to such self-employed persons as may be specified by national laws or regulations”. In addition, pursuant to Article 2 Nr. 1 of the Violence and Harassment Convention, 2019 (No. 190) the convention applies to “employees” and “persons working irrespective of their contractual status”.

⁵⁹ Reingard ZIMMER: § 5 Internationale Arbeitsorganisation. In: Monika SCHLACHTER – Johannes HEUSCHMID – Daniel ULBER (eds.): *Arbeitsvölkerrecht*. Tübingen, Mohr Siebeck, 2019. 175.

⁶⁰ ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), Colombia, Observation, C111, 2017. <https://tinyurl.com/2fsbwfr2> “[...] the Committee recalls that all workers without distinction, including workers in cooperatives, whether or not they are in a dependent employment relationship or are self-employed, must be afforded adequate protection against discrimination, including against sexual harassment at work.”

See also ILO, CEACR, Malawi, Direct Request, C111, 2015. <https://tinyurl.com/2eplqzk6> “Recalling that no provision in the Convention limits its scope as regards individuals, the Committee reiterates its request for the Government to indicate any regulations governing self-employed persons, members of the armed forces, the prison service, and the police protecting these categories of workers against discrimination in employment and occupation on the grounds set out in the Convention.”

⁶¹ Discrimination in the Field of Employment and Occupation, Report IV (1). International Labour Conference, 42nd Session. Geneva, ILO, 1958. 34–35. [hereinafter: ILO (1958)]. The report refers to the fact that “[a]t the Eighth International Conference of Labour Statisticians it was decided that “persons in employment” included all persons above a specified age who were “at work” and that the phrase “at work” included not only persons whose status was that of employee but also those whose status was that of “worker on own account”, “employer” or “unpaid family worker”.

Furthermore, C111's preparatory work illustrates that the ILO was equally concerned with protecting the self-employed from discrimination.⁶²

4.3. Applicability to “geographic discrimination”: Material scope

Article 1 of the Convention also establishes its material scope of application. First, it is crucial to determine the meaning of “discrimination” under the Convention. Subsequently, it must be clarified whether a difference in treatment based on geolocation with regard to online web-based platform workers qualifies as discrimination under the Convention.

4.3.1. Indirect and direct discrimination as covered forms of discrimination

As defined in Article 1 (1)(a) of the Convention, discrimination is “any distinction, exclusion or preference” which is linked to a ground of discrimination contained in the Convention and therefore has an “effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”. This definition indicates that “discrimination” under the Convention comprises three components: first, unequal treatment of a human being; second, a link to a protected characteristic of that person; and third, a negative consequence due to the unequal treatment.⁶³ The Convention contains no explicit clarification regarding the forms of discrimination covered under its scope, and yet it is important to elucidate which forms of discrimination are covered by it. If only certain forms of discrimination are targeted, the Convention's scope of application could be limited. Less apparent, and potentially also covered, is indirect workplace discrimination, which occurs when neutrally formulated policies and procedures have a disproportionately disadvantageous effect on certain groups of people; it, too, constitutes a safeguard to the achievement of substantive equality in the workplace.⁶⁴

During the Convention's drafting process, the exact definition of “discrimination” and the grounds of discrimination it should embrace were not undisputed among the ILO's stakeholders.⁶⁵ Representatives of the Philippines⁶⁶ and Belarus⁶⁷ submitted proposals to ensure that the drafting

⁶² In this regard, it was noted that “it had been the intention of the Office to include self-employed workers since it would hardly seem right for a Convention to deal solely with the elimination of discrimination in access to wage-earning employment and not to give to workers wishing to be self-employed any protection against laws, regulations or practices arbitrarily preventing them from doing so.” See ILO (1958) op. cit. 6.

⁶³ International Labour Standards. A Global Approach. Geneva, ILO, 2002. 65. [hereinafter: ILO (2002)]

⁶⁴ TEKLÈ op. cit. 614–615.

⁶⁵ ILO (1958) op. cit. 5–6.

⁶⁶ Discrimination in the Field of Employment and Occupation, Report VII (2). International Labour Conference, 40th Session. Geneva, ILO, 1957. 47. [hereinafter: ILO (1957b)]

⁶⁷ ILO (1958) op. cit. 6.

of a definition should include both direct and indirect discrimination. However, both amendments were rejected, on the argument that the current wording of the definition already reflected a broad understanding of discrimination, encompassing the concepts of direct and indirect discrimination alongside other forms of it.⁶⁸ Thus it is evident from the preparatory work that the Convention is meant to address all forms of discrimination, including direct and indirect discrimination.

