BUSINESSEUROPE

CONSULTATION RESPONSE

26 August 2021

2nd stage Social Partner consultation on improving working conditions of platform workers

General remarks

1. Platform work is a positive development for business, consumers and individuals, providing new innovative business models and opportunities for entrepreneurship, more consumer choice and additional possibilities for labour market integration. It also plays an increasingly important role in our economies, thereby contributing to sustainable growth. More generally self—employment and entrepreneurship, whether through on-line or off-line provision of services, also strongly contribute to our economy.

2. We also reiterate the diversity of platform work, which is part of its attractiveness for individuals and growth potential. It is unfortunately often reduced to specific sectors or tasks, whereas it covers many different services and occupations from legal advice, to cleaning, repair work and many more. And it's important not to forget that the paid-by-the-job model is not new – it's rather the use of digital tools that has created new opportunities for both on-line and for enhancing off-line service provision. Platform work also includes many different contractual arrangements, including employee, self-employed, fixed-term, part-time and agency work.

3. Providing services via a digital intermediary is a positive example of increased diversity in the way we work and how work is organised, providing opportunities for individuals looking for more flexibility, autonomy or to build up a client/customer base. Also, as highlighted in the Commission's accompanying Staff Working Document, studies show that whilst an estimated 11% of the EU's workforce do platform work, only 1.4% do it as their main job and for the majority, it represents rather an additional or minor part of their work/income. It also responds to growing consumer needs and desires for new and more rapid, on-demand services.

4. Any action at EU level in this domain should first and foremost support the potential these services represent in terms of economic development, with a positive appreciation of the growing aspiration for entrepreneurship, diverse work opportunities and freedom of choice in our societies and at work. Unfortunately, the actions proposed in the Commission's second-stage consultation do not adequately focus on these aspects.

5. At the same time, we agree that where there are issues, for example regarding working conditions, misclassification of employment status, access to information etc, they should be dealt with. However, this needs to be done at the appropriate level and using the appropriate and most effective tools. This means that the EU, Member States, social partners, platforms themselves and those providing services through them all have a role to play, in line with their specific competences. Involving different sectors is also important to ensure their different needs are taken

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into account. This was exactly the approach we proposed in response to the first stage consultation, including 14 specific proposals for action that involved all stakeholders, with the EU in a central role including building an alliance between these stakeholders. Therefore, we are deeply disappointed to see our position wrongly summarized as "generally sceptical of an EU initiative on platform work."

6. It is also crucial that actions to improve working conditions also support platform work and self-employment more generally and avoid stifling their future development. Actions must also avoid hampering, either on purpose or inadvertently, the flexibility that makes such work and self-employment in general attractive. They must also respect the diversity of platform work and the needs/desires of those providing services through platforms, whether they wish to do so as self-employed or employee.

7. Whilst we share the overall objectives of the commission and welcome that some of the suggested options are similar to what we propose, we are strongly concerned that this proposal goes against two of the key objectives of the initiative: allowing genuine self-employed to be able to fully benefit from the autonomy and freedom associated with their status and support sustainable growth of platforms.

8. These concerns are related in particular to the suggested option of "a rebuttable presumption of an employment relationship", which would inappropriately create an obligation to prove through legal procedures that a person is self-employed. We are also strongly concerned by the additional proposals that specific criteria should be established at European level to trigger such a presumption or limiting the presumption to situations where the work relationship has certain stability. These proposals contradict the Commission's own statement that they will respect national definitions/concepts of employment status. It also contradicts what was agreed in the EU directive on transparent and predictable working conditions, i.e. that it is not for the EU to establish a presumption of employment relationship or establish criteria for this. Furthermore, the suggested options of shifting the burden of proof, having an administrative procedure and certification of work-related contracts are already dealt with by the directive on transparent and predictable working conditions, which covers all employees including bogus self-employed and excludes only genuinely self-employed.[1] The possibility for Member States to develop templates to be used to certify work-related contracts is already regulated by the directive on transparent and predictable working conditions. Hence, there is no need for another template certified by an authority to prove your employment relationship.

