BUSINESSEUROPE

CONSULTATION RESPONSE

First phase social partner consultation on possible action addressing the challenges related to working conditions in platform work

Key points

1. While working via an online platform does not constitute a new legal form of work, it does present a **new way of organising and distributing work**, positively allowing workers, businesses and customers to grasp the opportunities provided by the digital transformation.

2. Platform work is a typical and positive example of the increasing diversity in the way we work. **"Platform worker" is not a legal category** and many contractual arrangements are covered in platform work, including employee, self-employed, fixed-term, part-time and agency work. Attention is unfortunately often on specific sectors or tasks, whereas it covers a wide range of sectors and occupations – from professional services including legal advice, translation, to cleaning, repair work and many more. This means that it offers a significant potential for integrating more people in the labour market and thereby increasing employment and growth.

3. In this respect, it would **not be appropriate to introduce one-size-fits-all rules** to try to deal with issues which may occur in some specific contexts, but which would hamper the vast majority of platforms that operate in a fair, efficient way and provide good opportunities to individuals, to customers and society at large.

4. However, we agree that there is a **need for action at the appropriate levels**, to address the challenges related to working conditions in platform work, where they exist. EU, Member States, social partners, platforms themselves and those providing services through them should all play a role.

5. In order to be successful, it must be done in a way that **respects the different EU, national and social partner competences and the different national social and industrial relations systems**, so that all can work together to make platform work safe for companies and workers whether as employees or self-employed. This is also in the interest of business. It also means that solutions found in some countries (e.g. the agreement recently found in Spain), must be seen in that specific context and are not necessarily replicable in other countries or situations.

6. We have a number of **proposals on how to address these challenges as set out later in our response.** A list of these is also provided at the end of our general remarks. It is important to take into account that there are a lot of existing EU legislation and instruments in place, as also highlighted by the commission, which when properly enforced and implemented, will provide solutions to most of the challenges. This includes the directive on transparent and predictable working conditions, the Council recommendation on access to social protection, the Platform to Business regulation and the GDPR rules. As well as the forthcoming regulation on artificial intelligence (AI) and the clarification of EU competition rules and collective

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representation of self-employed. The focus should be on encouraging enforcement and implementation of these rules.

7. The EU needs to take the right approach to ensure that the **development of new, innovative business models, including platforms is not stifled,** and that those wishing to provide services through platforms and more generally self-employment retain the flexibility that makes them an attractive way of working for them. It would for example not be acceptable to force self-employed into becoming employees by law. 10% of Europeans working are self-employed, and while some work through platforms, many don't.

8. **An EU definition of who is a worker and who is self-employed would not be appropriate or effective** either, as it would not be able to respect the different models in Member States and keep up with the dynamic developments on labour markets. Therefore, this solution was also rightly turned down by the EU legislator when the directive on transparent and predictable working conditions was adopted. Where self-employed workers working for a platform have the characteristics of an employee (as defined at national level), such workers should be re-classified as employees. This must be determined on a case-by-case basis.

9. The way we work is constantly changing, both to meet consumers' needs for new services and more rapid access to them, and to meet the demands of individuals who want to work more flexibly, for example to better balance work and private life, simply to have more autonomy, to build up a client/customer base, or to test more freely what work you want to do or to develop qualifications. **New forms of work are constantly being developed to respond to these demands**, as well as to create business opportunities, which is positive for the economy. A one-size-fits all approach which sets rules for a specific moment in time, will not be able to keep up with such dynamic developments.

10. Where labour markets function well, **being self-employed, including working through a platform, is a positive choice people make**. And for companies, the decision on whether to engage with self-employed or employing workers or a combination is based on what is working best for a company, bearing in mind that there are also many advantages of employing workers. The paid-by-the-job model is not new, rather the use of digital tools has created new opportunities for this and has brought part of the undeclared economy into the declared economy. As recognised by the Commission, platforms are often used as a means for self-employed to access a wider range of clients more easily and to top up their income. It is also an option often attractive for students and younger people in general and for part-time employees and others who want to work on an ad-hoc basis. **The diversity of needs and desires of those working through platforms should be respected, as well as national law determining the status of the relationship** (employment, self-employed or otherwise), depending on the different factors that are outlined in that national law (e.g. whether there is subordination or not, or the extent of control of the platform over individuals etc).

11. Where people feel that their only choice is to work as self-employed, including through a platform, because jobs as an employee are not available, this is usually due to labour markets functioning inefficiently. In such cases, creating a presumption of an employment relationship for all platform workers would not solve the issue – on the contrary, it would only make it more difficult for the most vulnerable to enter the labour market. Excluding them in this way could also lead to more undeclared work, putting them in an even more vulnerable situation, as well as negatively impacting the economy and creating an unlevel playing field for companies. It is however important that the choice provided to platform workers fully reflects the characteristics and nature of the work and the relationship, when determining the employment status in line with national rules. We should rather focus on **creating better functioning labour market**s, reducing constraints and non-wage labour costs.