This understanding is also supported by the interpretation of the CEACR. According to the Committee, language in Article 1 (1)(a) of C111, “distinction, exclusion or preference [...] which has the effect [...]”, indicates that the Convention cannot be limited to intentional discrimination.⁶⁹ Based on this understanding, the Convention also covers unintentional disparate in treatment of workers. In the case of indirect discrimination, disproportionate disparities in the treatment of a particular group of workers arises through the application of neutral criteria. Because indirect discrimination does not require intent, one can conclude that the Convention likewise covers indirect discrimination.⁷⁰ Consequently, consideration of the preparatory work and the CEACR’s interpretation of Article 1 (1) (a) consistently support the conclusion that C111 encompasses both direct and indirect discrimination.

4.3.2. Geographic restrictions as a mode of discrimination under C111

Preliminarily, it should be noted that the terms “geographic” or “geolocation” are not specified in the list of protected grounds in Article 1 (1)(a) and (b) of C111. However, as described above, in the context of online web-based platform work, situations arise where the geolocation of a platform worker may be a determining factor that leads to this worker being treated differently from other platform workers. But it is nevertheless conceivable that a restriction based on geolocation would relate to one or more of the discriminatory grounds the Convention enumerates.

The following section therefore examines whether unequal treatment on the basis of an online web-based platform worker’s actual “geolocation” could be related to the grounds of “race”, “colour”, “national extraction” or “social origin”. The grounds of “sex”, “religion” and “political opinion”, which are also listed in the Convention’s Article 1 (1), will not be addressed, as they have no evident link to the scenarios of unequal geographical treatment described above in section 3.

The two earlier-identified categories of unequal treatment due to geographical location, namely restrictions on access to and allocation of tasks on the platform as well as disparate treatment in wage payment, are addressed one after another in the following discussion.

⁶⁸ ILO (1957b) op. cit. 109.

⁶⁹ Giving globalization a human face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization. Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1 B). International Labour Conference, 101st Session. Geneva, ILO, 2012. 312–313.

⁷⁰ TEKLÈ op. cit. 614–615.

First to be considered are the cases of geographical barriers to job opportunities described above, in which access to a platform or to certain assignments on that platform can be made dependent on a person's IP address. The following discussion analyses whether these cases constitute discrimination, and if so, whether it is of the direct or indirect kind.

Under the Convention, the grounds of "race" and "colour" protect workers against unequal treatment on the basis of physical characteristics related to the colour of a person's skin and distinctions based on their belonging to a particular ethnic group characterised by religious and cultural features.⁷¹ The notion of the ground of "race" tends to be interpreted broadly and includes "linguistic communities or minorities whose identity is based on religious or cultural characteristics, or even national extraction"⁷². Although it was suggested during the drafting process of the C111 that the convention should also cover unequal treatment because of a person's "nationality"⁷³, "race" does not, as it understood in this context, imply that the Convention includes a person's nationality as a discriminatory ground.

When people are linked to their IP address and therefore do not have access to the same work opportunities as other platform workers, no direct distinction is made on the basis of "race" or "colour"; basically, the only determining factor of these barriers to access is the point of access to the Internet.

The same applies to the discriminatory ground of "national extraction". This ground seeks to cover citizens of a country who, either themselves or through their ancestors, originated in another country (e.g., naturalised citizens, descendants of foreign immigrants or national minorities).⁷⁴ In essence, therefore, this ground of discrimination focuses on the protection of persons who are citizens of the countries in which they reside and work. Early in the deliberations on the drafting of the Convention, the list of grounds initially included the discriminatory ground of "national origin", but representatives of Austria⁷⁵, Denmark⁷⁶ and Pakistan⁷⁷ in particular opposed the inclusion of the ground, as the concept would also have incorporated the element of "nationality"⁷⁸ and was therefore considered incompatible with their existing labour market regulations. For this reason, the originally proposed ground of discrimination "national origin" was changed to "national extraction".⁷⁹ The ground of "nationality" was not originally intended to be included in the Convention.⁸⁰

⁷¹ ILO (1957a) op. cit. 9–12.

⁷² ILO (2002) op. cit. 66.

⁷³ ILO (1957b) op. cit. 60.