9. We reiterate our call for a different approach, involving all stakeholders in a constructive way: the establishment of a dedicated forum bringing together the European Commission, social partners and member states, and where relevant platforms and those providing services through them, to assess this issue. Where useful and feasible, this forum could produce a catalogue of those criteria for determining employee status which are common across a large number of member

[1] As set out in recital 8 of the directive.

states, as well as highlighting differences. This could potentially lead to a guidance document to support member states, platform providers and those providing services via them with a better understanding of the rules in different countries and support targeted actions in a way which fully respects national competences and ensures the commission's commitment not to touch national definitions of employment status is safeguarded.

10. The specific nature of self-employed, i.e. that they are undertakings/companies as opposed to employees, and therefore have different rights and obligations regarding working conditions, is clearly reflected in the EU Treaty. As a result, it is rightly acknowledged by the Commission that article 153 cannot be the legal basis for the part of the initiative that concerns self-employed. However, we are concerned that the legal basis proposed is an attempt to harmonise working conditions of self-employed providing services via platforms, which is not allowed by the treaty. Those working as employees of platforms, including falsely categorized self-employed are already covered by all EU and national legislation providing employee rights. The Commission does not provide evidence that special rules are needed for platform employees. Therefore, an initiative focusing on employees of platforms has no added value as there is extensive social legislation (e.g. transparent and predictable working conditions, health and safety, working time etc) which already applies in such cases.

11. To meet the twin objective set by the commission of ensuring decent working conditions and sustainable growth of platforms, to have an adequately flexible framework, which meets the diverse needs of platform workers and different types of platform work, and to respect national competences including those of social partners, we believe that a binding EU directive on working conditions for platform workers would not be the right approach. We remain convinced that a self-regulatory approach by platforms themselves, combined with a dedicated forum bringing together the key actors to better understand and, where feasible, develop guidance on determining employment status, would be the right approach. It would be effective in securing good working conditions for platform workers, combined with an effective application of the existing relevant EU regulations and frameworks (e.g. Transparent and Predictable Working Conditions Directive, Council recommendation on access to social protection, Platform to Business regulation, GDPR), and those in progress, in particular the AI Act and the forthcoming initiative on EU competition law and collective representation.

Answers to consultation questions

- ***What are your views on the specific objectives of possible EU action set out in Section 5.1?***

12. Based on our general remarks above, as well as our response to the 1st stage social partner consultation, we agree with the overall objective of the commission, i.e. to ensure that people working through platforms have decent working conditions, while supporting the sustainable growth of digital labour platforms in the EU. In general, we also agree with the more specific objectives, but with some

important caveats, as highlighted below. These points are touched on further in the next sections of our response.

- ***"Ensuring that people working through platforms have, or can obtain, the correct legal employment status in light of their relationship with the platform and gain access to associated labour and social protection rights".***

13. Whilst the document states that genuine self-employed will be able to fully benefit from the autonomy and freedom associated with their status, the overall objective tends towards re-classifying all platform workers as employees. This does not respect the element of individual choice, either as an employee or self-employed, bearing in mind that they come with different rights, but also responsibilities (e.g. employees are subordinate to an employer). Also, development of platform work differs across EU member states and is partly impacted by the performance of the labour market in providing opportunities to individuals. Where labour markets function well, self—employment, including when providing services via a digital intermediary, is a positive choice people make; whereas where people feel their only choice is to work as self-employed, including through a platform, it is often because jobs as an employee are not available. However, the way to tackle this is to improve the functioning of labour markets, rather than regulating platform work.

14. What matters is whether those providing services through platforms are correctly classified. This can only be done at the national level, on a case-by-case basis, in line with the given criteria, as also reflected in article 1.2 of directive 2019/1152 on transparent and predictable working conditions.

- ***"Ensure fairness, transparency and accountability in algorithmic management".***

15. We agree with this objective, as there may be a lack of information and understanding by people providing services through platforms, on how the algorithms work. However, this is not unique to platform work. Furthermore, releasing trade secrets or commercially sensitive information, such as algorithms, to the public seems to be disproportionate in achieving transparency. The average lay person will still have no further knowledge of the impact of the algorithm. What is necessary instead is promotion of transparency as to what the data collected is being used for. This is already being utilised under the GDPR. Also, with the ongoing discussions regarding the recently proposed regulation on AI, we do not believe that further separate initiatives dealing with specific topics are either necessary or appropriate in terms of providing one set of clear, proportionate rules.