12. The consultation document does not adequately recognise that the **status of employee comes not only with rights, but also many obligations**: in an employment relationship, the employer, for example, decides when and where an employee works, what tasks they need to complete, how and by when. It also comes with financial/contractual obligations, such as employee contributions, adherence to specific insurance schemes etc. People often choose the flexibility and autonomy offered through self-employment, including working via platforms, as they are not bound by contractual obligations towards an employer and can organise and control their own schedule or bring a business idea to fruition. This individual decision must be respected, including avoiding forcing platform workers into an undesired employment status.

13. At the same time, we recognise that where new forms of work appear as part of dynamic labour market developments, the classification of those working as self-employed or employees via platforms or other means sometimes needs a follow-up by the legislator or social partners and may also need judicial clarification. This is evidenced with the various rulings in national and EU courts. However, it would **not be possible or appropriate to tackle the classification through an EU directive,** as determining employment status for good reasons remains a national competence and a one-size-fits all approach would not be able to reflect the diversity between member states and the dynamic development of new work forms. However, other actions could be taken at EU level, in line with the comments later in our response.

14. We agree that **social partners at national level have an important role in representation of employees engaging in new forms of work,** including platform work, whilst respecting different industrial relations systems. However, a harmonised EU approach would not be appropriate as it is for national social partners to decide which groups of workers are covered by their collective agreements, bearing in mind that this is restricted to employees and only social partner organisations have the mandate to negotiate and implement collective agreements.

15. Collective representation of self-employed, including those working through platforms, is possible and is already the case in some member states, for example to discuss working conditions, training etc, but not pay as it would not be in line with

EU competition rules. However, it is a decision for the national level bearing in mind that the conditions are set by national law and industrial relations systems. In line with that, there is no legal basis in article 153 of the EU treaty for regulating the working conditions for self-employed or for that matter to change their categorisation from self-employed into employee.

16. However, we are **looking forward to the Commission clarification of the possibilities for collective representation while respecting EU competition** rules and we have already provided input to the Commission on where we see there are possibilities for collective representation and welcome further dialogue with the commission on this. However, collective representation of self-employed must not be mixed up with the collective agreements of social partners which concern rights and obligations for employers and employees, which, if they covered self-employed, would force them into being employees.

17. The provision of services across the EU, including cross-border, is a crucial aspect of the single market and platforms play an important part in this, as well as having future growth potential. As recognised by the commission, this is positive for the EU economy and citizens and should therefore be supported. In terms of single market rules, it is important to ensure a level playing field irrespective of the channel of sale/service provision and the location of the economic operator. A risk-based approach is necessary, whilst applying corrective measures on markets, however only when this is necessary and is not disproportionate to the risk/impact.

Our 14 proposals for action:

- EU to encourage those **Member States**, where issues related to classification of employment status, including legal uncertainty, arise, while taking rulings of the European Court of Justice (ECJ) and relevant national court decisions into account, to **assess the different characteristics of workers** to determine whether they are more appropriately classified as an employee or self-employed.
- Consider setting up a **quadripartite approach** (European Commission, Member States, social partners), to facilitate exchanges of experience and mutual learning on how Member States qualify the **status of workers**, as well as a better understanding of the impact of ECJ rulings and national court decisions. If possible, this could lead to a catalogue of the main characteristics and procedures used across Member States to classify an employment relationship.
- When transposing the directive on **transparent and predictable working conditions**, to work closely between the different actors when applying the scope of the directive concerning employment relationships, while respecting that this cannot be interpreted uniformly throughout the EU.
- Check the feasibility and value of facilitating a **dialogue** between different **platform providers,** to aim at developing **principles for good quality platform work by way of a code of conduct/charter** on relevant, commonly defined issues. For example, regarding adequate working conditions, information on expected pay and duration of an activity (bearing in mind that this is often determined by the client/service provider), skills and training provisions, access

to social protection, implications of use of different contractual arrangements, expected client behaviour. This could potentially involve business organisations and platform workers and where relevant social partners.

- **Ensure implementation and enforcement of relevant existing EU legislation and recommendations,** in particular the directive on transparent and predictable working conditions, the General Data Protection Regulation, Platform to Business Regulation, Council Recommendation on access to social protection and Council Recommendation on improving occupational health and safety of self-employed.
- EC and EU-OSHA to follow-up further on the actions suggested by the Advisory Committee on Safety and Health on the **Council recommendation on improving occupational safety and health protection for self-employed**, including involving other actors to improve the achievement of the aims of the Recommendation, e.g. EU-OSHA, national bodies and vocational training institutions, to consider how to raise awareness amongst self-employed workers of the need to manage health and safety proactively, and how to make available to self-employed workers relevant, free and easy-to-use tools to facilitate this.
- Within further development of the **monitoring framework of the council recommendation on access to social protection**, look into the issue of platform workers, both self-employed and employees, including, where necessary as part of member states national implementation plans.
- EU to encourage member states to assess the impact and feasibility of temporary **extension of benefits during the COVID crisis** in a more long-term perspective, whilst supporting sustainability of public finances.
- **Member states**, in implementing, where necessary council recommendation on social protection, to **formally cover self-employed**, **including those providing services through platforms**, in case of potential social risks and to ensure they contribute in an appropriate way. This should be done in full respect the different situations of workers and self-employed and safeguarding sustainability of the system overall.
- EU and member states to **assess reasons for lack of adherence to schemes by self-employed**, including lack of feasibility for individuals, contributory capacity, relevance/tailoring of the schemes to correspond to their needs, lack of awareness and information, or desire for flexibility.
- Member states to **increase transparency about entitlements and obligations** and provide information on the conditions and rules of schemes, to support take up.
- Member states to **encourage cooperation** between **platform providers** and those providing services through them, with **providers of tailor-made market-based solutions** regarding relevant benefits, whilst avoiding this leads to an implicit categorisation of platform workers as employees.
- EU to elaborate **guidance regarding existing legislation on the implications of cross-border platform work**, combining fairness with a proper functioning of the single market, on the basis of competition.
- As part of a wider approach towards the use the **European Social Fund+** to facilitate the up and re-skilling of workers, encourage member states to facilitate the access to training programmes for **platform workers.**