⁷⁴ TEKLÈ op. cit. 615.

⁷⁵ ILO (1957b) op. cit. 17.

⁷⁶ ILO (1957b) op. cit. 19–20.

⁷⁷ ILO (1957b) op. cit. 102.

⁷⁸ One of the background documents to C111 clarifies that the concept of "national origin" has a broader approach than the criterion of "national origin". The former "[...] distinguish[es] two elements [...]; the natural distinction of foreign descent and the legal distinction of nationality. Both affect migrant workers and their descendants, but in different ways." See ILO (1957a) op. cit. 17.

⁷⁹ ILO (1957b) op. cit. 104–105.

⁸⁰ Discrimination in the Field of Employment and Occupation, Report IV (2). International Labour Conference, 42nd Session. Geneva, ILO, 1958. 8.

If one applies this to cases in which persons are treated differently based on their IP address, it becomes apparent that online web-based platform workers do not fit within this understanding of “national extraction”. This kind of non-location-based form of platform work is characterised by a cross-border element⁸¹, which usually implies engagement of people of different nationalities. Under this notion of “national extraction”, unequal treatment of online platform workers based on their IP addresses would only be covered if it excluded nationals of the jurisdiction to which the platform itself was subject.

However, the CEACR often considers the grounds “race”, “colour” and “national extraction” together, because these grounds are not entirely distinct and tend to overlap in many cases. This means that the CEACR also recognises multiple discrimination, in which more than one ground of discrimination may be affected at once.⁸² For a long time, the CEACR’s interpretation of the term “national extraction” merely held that this ground referred to discrimination against nationals of the same country whose nationality they have and in which they reside, based on their place of birth, ancestry or a migratory background.⁸³ But the CEACR’s interpretation now suggests that an overall perspective on the grounds of “race”, “colour” and “national extraction” places migrant workers within the Convention’s scope of application, regardless of their nationality. The CEACR points out that migrant workers are particularly vulnerable to discrimination and that they therefore need legal protection.⁸⁴ Accordingly, the Committee interprets C111’s scope of application in this respect as being broader than the preparatory work would suggest.⁸⁵ This update in the understanding of a provision of the Convention through the interpretation of the CEACR, even in contradiction to the elaborations in the preparatory work, will ensure that the Convention remains relevant to contemporary issues.⁸⁶ Otherwise, the sense and purpose of international labour standards would be severely limited as ILO instruments, especially in light of lengthy preparatory processes are slow to respond to current developments. International labour standards must therefore be understood as organic sets of regulations which grow, through interpretation, alongside current developments in the world of work such as platform work.

Online web-based platform workers share a distinct similarity with migrant workers: just as migrant workers in the traditional sense, they are usually seeking work opportunities beyond their own national borders. The key difference here, though, is that these platform workers do not need to change their physical location even as their productive capacity moves across national borders via the Internet. The Internet serves as a central element in matching labour supply to demand. Because

⁸¹ Zachary KILHOFFER – Willem Pieter DE GROEN – Karolien LENAERTS – Ine SMITS et al.: *Study to gather evidence on the working conditions of platform workers*. Luxembourg, Publication Office of the European Union, 2020. 94–95.

⁸² ILO (2012) op. cit. 319–320.

⁸³ ZIMMER (2019) op. cit. 177.

⁸⁴ ILO (2012) op. cit. 325.

⁸⁵ ILO (2012) op. cit. 324–326.

⁸⁶ ZIMMER (2013) op. cit. 35.

the Convention is a fundamental human rights instrument intended to apply equally to all workers⁸⁷, the circumstance that the Internet is a purely technological element of labour intermediation cannot justify online web-based platform workers being treated differently from traditional migrant workers. Web-based platform workers can be seen as digital migrant workers who, digitally and globally, provide labour without physically leaving their location. Because the CEACR also tends to view migrant workers as falling within the scope of C111, it is reasonable to suppose that internationally operating online web-based platform workers should also satisfy the Committee's understanding of the need protection.

As already stated, completely restricting the access to a platform or restricting it to tasks on the basis of the user's IP address is, as a practice, not directly linked to a person's nationality. Therefore, direct discrimination in relation to (digital) migrant workers does not apply in these cases.