- ***"Enhance knowledge of developments in platform work and provide clarity on applicable rules for all people working through platforms operating across borders".***

16. We agree that it would be useful to improve knowledge and clarity on the applicable rules when it comes to people providing services through platforms

cross-border. Positively, the focus here is on enforcement of existing rules and providing information. However, it is important that information provision does not result in a disproportionate burden on platforms or those providing services through them to generate such information.

Further remarks on objectives

17. We believe that a key objective is missing – improving the working conditions of platform workers on the ground, i.e. from a practical point of view. As part of this, it is crucial that governments and labour inspectorates enforce the existing rules, as well as providing guidance to facilitate understanding of the rules. In addition, we note that the key objectives outlined by the commission relate to frameworks/aspects which can have an impact on working conditions, however, we believe that a practical rather than legal approach would be more appropriate and effective, to deal with issues where they exist, but on the ground. Also, we do not agree with the commission's analysis that platform work often results in precarious working conditions.

18. We regret the use of the general terminology of platform work, as this is misleading. Platforms are simply an innovative way of providing pre-existing or new services through a triangular relationship: service provider – intermediary – client. By using the term "platform work", the Commission puts all activities in the same basket, ignoring the fact that a large segment of these activities create no question about the nature of the relationship.

19. We remain convinced that it would be preferable for the platforms themselves to take the commitment to deal with the issues related to working conditions at source, as part of a self-regulatory approach which is tailored to their specific situations and challenges. This is particularly the case where issues of misclassifications or inappropriate working conditions have occurred in recent years. This is precisely why we proposed in our first-stage consultation response a code of conduct/charter to be developed by platforms themselves. This code of conduct would then provide a clear common basis for each platform to apply and respect in their own organisation, in agreement with their employees and/or self-employed (depending on how they are classified), including possible collective representation, if in line with national industrial relations systems. We understand that platform providers as well as other digital intermediaries/agencies that provide contact between self-employed and clients, are ready to follow this route.

20. If designed in the right way, this could be more effective in improving the working conditions of platform workers, whether they are employees or self-employed. The commission sets out different options for the personal scope of a possible EU initiative, e.g. targeting all people working through digital labour platforms, regardless of employment status or limiting to workers (including those people with a misclassified employment status). A directive based on article 153 on working conditions of platform workers, as acknowledged by the commission, could only be applicable to employees (or falsely categorised self-employed), who are already covered by social and labour law. Therefore, the added value is very questionable.

As explained later (see other issues – legal analysis), we do not believe that the proposed internal market legal bases are appropriate or acceptable to legislate on working conditions of self-employed platform workers. In contrast, a commitment by platforms would have the benefit of covering both employees and self-employed contractors providing services via platforms, for the platforms concerned, thereby providing for a much broader impact.

21. The Commission also sets out different options regarding the platforms to be covered, e.g. targeting all digital labour platforms active in the EU, or only certain types of platform work or certain types of platform business models. We do not believe that focusing on certain types of platform work makes sense. Firstly, it would be difficult to determine different types, in particular since platform work does not have a clear meaning. In fact, referring to digital intermediaries which connect clients and service providers is much more accurate. Secondly this could also create an unlevel playing field. In fact, the diversity of platform work, which is clearly acknowledged by the commission, makes a one-size-fits all approach inappropriate. Providing an adequately flexible framework which could be appropriate for different types of platform work and different needs of platform workers, would not be feasible in an EU directive. This necessary flexibility combined with adequate commitment by platforms and monitoring mechanisms could be much better achieved by way of a code of conduct/charter by platforms themselves.

- ***What are your views on the possible avenues for EU action set out in Section 5.2 of this document? And***
- ***What are your views on the possible legal instruments presented in Section 5.3?***

22. We are strongly concerned that some of the proposals put forward are not appropriate or effective in achieving the objectives set out and, in some cases, would run counter to them. Also, some of the proposals in fact contradict the overall narrative/analysis of the commission of opportunities and challenges.