General comments on EC analysis and our suggestions for the way forward

- **Employment status**

18. We agree with the commission's analysis that employment status of platform workers is a key issue that in some member states has an impact on other aspects, such as access to social protection or labour law. At the same time, as stated by the commission, for the majority of people working on platforms, it is a second or marginal job – therefore it is very likely that many of them have access through other jobs and this has to be taken into account.

19. "Platform worker" is not a legal category. Platform work is either based on an employment relationship or a self-employed activity (or other types of contractual arrangements), which come with clear legal rights and obligations. If self-employed workers working for a platform have the characteristics of an employee (as defined at national level), this constitutes bogus self-employment. We fully agree that in this case, such workers should be re-classified as employees. This must be determined on a case-by-case basis.

20. There have been a range of regional, national and EU court rulings, with different results. As stated by the commission, "the jurisprudence is not yet sufficiently settled on this issue for us to draw clear conclusions from it". Also, with dynamic labour markets, no decisions would be fit for the future. **The idea of setting a rebuttable presumption of employment or switching completely contradicts this, by falsely suggesting that there is a logic and tendency to qualify platform workers as employees.** This is not accurate, either in terms of the diverse court rulings nor the practice of the majority of platforms, where those using them are correctly classified as self-employed. Whilst the directive on transparent and predictable working conditions already includes this point (in article 11), it is dealt with in a very different way as it does not take a one-size-fits-all approach by making this mandatory at EU level. In the directive, it is one of two options for member states which allow use of on-demand contracts. The other option is to limit the use of on-demand work.

21. We appreciate that diverging court cases can put platform workers and platform operators in an uncertain legal situation, also in terms of expanding to new markets. However, we do not believe that this is an issue that can be solved by an EU social directive, as it is simply not feasible nor appropriate to determine the status of every platform worker at EU level. This can only be done at national level, as forms of employee – self-employed or even third categories of workers differ and develop.

22. We do, however, believe that there is room for EU action on this issue, but it has to be appropriate and proportional, also in terms of the division of competences between EU and national level, and social partners. The EU should encourage those Member States, where issues related to classification of employment status, including legal uncertainty, arise, while taking rulings of the European Court of

Justice (ECJ) and relevant national court decisions into account, to assess the different characteristics of workers to determine whether they are more appropriately classified as an employee or self-employed. Member states should be encouraged to look at the aspects that determine classification of employment status, such as exertion of control, subordination, strong organisation of working conditions (e.g. working hours, place, time of activity) etc. The transposition of the EU directive on transparent and predictable working conditions gives member states already an additional opportunity to look at this issue, as they will have to assess which workers are covered by the directive. When doing so, the different actors should work closely together when applying the scope of the directive concerning employment relationships, while respecting that this cannot be interpreted uniformly throughout the EU.

23. Our proposal is to consider setting up a quadripartite approach (European Commission, member states, social partners), to facilitate exchanges of experience and mutual learning on how Member States qualify the status of workers, as well as a better understanding of the impact of ECJ rulings and national court decisions. If possible, following the exchanges, this could lead to a catalogue of the main characteristics and procedures used across member states to classify an employment relationship. The aim of such an approach would be to exchange good ideas on how Member States and social partners can proceed, at appropriate levels, in particular where legal certainty is lacking.

24. This could also be useful information for platforms and platform workers themselves and self-employed in general, to provide more clarity on how best to organise employment/self-employment relationships as part of their activities, in line with national specificities. This could improve legal certainty. It could also help them to understand the implications in terms of access to social protection, labour law coverage, collective representation etc, of different employment statuses including if moving to another Member State.

- **Working conditions**

25. As acknowledged in the consultation document, working conditions vary greatly depending on the type of tasks, and are therefore not always related to the fact that the person is working through a platform as they equally apply to other self-employed doing similar tasks. Therefore, an initiative targeting “platform work” as such does not make sense and could create an unlevel playing field between self-employed. At the same time, this is an **important issue in view of the future development of good quality platform work and self-employment,** which merits discussion at EU level and action, where necessary, by platform providers, business organisations and where relevant the legislator and social partners. This is also important in terms of ensuring a level playing field with companies that have employees and, which have to abide by labour law and collective agreements.