However, the prohibited ground of "social origin" could seem superficially more appropriate in such constellations, potentially covering differentiation of workers based on their geolocation. "Social origin" as a characteristic includes situations in which the "individual's membership in a class, socio-occupational category or caste determines his or her occupational future, either because he or she is denied certain jobs or activities, or because he or she is only assigned certain jobs."⁸⁸ It is therefore a safeguard against barriers to access to employment opportunities as a result of social stratification.⁸⁹ The Convention mentions no reference point for the contemplated social stratification; is it to mean social stratification within a national society, or can its understanding also include global society, i.e., the social disparities differences between the Global South and the Global North? With geographical restrictions on access to online web-based platform work, it seems that platform workers from the Global South face more difficult access to work opportunities on digital labour platforms based in developed countries than their Global North counterparts.⁹⁰ However, the preparatory work of the Convention and its interpretation by the CEACR instead suggest a narrower understanding of the social reference point. The criterion "social origin" considers, instead, a person's social mobility; it protects their chances of socially advancing within a society by, for example, shifting from one social stratum or status to a different one.⁹¹

Yet geographic restrictions on access to digital platform work still do not affect the criterion of "social origin". They are not tied specifically to the social mobility of an individual but rather to the geolocation determined by their IP address. This does not constitute an obstacle to advancement

⁸⁷ TEKLÈ op. cit. 615.

⁸⁸ ILO (2002) op. cit. 67.

⁸⁹ ILO (1957a) op. cit. 19.

⁹⁰ MELIA op. cit. 43.; BRAZ op. cit. 158–159.; Mothobi ONKOKAME – Aude SCHOENTGEN – Alison GILLWALD: What is the state of microwork in Africa? A view from seven Countries. *Policy Paper Series After Access – Assessing Digital Inequality in Africa*, No. 2. (2017) 15–16.

⁹¹ ILO (1957a) op. cit. 19.; Special Survey on Equality in Employment and Occupation, Report III (Part 4B). International Labour Conference, 83rd Session. Geneva, ILO, 1996. 16–17.

within a class system or social category, so there is no direct discrimination on the basis of “social origin”.

Despite this, geographic restrictions on access to work opportunities may constitute indirect discrimination and could conceivably constitute indirect discrimination on the basis of “race”, “colour”, “national extraction” and “social origin”. The foregoing also indicates that the grounds of discrimination in these cases tend to overlap.

Tying access to a platform to the individual IP address from which a person is attempting to connect is, *prima facie*, a neutral factor. It does not, as discussed above, relate directly to “race”, “colour”, “national extraction” or “social origin”, nor does unequal treatment based on IP addresses represent a stand-alone protected ground of discrimination. When excluding the IP addresses of certain regions that are predominantly in countries of the Global South, however, persons from these countries are disproportionately more affected by access restrictions than other platform workers who are situated in industrial countries would be. And it may constitute indirect discrimination, particularly if it were to be substantiated that the disparate treatment was based on the fact that the persons did not have adequate language skills to satisfactorily handle the tasks.⁹²

Considering the CEACR’s interpretation, it makes sense to conclude that the link to geolocation through the worker’s (device’s) IP address constitutes indirect discrimination against digital migrant workers. This type of worker is disproportionately more often affected by these restrictions. As a result, as a type of migrant worker, online web-based platform workers working across borders are also protected from indirect discrimination.

In addition to that, indirect discrimination based on social origin can also occur when the candidates’ residential location is used as a criterion in the search for suitable workers.⁹³ An IP address provides digital documentation of the location from which the Internet is being accessed; and since this location will usually be an online web-based platform worker’s place of residence, it constitutes indirect discrimination against the worker for the platform to restrict access to and distribution of tasks on the platform based on that IP address.

The second category of geographical constraints, restrictions on the payment of wages, is different. Here, the unequal treatment is more obvious. For example, in the case of AMT mentioned above, Amazon published a list of countries outside the US which are eligible for bank transfers; only people who live in these listed countries would be able to have their wages paid into a bank account, and all other platform workers would have to settle for Amazon vouchers.

The considerations made earlier would also apply here: the Convention does not fundamentally protect against differential treatment based on “nationality” or “location of residence”; but pursuant

⁹² Nevertheless, requiring a certain degree of language skills for certain tasks on platforms may be justified under Article 1(2) of the Convention if the particular level of proficiency is an inherent requirement of the job.