Employment status

23. Regarding the issue of misclassification of employment, we agree that where categorisation as self-employed does not correspond to the type of relationship that truly exists between a platform and an individual performing work through it, in line with national criteria, the individual should be reclassified as an employee. This is in fact already the case. One of the policy options included in the staff working document provides a good balance in this respect, i.e.: to “ensure correct employment classification in platform work, based on national definitions of worker, taking into consideration the jurisprudence of the CJEU and in full respect of national competence and the diversity of Member States’ labour market traditions”. Unfortunately, this approach is not adequately reflected in the consultation document or in the options for action.

24. Whilst we acknowledge that there are a number of court cases on this issue, this is normal with new forms of work organisation, where it is necessary to establish legal practice. Furthermore, the Commission provides no evidence that there is a high risk of misclassification. There is a clear contradiction in the commission's analysis and its narrative/reasoning behind the proposed actions. As the commission itself acknowledges and as shown in the accompanying staff working document, while there may be some trends in how judges deal with such cases and what they consider as important factors in a decision, the case law is far from consolidated, and for good reasons linked to differences in national labour and social regulations, there is a diversity of approaches across member states. Individuals providing services through platforms are not repeatedly classified as workers, as is suggested – this depends very much on the rules at national level and whereas this has been the case in some countries, in others it has been quite the opposite, with more cases of confirmation of self-employed status. As highlighted in annex IV of the Commission's Staff Working Document on relevant decisions of national courts and administrative bodies, for example, in Germany and France, more cases have led to classification as self-employed, whereas in Spain mostly as employees, and in Netherlands, Sweden and Belgium, the results are very mixed. Also, the cases focus primarily on a limited set of sectors that are serviced by platforms and therefore only provide a snapshot of the situation rather than the full reality which is much more diverse.

25. For these reasons, we are strongly against installing a rebuttable presumption of employment for those providing services via platforms, in particular through a binding EU instrument. This would not reflect reality for the vast majority of individuals nor the diversity of situations. Secondly, this is already included in the directive on transparent and predictable working conditions as one of the options for member states. Also, this directive is in the process of being implemented and the guidance for member states (developed by the expert group set up by the commission) has just been finalised. It is important to see the results of implementation before considering the need for any further actions. Furthermore, the compromise found in the directive struck the right balance by making this one of the options for member states (amongst others), rather than an EU level legal obligation. The proposal to automatically assume that those providing services via platforms are employees goes much further. This would be a contradiction to the Commission's role to ensure respect for fundamental rights and freedoms as enshrined in the EU fundamental rights charter, which includes the right to choose an occupation and the right to engage in work (article 15) and the freedom to conduct a business (article 16)[2].

[2] Article 15 **Freedom to choose an occupation and right to engage in work**
1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. (…)
Article 16 **Freedom to conduct a business**
The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

26. The creation of a rebuttable presumption of employment status takes away individuals' choice to be self-employed. Bearing in mind that the consultation document rightly acknowledges that there is genuine self-employment in platform work and that this is often a conscious choice for people, it is not acceptable to force genuine self-employed into becoming employees by law. This would also hamper a key aspect of what makes platform work with self-employed status attractive for many individuals – the flexibility to organise their work, including in terms of work-life balance, as well as autonomy. In effect, it would also simply reverse the direction of misclassification, potentially leading to more litigation, rather than providing a solution.

27. Hampering entrepreneurial activity whether in terms of platform work or otherwise, will also have a negative impact on the economy overall, as this is a key factor of economic growth. It could create a situation where genuinely self-employed individuals do not wish to offer their services through platforms, as they don't want to be automatically classified as employees. This would also negatively affect the sustainable growth of platforms, which are in general correctly based on a model of independent contractors providing services through a digital intermediary, as well as potentially disincentivising European entrepreneurs from creating new platforms in Europe. The Commission also has in mind to ensure a level playing field between platform providers and other companies. However, platform providers are covered by the same EU rules as all companies and furthermore we are concerned that creating a distinction between self-employed providing services online and those doing so offline, would lead to an unlevel playing field for self-employed overall.