26. Where those working on platforms are employees, clearly existing labour laws apply like for any other employees. The transposition and implementation of the EU

directive on transparent and predictable working conditions will provide further and more targeted protection to platform workers who are employees, as it includes specific provisions for on-demand work, as well as the enhanced obligations to provide information to employees regarding the conditions of employment.

27. Of course, for those platform workers who are self-employed, the rights traditionally associated with being an employee are not available. However, this is balanced by the fact that they do not have the same obligations that employees have towards their employer.

28. However, the common perception that all platform workers are part of a vulnerable 'digital working class' that needs to be protected from exploitative tech giants, is not the reality. Whilst there may be problems with working and social conditions and health and safety regulations, for some specific tasks, the consultation document provides clear evidence that there are many more platform workers doing highly skilled tasks, who most likely enjoy similar working conditions to others doing such tasks as traditional self-employed.

29. **Many of the issues raised in the consultation document regarding health and safety are not unique to platform work:** Screen-based work is common in many jobs, psychosocial risks and musculoskeletal disorders also affect self-employed more generally and employees. As for other self-employed, there is also a responsibility on the individual to protect themselves from health and safety risks. Evaluating workers' performance is not an aspect unique to platform work either.

30. Also, the existing council recommendation on the improvement of the protection of the health and safety at work (OSH) of self-employed workers already recommends that member states should promote the prevention of occupational accidents and diseases of self-employed workers, take measures to provide information, advice and access to sufficient OSH training, at reasonable cost to self-employed and to access health surveillance. A council recommendation is a logical tool in this area, given that the treaty gives limited powers to the EU concerning self-employed. The Advisory Committee on Safety and Health, in its 2014 opinion on this recommendation, found that it had led to an increase in member states including self-employed in their OSH legislation, whilst also showing a wide variation, depending on different national systems. Noting strong differences in law, custom and practice amongst the Member States in relation to self-employed, it pointed out that a single EU-wide approach on the protection of their safety and health at work could not conceivably address all the different systems fairly and coherently, and concluded that the EC actions should remain non-legislative and general in nature. It also suggested to involve other actors to improve the achievement of the aims of the Recommendation, e.g. EU-OSHA, national bodies and vocational training institutions, and to consider how to raise awareness amongst self-employed workers of the need to manage health and safety proactively and how to make available to self-employed workers relevant, free and easy-to-use tools to facilitate this. The Commission and EU-OSHA could follow-up on a number of these points.

31. Furthermore, many **platforms have taken action to ensure that good working conditions prevail** so that they can attract the workers they need to grow - some are highlighted in the next section of our response. And it is possible, like for self-employed more generally, for those working on platforms to subscribe to market-based insurance schemes, for example health/accidents. Covering employees with insurance also comes at a price either in form of a payment from the employee or in form of lower wages than otherwise.

32. We agree that there is a need to provide clear information to platform workers in a transparent way, on how the platform functions and its terms and conditions, as this helps predictability and understanding. However, we do not agree with the analysis that because people working through platforms do not have access (like employees) to a formal written statement, that they do not have adequate information on the terms and conditions. The Platform to Business regulation, which was recently agreed and is implemented at national level, already places obligations on platforms in this field. We also do not agree that there is no mechanism for complaint handling, as this is a specific obligation of the regulation. It is important that platform providers implement it correctly. We therefore do not see the need for extra EU legal requirements in this area but proper implementation and enforcement of existing rules.

33. Platforms are legally required under the EU Platform to Business regulation to ensure that their terms and conditions are drafted clearly, easily available at all stages including pre-contract, set out possible future reasons for suspension of work, and they need to notify any changes to their terms and conditions at least 15 days before making them. They also often make their terms and conditions public, including for those who work on the platform. Therefore, extra requirements are not necessary.

34. Regarding the proposal for action to ensure protection from unfair dismissal from the platform, clearly this does not apply to the majority, as they are not employees. However, when it comes to rules regarding ending a business contract, i.e. between the platform and the business user, issues such as deactivation from the platform/non-payment of completed tasks or termination of contract, normal contractual rules apply like for any other business to business transaction.

35. It is normal that contractual agreements differ from one platform to another, due to their different business models and ways of operating. Forcing standard contracts will only hinder the variety of the platform economy, which is one of its assets and one of the reasons that it is taking more of the market share.

36. We agree that it could be useful for platform workers to have information on expected pay and duration of an activity before accepting the task, as this helps them to plan their activities. In practice, this is already very common. However, an EU measure imposing such requirements on self-employed platform providers is not appropriate or effective, as the processing time and consequently payment for activities mediated via platforms depends very much on the individual qualifications and skills of the platform workers, and in some cases cannot be predicted by clients. Also, like for

other self-employed, the duration of the work is often determined by the service provider. This fully applies already to platform workers who are employees, as part of the provisions on on-demand work in the directive on transparent and predictable working conditions.