⁹³ TEKLÈ *op. cit.* 620.

to the CEACR's interpretation, it does protect migrant workers. Pay-out functionality that is limited in a country-specific way directly affects (digital) migrant workers who do not live in the eligible countries, for they cannot receive the wages that they might have earned in cash; receiving those wages in kind may be pointless for them. In this case, it is reasonable to conclude that there is ongoing direct discrimination in accordance with the Convention.

4.4. Proof of unequal treatment under the Convention

Having established that, theoretically, differential treatment based on geolocational requirements can constitute discrimination under the C111. A major problematic aspect of the Convention, however, is the absence of a mechanism for proving discrimination.⁹⁴ Particularly in cases of indirect discrimination, it is difficult for the victim to prove that discrimination has occurred. With differential treatment based on geolocation, it is even more difficult to prove that a platform worker has been discriminated against, because the platform operator's decision-making process is based on algorithms or is otherwise not transparent.⁹⁵ However, the application of algorithms in the decision-making is not unique to digital labour platforms. In the organisation of traditional forms of work algorithms can also be applied in decision-making processes, such as recruiting. Here, similarly, there is no guarantee that the algorithms employed are unbiased and avoid the risk of discrimination.⁹⁶

As noted above, the Convention does not require that discrimination must have been intentional. Accordingly, victims of discrimination do not have to prove intent. This means that the Convention also covers cases of unequal treatment based on an algorithm without any intention to discriminate. However, when a platform denies registration or fails to allocate available tasks, it usually will not provide any justification. This makes it difficult to prove discrimination, especially as the decision-making process is, again, not being made transparent. A recent case brought before the National Data Protection Commission in Luxembourg and which was eventually dismissed by the Commission on 21.04.2023⁹⁷ illustrates how opaque decisions are made on microtask platforms. In this particular case, an internet user attempted to register on AMT and received an automatic rejection.⁹⁸ The user was not informed about the reasons for the refusal. The decision of the platform operator and its underlying criteria were kept undisclosed. As a result, the complaint was filed on grounds of data protection

⁹⁴ TEKLÈ op. cit. 628.

⁹⁵ ILO (2022b) op. cit. 34.

⁹⁶ See for example Jeffrey DASTIN: Insight – Amazon scraps secret AI recruiting tool that showed bias against women. *Reuters*, 11. 10. 2018. Accessed on 19. 12. 2023. <https://tinyurl.com/ynoclau9>

⁹⁷ NOYB – European Center for Digital Rights: Profiling & Automated Decision Making, C-053 Amazon (Luxemburg). Accessed on 19. 12. 2023. <https://tinyurl.com/ytuot5msn>

⁹⁸ NOYB – European Center for Digital Rights: Réclamation auprès de la Commission nationale pour la protection des données, C-053 Amazon (Luxemburg), 22. 12. 2021. Accessed on 19. 12. 2023. <https://tinyurl.com/ypfr68a6>

claiming a violation of Article 22 of the General Data Protection Regulation (GDPR), which prohibits automated decisions without human intervention. Due to the absence of transparency, there were no other legal bases for challenging the refusal of registration. Even if the decision was discriminatory, the internet user would not have had sufficient grounds to establish discrimination in a court.

4.5. *A way forward?*

To prevent such regulatory gap, it might be feasible to introduce transparency requirements and a right to information when platform operators deploy algorithms for decision-making, in order to avert discrimination.⁹⁹ This could be considered internationally, not only for platform operators, but also for all legal relationships in the field of labour, to be included in an instrument of the ILO, thus establishing an international standard acting against algorithmic discrimination, which would complement the functioning of the C111. Guidance on such transparency obligations could be derived from the provisionally agreed Artificial Intelligence Act of the EU¹⁰⁰ and the – now shelved for the time being – Proposal for an EU Directive on Platform Work¹⁰¹. For the latter, in particular, Article 9 (1)(c)(iv) of the Proposal in the version as provisionally agreed by the Council enshrines a right to be informed of the grounds considered by automated decision-making systems when it comes to the restriction, suspension or termination of a platform worker’s user account or if the platform refuses to pay wages. However, for the provision to be applicable, the wording indicates that a platform worker’s user account must have already been approved by the platform. Without prior approval, it would not be possible to restrict, suspend or terminate a platform worker’s user account.

To ensure that a right to information extends even to the registration process, it is therefore essential that it applies pre-contractually, in other words, when a user account is created.¹⁰² This feature could improve accountability in the registration process and prevent potential discrimination when registering on a platform. However, it is also crucial to consider the platform operator’s interests.