28. We welcome that the commission does not intend to touch on employment status, rather relying on national definitions. However, this is another reason to avoid an EU rule on rebuttable presumption of employment. Defining criteria in binding EU legislation to determine when employment status does not apply, in an adequately clear and legally sound way, would require a certain level of prescription. This would not be feasible across the EU, given that despite some common aspects, there is diversity in the criteria for classifying employment status, based on national systems and practices.

29. For the same reasons as above, we do not support a shift in the burden of proof, obliging the platform operator to prove that an individual providing services through the platform is in fact self-employed. Furthermore, in the directive on transparent and predictable working conditions a solution was found in article 18 concerning the burden of proof in case of redress that would also apply in situations with platform work concerning employees. There is therefore no reason to have a separate set of rules specifically for platform work. It may be useful to assess the proof required for people engaged in platform work in legal proceedings to determine employment status, however since this relates to national judicial systems, which are solely a competence of member states, this could only be done at national level and certainly not through binding EU legislation setting an obligation or criteria for this. However, some encouragement/guidance could be given at EU level, if developed in an appropriate way (see our concrete proposal below). Similarly, it could be

useful to look into the benefits of administrative procedures and learn lessons from other member states, also bearing in mind that according to article 16 of the Directive on transparent and predictable working conditions, all member states need to introduce a right to redress at least for employees.

30. In view of the comments above, facilitating mutual learning, better understanding and developing guidance would be the right approach and not binding EU rules regarding classification of employment status. As proposed in our response to the first stage consultation, this could be successfully achieved by bringing together the European Commission, social partners and member states, and where relevant platforms and those providing services through them, in a dedicated forum. This has the merit of involving all stakeholders, rather than taking an EU legal approach which would not be able to achieve the objective nor achieve the level of constructive cooperation which is necessary on this topic. Such a forum could assess the following points (non-exhaustive):

    - How member states qualify the status of workers and self-employed (and where relevant, third categories of workers), and which criteria are used;
    - Commonalities and differences in the criteria used for qualifying employment status across member states;
    - Implications of national and ECJ rulings on classification of employment status and how member states take these into account;
    - The proof required for determining employment status in court cases in different jurisdictions;
    - Lessons learned from national administrative procedures, where they exist.

31. In preparation for these exchanges between the Commission, the Council, employers and workers, we call on the Commission to mobilise the EU labour law network to come up with an analytical report presenting the relevant rules that apply in EU Member States, and an in-depth comparative assessment of the relevant ECJ and national Courts' jurisprudences.

32. On this basis, where feasible and useful, such a forum could develop a catalogue of those criteria for determining employee status which are common across a large number of member states, as well as highlighting differences. This could help both platform providers and those providing services via them with a better understanding of the rules in different countries. This could potentially be framed in a general guidance document. Such a document could also 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 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. It could also encourage member states to look into different options, including national administrative procedures and whether it would be beneficial to reduce the proof required for determining employment status in court cases. This is also in line with one of the policy options provided in the staff working document, i.e. "providing guidance on indicators that could be used to assess and establish the employment status and/or the self-

employment status in platform work". This would have to be done in a way which respects national competences and social partner autonomy, including ensuring that any action taken does not directly or even inadvertently go against the commitment taken by the Commission not to touch national definitions of employment status.

Management of algorithms

33. Regarding management of algorithms, we do not believe that separate regulation on issues related to platform work is appropriate or necessary. Artificial Intelligence (AI) should be dealt with in the broader risk-based framework, as AI is not an issue specifically related to the platform economy alone. The Commission should avoid unnecessary overlaps and duplication, by having only one set of overarching rules. This is one of the main reasons why the AI Act was proposed – to avoid fragmentation and a patchwork of requirements related to different policy areas. This would also provide for more legal certainty. Also, the GDPR already provides workers with a variety of rights with respect to their personal data and the platform to business regulation also includes requirements for platform providers on transparency and accountability.