37. Regarding surveillance, direction and performance appraisal, the GDPR already provides an adequate framework to protect those working on platforms, whether as employees or self-employed, as it applies to all legal or natural persons. For example, it classifies excessive use of high-tech monitoring as “high risk” and there are also strict guidelines on use of video for surveillance of people.

38. One of the main flexibilities appreciated by platform workers is the possibility to decide when they work and this is recognised by the commission. For example, platform workers are often working on multiple apps for different platforms at the same time. This flexibility could be hampered by applying specific working time rules, which do not fit the nature of platform work, as they are set with a traditional employer-employee relationship in mind. For example, we do not agree that the time self-employed platform workers spend waiting to take a job should be classified as working time, including being paid for this. Like any other self-employed, this is part of the activity of finding clients, which is in fact facilitated by the platform. This could also create an obligation to be connected during those moments that are set as working time, whereas the individual may not want to. It would also be complicated to monitor this in cases where individuals work on numerous platforms.

39. Practices regarding payment differ between platforms. As stated in the consultation document, for the majority it is determined by the client and/or the person providing the service, i.e. it is a market-based transaction, like traditional self-employed. Also, as shown in the consultation document, one of the primary motivations of platform users and the majority of platform work is as an intermittent, marginal activity for extra income. Setting EU wide rules which determine how the payment should be set and by whom would not reflect this diversity and is unnecessary in view of the nature of this work. Bearing in mind that self-employed users of platforms are undertakings, as part of the client – business relationship, the EU late payments directive also applies.

40. One possibility to improve working conditions, where this is necessary, feasible and brings added value, would be to facilitate a dialogue between different platform providers, potentially involving business organisations and platform workers and where relevant social partners, to develop a code of conduct/charter on relevant, commonly defined issues. This would allow for key principles for good quality platform work to be devised, including adequate working conditions, skills and training provisions, access to social protection and implications of use of different contractual arrangements.

- **Social protection**

41. We agree that access to social protection for platform workers is a key issue, both from the point of view of covering potential risks (e.g. accidents, unemployment) for

those that need it. However, these challenges also apply to self-employed in general. Therefore, we do not see the merits of an approach targeting platform workers specifically. Also, any measures must avoid deterring platforms from providing access to schemes, e.g. voluntary or market-based, or deter individuals from engaging in platform work due to a lack of flexibility or increased costs.

42. The **Council Recommendation on access to social protection is the right framework for member states to tackle this issue** as it covers self-employed whether they work through a platform or not.

43. The Social Protection Committee has developed a monitoring framework on access to social protection, including for self-employed, which covers many of the branches of social protection highlighted as challenging in the consultation document (e.g. sickness benefits, unemployment, accidents at work). Reforms have taken place or are in process in a number of member states to recalibrate and extend schemes to cover self-employed. No doubt more work is needed and we welcome the possibility to contribute to this important work. As the monitoring framework is further developed, the issue of platform workers, whether self-employed or employees, should be looked into, including, where necessary as part of member states national implementation plans.

44. Whilst there are still gaps in access to social protection, these vary from one member state to another, depending on the type of work and the branch of social protection. Therefore, it is important to leave member states the choice of how to extend coverage, to which groups of workers and regarding which branches of social protection, in line with national systems.

45. Taking into account the measures that were taken in some member states to cushion the social impact of the COVID-19 crisis, including temporarily extending some benefits to self-employed, it would be worthwhile member states assessing the impact and feasibility of such measures in a more long-term perspective. This would have to be done in a way which supports sustainability of public finances.

46. Whilst it is important to respect the different situations of workers and self-employed, to safeguard the sustainability of the overall system, self-employed, including those providing services through platforms, should be formally covered in case of potential social risks and contribute in an appropriate way, to avoid reliance on tax-financed social assistance without the necessary contribution base. They need to be able to choose the branches of social protection for which they want coverage and the type of insurance, provider and type of scheme which best corresponds to their situation.

47. The focus should not only be on assessing the extent to which statutory schemes could be extended to self-employed, but also on promoting market-based solutions directly between platforms and providers that are aligned with the business model and type of activity. However, it is important that this does not lead to an implicit categorisation of platform workers as employees, since being self-employed means they have other needs and possibilities compared to employees.

48. The Commission points to ensuring that digital labour platforms also contribute to the social protection schemes. Where there is an employee-employment relationship, this is of course normal. However, in the vast majority of cases, we are speaking about self-employed. They may also be offering their services on multiple platforms simultaneously, which would create problems with regards to the calculation of appropriate contributions. Also, platforms contribute as any other company to paying taxes, thereby contributing to the social protection systems in that way, so it is difficult to understand exactly the problem that the commission is trying to tackle. If platforms decide voluntarily to contribute to schemes for their employees, as some do, this is of course their choice and could be encouraged, as long as this does not lead to an automatic categorization of workers as employees.