⁹⁹ Frederik ZUIDERVEEN BORGESIU: Discrimination, Artificial Intelligence, and Algorithmic Decision-Making. Strasbourg, Council of Europe, 2018. 64–65. <https://tinyurl.com/yj6cba62>

¹⁰⁰ European Parliament: Artificial Intelligence Act: MEPs adopt landmark law. Press release. 13. 03. 2024. Accessed on 13. 03. 2024. <https://tinyurl.com/23kbve8h>. For an overview of the regulation’s process, see European Union: Procedure 2021/0106/COD. *EUR-Lex*. Accessed on 13. 03. 2024. <https://tinyurl.com/ykmsrcso>

¹⁰¹ See the version recently and provisionally agreed under the Belgian presidency of the Council: 7212/24 ADD 1, 08. 03. 2024. Accessed on 13. 03. 2024. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_7212_2024_ADD_1

¹⁰² Anti-discrimination legislation also focuses on protecting against discrimination at the initiation stage of a contract, where the risk of discrimination is already present. See, for example, Article 3(1)(a) Council Directive 2000/78/EC at EU level: “[...] this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions [...]”. Article 9(5) of the version of the EU Platform Work Directive as agreed by the Council acknowledges the importance of the right to information during the recruitment or selection phase of a platform worker. This is a change from the EU Commission’s original proposal, which did not address this issue.

Specifically, it is essential to ensure that the transparency requirements do not lead to the revelation of algorithm-specific business secrets.¹⁰³

5. Conclusion

In general, the scope of C111 also extends to situations of unequal treatment on the basis of geography. Therefore, it is appropriate, in line with the CEACR's interpretation as well as with the ILO's preparatory work of the Convention, to include these workers under the Convention. ILO member states, in accordance with their obligations under international labour standards, must ensure that national legislation provides adequate protections against discrimination, for both self-employed and employed workers. Accordingly, the Convention does guarantee a certain minimum standard of protection for workers on online web-based platforms irrespective of their contractual status. In addition, C111 allows member states, pursuant to Article 1 (b), to include further grounds of discrimination beyond those already listed in Article 1 (a). ILO member states may therefore introduce such grounds in accordance with their international obligations, including in relation to a person's geographical location. At the same time, Article 3 of C111 allows ILO member states additional flexibility in determining the method by which the convention should be incorporated into national law. This approach permits a flexible implementation that considers the legal peculiarities of the member states.

Nevertheless, indirect discrimination can also occur, particularly in the cases described above. While C111 is not specifically tailored to platform work, the underlying principles of equal treatment and non-discrimination remain applicable. The key challenges faced by digital platform workers may often be analogous to those faced by workers in traditional forms of employment, especially when it comes to the involvement of algorithms in decision-making and organisation of work. With this in mind, one has to consider that these processes are opaque and will in many cases not be transparent to a platform worker. While there will usually be no unjustified direct discrimination in the platforms' selection of online web-based workers, there is a significant risk of indirect discrimination as described above. Indirect discrimination is a prominent manifestation of the dangers posed by the non-transparent use of algorithms on digital labour platforms.

Consequently, it is concerning that the Convention does not contain robust rules on the allocation of the burden of proof. Especially in the case of geographical restrictions on access to work opportunities, such proof is difficult to establish. Here, the ILO should make improvements to ensure that the standard of protection can continue apace with current technological developments in the world of work. The focus should be placed on a "human-in-command" approach to algorithms and artificial intelligence,

¹⁰³ In this regard Noelia de TORRES BÓVEDA: Business Secrecy as a Limit to the Right to Information on Algorithms. *Hungarian Labour Law E-Journal*, 2022/2. 48–56.

as suggested by the Global Commission on the Future of Work in 2019.¹⁰⁴ Creating a dedicated ILO instrument that accounts for the risks that are inherent in the use of algorithmic decision-making secures that international labour standards continue to provide protection against discrimination, even given new forms of work. This would fill a “regulatory vacuum within the ILO”¹⁰⁵ and would strengthen the objective of the Philadelphia Declaration, which declared protection of “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”¹⁰⁶.

¹⁰⁴ Work for a brighter future: Global Commission on the Future of Work. Geneva, ILO, 2019. 43–44.

¹⁰⁵ ILO (2022b) op. cit. 34.

¹⁰⁶ See Fn. 48.