34. Furthermore, as acknowledged by the Commission in the consultation document, the draft AI regulation already proposes a comprehensive set of risk management, human oversight and transparency requirements to mitigate the risks for health and safety and fundamental rights for high-risk AI systems used in self-employment, which would also apply to platform companies. More specifically, article 14 of the proposed AI Act requires high-risk AI systems to be designed and developed to enable individuals to "fully understand the capacities and limitations of the high-risk AI system" and to "be able to correctly interpret the high-risk AI system's output." However, this does not require a separate set of rules on AI for platform work – it needs to be dealt with in the AI Act to ensure consistency with different uses of AI. Also, more nuance needs to be introduced in the AI regulation, reflecting the specific situation/context, as AI used in self-employment, including platform work, should not be automatically classified as high risk. The focus needs to be on situations where the decisions made by AI systems, including algorithms pose an actual high risk for health and safety or have a detrimental impact on fundamental rights, based on objective, clear and unambiguous criteria. The definition of high risk should also include an element on human oversight.

35. The Commission also notes that the proposed AI Act addresses inherent challenges in the development of AI, such as bias, notably by setting requirements for high-quality datasets, helping to tackle the risk of bias and discrimination. These acknowledgments by the Commission are contradicted in the approach it proposes, to have separate rules on AI related to platform work. More specifically, for high-risk AI systems used in self-employment, the AI Act will introduce robust transparency requirements, including clear and concise documentation, instruction of use for specifying the capabilities and limitations of performance of the high-risk AI system, as well as the logic and underlying design choices.

36. The GDPR also sets specific rules for automated processing (AI) of personal data treating it as "high-risk". This means that no decision that legally impacts an individual (e.g. dismissal from a platform) can be taken on the basis of automated processing unless the decision is permitted by Member State law, required to carry out a contract, or consent was explicitly given. In relation to the final two points, the data subject always has the right to express their point of view and challenge the decision. Further to this, no "special categories" of data (e.g. race, origin, sexual orientation or any biometric data) can be used to take such decisions (Art 22, GDPR).

37. Regarding the argument of the Commission that algorithms are tools of control that determine aspects related to the work relationship, it is important to bear in mind that the Platform to Business Regulation already lays down certain requirements regarding terms and conditions, which need to be given transparently to business users, including i.e. those providing services via platforms. This information should be readily available pre-contractual stage. In addition, it is important to understand that whilst those providing services through platforms of course interact with the algorithms, they are much more related to internal/operational procedures, which help to improve efficiency in the running of the platform and in providing a good service to customers. For delivery platforms for example, they are often used to optimise order time, which is important for those providing the service and the customers. In the main, we do not believe that algorithms are tools that control those providing services through platforms, as in the vast majority of cases they operate with high levels of autonomy in terms of when and where to work, which tasks/orders to accept etc.

38. To supplement the AI regulation, it could be useful to provide more specific guidance or procedures in relation to issues arising specifically in platform work. This could be done via self-regulation by the platforms themselves, in the code of conduct/charter already proposed by BusinessEurope, or in interpretative guidance, once the AI act is adopted. For example, we agree that information provision is important in ensuring a good understanding of the impact of the algorithms used by a platform, i.e. the output – this is in fact already done by some platforms. However, it would not make sense to provide detailed technical information on how the algorithm works, i.e. the process, as this would only be understood by experts. Furthermore, it is likely to give away confidential business information.

Cross-border issues

39. Regarding cross-border issues, it is normal that the rules applying to employees do not apply for those individuals who are genuinely self-employed providing services through platforms. As for self-employed, rules regarding business transactions in the single market apply to such individuals, like any other company, including (as highlighted by the Commission), GDPR and the platform to business regulation. Of course, where platform workers are misclassified as self-employed, they should be reclassified according to rules at national level; then all of the related rules on social security etc will apply.

40. In general, it is important that any initiative on platform work avoids disrupting the framework for free provision of services created under the Services Directive and the Professional Qualifications Directive. Given that professionals falling under the scope of the Professional Qualifications Directive can be offering their services through platforms as well as off-line, it is important to avoiding cutting the single market in half, purely because of the channel through which they are offering services.