- **Algorithmic management**

49. Business strongly supports the use of Artificial Intelligence (AI) to support human activities as part of a human-centric approach. Integrating new digital technologies, including AI, has the potential to improve services and should be seen as an opportunity in the EU, not only for companies, but also for citizens and workers. At the same time, AI needs to involve human actions at some stage to oversee the results. We therefore support an approach which is based on transparency, human oversight and accountability and full respect of data protection.

50. The **commission will soon publish the draft regulation on AI, which will deal with these aspects. Therefore, we do not see the need for a specific initiative to safeguard platform workers from the use of AI.** AI should be dealt with in this broader risk-based framework, as AI is not an issue specifically related to the platform economy alone. We could support a common approach regarding the challenges of automation-workers rights, potentially guidance, but only if this is linked to the broader upcoming AI initiative.

51. It is important to ensure that in defining when and how the human plays a role, this is done in a way that does not take away the benefits of AI, (e.g. in doing potentially repetitive or monotonous tasks repeatedly and avoiding human error). We support the EC AI White Paper which explains different stages, depending on the type of AI, at which a human would play a role, i.e. before the AI decision is taken, monitoring as the AI is making the decisions, or reviewing AI decisions afterwards.

52. When it comes to assessing the level of risk of use of AI in different situations, a case-by-case approach is needed to take account. Simply determining all use of AI in labour market situations as high risk, would not take into account the specific nature of different situations. For example, whilst it is important to safeguard against bias in AI, it can also contribute to tackling conscious and unconscious bias, which is part of all human decision making, including on labour markets.

- **Cross-border aspects**

53. We agree with the analysis that the European platform providers are challenged to grow at scale, whereas there is a growing demand of European consumers for this type of service. This is due to the EU being a fragmented and highly regulated market.

54. As already said, the solution is not to introduce labour law or employment status for self-employed. **The rules of the single market also apply to platforms and self-employed doing business through a platform. What is required is a better digital infrastructure and a less burdensome regulatory approach**, which impacts smaller European platform providers in particular. Regarding the lack of level playing field with platform providers from 3rd markets, the best solution is to make life easier to do business in the EU.

55. Regarding liability, it is important that platform providers have some responsibility, under certain conditions, however this does not require a complete overhaul of the liability regime, as platforms cannot be fully and automatically liable for a service or product traded via the platform.

56. We agree that guidance regarding existing legislation could be elaborated on the implications of cross-border platform work. However, fairness should be combined with ensuring proper functioning of the single market, including on the basis of competition. For example, where necessary, it could be useful to have guidance on how the existing EU rules, in particular on social security coordination for self-employed, apply in the case of those using platforms to provide services to clients in other EU member states or self-employed wanting to move to another EU member states to provide his or her services from there. Also, providing more information on the existing rules, rights and obligations of those providing services through platforms, would be useful.

57. Determining the applicable law or the competent court may represent challenges in cross-border contracts but this is not exclusive to contracts with online platforms. The Brussels I and Rome I regulations already include specific provisions that help identify the competent court or the applicable law. Both include special protective rules in certain categories of contracts, for example, those covering employees. Improved awareness of these EU rules could be promoted to help guide contractual parties in case of contractual disputes.

- **Skills, training and professional development**

58. It is relevant to look at ways in which workers in diverse forms of work, including platform workers, are able to access training, while respecting the roles played by the different actors concerned and the different national practices when it comes to the organisation and provision of education and training. While there is **no role for the EU to determine how training is organised or financed at national level nor to provide an EU right to training, it could encourage member states to**

facilitate access to appropriate training/skills-updating/re-skilling programmes by platform workers and to assess potential barriers to access. This could also be done in cooperation with platform providers, or solely by them, as long as this is not interpreted as platform workers being employees.

59. The training/skilling options need to be adapted to the particular situation of platform workers, bearing in mind that this is often a marginal activity and that they require flexibility in terms of when/how training is provided, to ensure that they can combine it with the often sporadic and flexible nature of their activity on the platform.

60. It will also depend on the tasks and the existing level of skills, and in this respect, it is no different from other forms of work/self-employed for the same job or tasks. Also, as noted in the consultation document, the majority of platform workers are highly-skilled, therefore analysis of skills gaps needs to be done on a case-by-case basis, including by the platform worker, in terms of his/her tasks.

61. The consultation document refers to employer provided training, however this is not the full picture, as training is often provided on a cost-sharing basis by employers and workers/trade unions and by public authorities or education and training providers.

62. We do not agree that there is little incentive of platforms to invest in skills or training, as this is an important point in ensuring that those providing services through platforms perform the job for the client in a satisfactory way and that platforms can attract the self-employed and employees they need. This may also be a way for a platform to attract workers to offer their services through them. Many platforms are already very committed and successful in providing training or onboarding support for people providing services through their platform. These initiatives should be further promoted across the EU through mutual learning and the exchange of best practices. In many cases, platforms have also moved vulnerable workers from the undeclared economy to the declared providing them with also necessary training for them to deliver good service to customers.

63. Portability of, and access to training is an important issue for self-employed. The forthcoming commission initiative for a council recommendation on micro-credentials could go some way to improving this. Another option could be to encourage development of training funds by platforms – a similar approach was taken by agency work providers over the last years.

- **Collective representation and bargaining**

64. As pointed out by the commission, **self-employed are considered as undertakings and are therefore subject to the rule of prohibition of price cartels between economic actors.** Therefore, to avoid distorting or restricting competition within the internal market, they are not allowed to conduct collective bargaining and conclude collective agreements concerning tariffs. This applies in exactly the same way for self-employed providing services through platforms.

65. Where platform workers are falsely classified as self-employed according to national rules, they should be treated as employees and can then be part of collective bargaining, through trade union membership. For justified and valid social reasons, collective agreements establish a type of price cartel for employees, by setting wages and other costs. However, this is a completely different situation to self-employed, who are undertakings/economic operators, for which the same social reasons cannot/do not apply also because it would turn them into employees.

66. When it comes to setting tariffs, we do not agree that competition law should be changed, to allow genuine self-employed to collectively bargain, as this would set a dangerous precedent for well-functioning competition law. However, we agree that competition policy should not act as a barrier to the freedom to form an association (e.g. an informal group wishing to represent themselves towards the management of a platform) and the ability to discuss working conditions, training etc, including through collective representation.

67. Also, we do not see a particular issue for bargaining power of those providing services via platforms any more than the bargaining power of a self-employed working through other means – this is part of the contractual relationship with a client.

- **Option of EU social partner negotiations**

68. Since this initiative does not only concern employees and the labour market as such, but also concerns self-employed, it would not be appropriate for us to enter into negotiations, as this goes beyond our responsibilities. However, many of the actions and solutions that we propose would naturally involve social partners. Given the potential impacts for labour markets, industrial relation systems and companies, it is crucial that we remain important part of further dialogue on the initiative and the work to be done.

Additional specific comments

69. The consultation document rightly acknowledges that it is not possible to draw clear conclusions from the current jurisprudence on the **classification of platform workers,** as court cases so far use different criteria or emphasise the criteria differently. This is natural given the different national rules determining employment status and shows how difficult, but also inappropriate it would be to determine this at EU level.

70. Even for the same platform provider, in the same member state, there can be different rulings. For example, the *cour d'appel* in Lyon in January 2021 confirmed the status of an Uber driver as self-employed. However, in March 2020, in a case in the *Cour de cassation*, an Uber driver was qualified as an employee. In these cases, it came down to whether there was a link of subordination, which is the key determining factor of an employment relationship in France. This shows that the issue can only be dealt with on a case-by-case basis.

71. Whilst a number of **court cases** are mentioned in the consultation document, it does not give the full picture, notably leaving out the ECJ Yodel ruling, where it was confirmed that a courier working for Yodel in the UK (when they were still an EU member state) was correctly classified as self-employed.

72. Some of the aspects which show that **platform workers are correctly classified as self-employed**, is that they are free to work on numerous platforms, they have control over if, when, where, for whom and for how long they work, and can set their own rates. This depends on the business model, but it is the general practice on most platforms. Whilst there are differences in national definitions of employees, some features which are common in a number of member states include: subordination, obligation to work when asked to, control etc. These are the kind of aspects that could be discussed as part of the quadripartite approach we propose.

73. A potential problem that the commission points to is the possibility for platform workers to **seek recourse** if the client refuses to pay for an already performed task. This should be avoided as it can lead to difficult financial situations, but it is not unique to platform work – traditional self-employed can also face such situations.

74. We agree that it could be useful for platform workers to **have information on expected pay and duration** of an activity before accepting the task, as this helps them to plan their activities. However, we do not believe that EU action placing such requirements on platform providers would be appropriate or effective, given that in the majority of cases, the client determines the job to be done and the payment.

75. However, on both points above, **platform providers could be encouraged** to lay down clear terms and conditions regarding the behaviour of clients. This could

be part of the code of conduct/charter mentioned previously, where deemed necessary, feasible and of added value.

76. Regarding the point raised on **income insecurity**, it is important to bear in mind that platform work is often a top up or marginal activity and that the income naturally reflects this. For example, for the ride hailing service Bolt, in its home market of Estonia, 50% of drivers are connected less than 20 hours per week, as they are either supplementing their wages from other employment, or fitting this activity around others. Therefore, we do not believe it is relevant to speak about this in the majority of cases. It also depends on the type of activity, and considering that many platform workers (as stated by the commission) are highly skilled, it is to be expected that they can bargain for good levels of payment for the tasks they perform. An internal study done by Bolt for example, shows that in EU member states, its drivers earn revenues higher than the national minimum wage and often up to two to three times higher.

77. Regarding the assertion that platforms 'nudge people to be **available for work when the demand is high'** - rather than seeing this only as a problem, the benefits need to also be looked at, i.e. this can in fact help platform workers to optimise their earning potential. Whilst it is important that this is done in a way which does not exert excessive pressure on platform workers or entail repercussions if they do not accept tasks, at the end of the day, it is for the individual to decide whether he/she will accept the task or not, also in terms of work-life balance, tasks performed via other platforms, or other jobs.

78. When member states look into **access to social protection** of self-employed, including platform workers, as part of implementation of the council recommendation, it is important that the solutions proposed correspond to the specific individual work situation. This includes the individual's capacity to contribute, how much they actually work, whether they are active on numerous platforms, and whether they have income/coverage from another job (e.g. as an employee), which, as recognised by the commission, is the case for many platform workers. This is important in assessing whether the eligibility requirements and possibilities for accumulating social security entitlements are fair.

79. It is up to member states to see if improvements are needed and how to achieve them, i.e. whether by extending coverage under existing schemes or creating new ones, as well as the balance between public, private and occupational schemes. This will depend on the national systems, which differ. For example, in some member states (e.g. Denmark, Germany), access to many branches is already granted for self-employed. In Germany, health insurance is already mandatory for self-employed workers while there are options to register for unemployment and sectoral accident insurance voluntarily. In Austria, self-employed contribute to and participate in the public social security funds

mandatorily. Self-employed below a certain annual income threshold can opt in (threshold in 2021**:** EUR 5.710,32)[1].

80. A key factor affecting social protection coverage is non take-up of schemes by self-employed, probably including platform workers. When assessing coverage, it is important to bear in mind that adherence to schemes may not be desirable or feasible for individuals, due to their contributory capacity, relevance/tailoring of the schemes to correspond to the needs of self-employed, lack of awareness and information, and of course simply a desire for flexibility, which must be respected. These aspects should also be assessed.

81. The debate is often around access to public schemes, which is one option, where platform workers would also need to contribution. However, it would be useful to encourage platform providers and **market-based operators** to work together to develop schemes which are tailored to the needs of platform workers, including in terms of providing protection from risks and transferability of benefits when moving between or working on multiple platforms. Industry-funded portable benefits funds, allowing platform workers to accrue funds to access the protections and benefits they want, is another option to be considered by member states.

82. Increasing transparency about entitlements and obligations and providing information on the conditions and rules of schemes is also important in supporting take up.

83. Regarding use of AI, stakeholders may not realise that platforms do in fact have human involvement. For example, a Dutch court recently ruled that a specific system used by Uber is not solely based on automated decision making (as was suggested), as there is also meaningful human involvement in the system. Where improvements are needed, including changes to processes, of course platform providers should take action, as Uber did in this case. This shows that it is important to have a complete and accurate picture of the situation regarding AI, also bearing in mind the diverse ways that platforms operate.

84. Regarding cross-border aspects and the geographical location of work, self-employed and platforms have to follow the rules of the single market like any other company and as part of that, they are free to compete also in accordance with EU competition rules.

85. Regarding **training and upskilling** of platform workers, it is important to keep in mind what skills are actually needed for specific tasks and more generic skills (e.g. digital, soft skills), bearing in mind that platform workers may perform many different tasks for different clients and are not hired for a specific job. We therefore do not believe that a legal obligation is appropriate in this field, also bearing in mind that it is up to the self-employed platform worker to assess whether he/she

[1] https://www.svs.at/cdscontent/?contentid=10007.816352&portal=svsportal

requires certain skills. As part of a wider approach towards the use the European Social Fund+ to facilitate the up and re-skilling of workers, access to training for platform workers could be facilitated.

86. However, platforms could be encouraged to **partner with training and skills providers**, to be able to offer optional tailor-made programmes to those providing services through the platform who need and desire them. This could take inspiration from existing examples. This is another aspect that could be part of discussions on a possible code of conduct, where feasible and of added value.

87. When it comes to working conditions, access to social protection, and skills/training, it is important to note that **actions have already been taken by some platforms** – some are highlighted in the commission's consultation document. For example, Deliveroo provides the following to those using the platform: Free accident and liability insurance for all riders while delivering and for one hour after they have logged out; access to over 700 free online course for riders and their family members; access to first aid courses; deals with partners for workshops on road safety, bike maintenance etc; as well as specific measures to mitigate the risks during the COVID-19 sanitary crisis (e.g. free hand sanitiser and face masks, contact-free deliveries, a support fund for riders forced to self-isolate or testing positive and thereby unable to work. Whilst many of these are specific to the nature of the tasks, as part of discussions on a possible code of conduct/charter, such possibilities could be discussed with a broader range of platform provides, whilst respecting their diversity. It is important to ensure that providing such benefits does not lead to an automatic assumption of employment relationship, otherwise this is likely to make it less attractive for platforms to voluntary provide them, as well as for all the other reasons set out in this response.

88. Regarding **collective bargaining**, we recall that the possibility for exemptions to be made for agreements or bargaining practices that promote economic progress and in relation to public interest, has been interpreted in case law of the ECJ as exempting collective agreements for employees from the scope of competition law. The ECJ underlined correctly the role and autonomy of social partners in a number of Member States to set (e.g.) wages as part of collective bargaining. Even though, whilst article 101 of the TFEU does not explicitly include an exemption from competition rules for agreements on pay and working conditions, this is the case in some national law. This is of course a decision for the national level and it also shows that the existing rules, interpreted by the courts, already provide the necessary elements of flexibility.