41. We do agree, however that having access to reliable data is important when platforms, or self-employed providing services through a platform, are operating cross-border. This cannot only rely on provision of data by platforms, but also better coordination between national governments to share information. Improvements would be needed in this area, including facilitating by use of digital tools. As stated by the commission, information requirements for platforms can increase administrative costs and burdens, therefore any actions in this area must be proportionate. In this respect, we find that it would be excessive to require platforms to report very detailed data regarding the transactions they facilitate, as suggested by the commission, which mentions task duration, pay per task, assignment of the task to the workers etc.

42. Regarding transparency obligations for platforms, rules already exist in the platform to business regulation. Therefore, we do not see the need for additional legislation. However, providing more clarity, e.g. through guidance, both for platforms and those providing services through them on the different obligations/rights would be useful. We see some benefits in principle with the proposal for a register of, or transparency obligations for, platforms, which could provide key information such as the active terms and conditions, the number of people working through them and their employment status. However, there are a number of practical issues and questions, including how to define who needs to register, the administrative burden of providing data, the overlap with existing legal information and transparency obligations etc. The feasibility, challenges and added value would need to be discussed further with the platform providers themselves and those providing services via them.

43. A clarification of any problems linked to portability of social security for self-employed operating cross-border could be useful, bearing in mind that self-employed are already fully covered by EU regulation 883/04 on coordination of social security when moving within the EU.

44. We also believe that some of these aspects could be part of the code of conduct/charter already proposed, upon agreement of the platforms that engage in this.

Representation of platform workers

45. Regarding representation of platform workers, we look forward to the initiative of DG Competition which will tackle aspects of this in relation to collective representation/bargaining of self-employed and competition rules. National

industrial relations systems and the principle of freedom of association must be fully respected in this context, including in line with article 153.5 of the EU Treaty, which means that EU legislation creating binding rules for worker representatives to have direct access to those providing services through platforms would not be appropriate or acceptable. Worker representatives, including trade unions play an important role, including in representing platform workers. However, given the diversity in national industrial relations systems, a blanket EU approach is not possible – for example, whilst in some countries self-employed providing services through platforms can be represented by trade unions, in other countries this is not allowed, as trade unions can only represent employees. And in some countries, business or other organisations and bodies represent self-employed - trade unions have no monopoly on this.

Other issues

Legal basis

46. Regarding the legal basis, we welcome the commission's acknowledgement that article 153 cannot be used for actions regarding self-employed, whereas the majority of those providing services through platforms are correctly classified as self-employed. At the same time, since a directive based on article 153 in the area of working conditions would only apply to employees, this seems unnecessary and irrelevant since platform workers who are employees (or false self-employed) are already covered by the existing requirements (e.g. on working time, transparent and predictable working conditions, health and safety etc). Other EU legal acts on the conditions for self-employed are based on TFEU Article 352[3]. The Commission states that this implies unanimity, however such an obstacle to agreement in council cannot be a reason to apply another treaty article in an incorrect way.

47. As noted, article 53(1) of the treaty empowers the EU to issue directives coordinating national provisions concerning the uptake and pursuit of activities as self-employed as part of the right of establishment in another EU Member State; and article 114 allows for the approximation of laws with regard to the establishment and functioning of the internal market, however excludes those relating to the rights and interests of employed persons. It's important not to forget that Article 114 should be read in conjunction with Article 26 TFEU, which clearly states the objective of upholding the freedoms of the Single Market. Whilst these articles could set rules regarding internal market/business-related aspects of platform work, they do not provide an appropriate or sound legal basis for a directive on the working conditions of self-employed engaged in platform work. It seems that the commission is considering whether to use a single market legal basis to harmonise rules on working conditions across the EU, which would completely contradict treaty articles on social matters (e.g. article 153 (2), which

[3] For example, 2003 Council recommendation on the improvement of the protection of the health and safety at work (OSH) of self-employed workers; and 2019 Council recommendation on access to social protection for workers and the self-employed.

excludes harmonisation of member state laws). This is not only legally impossible, but also for good reasons, as social aspects are a shared competence between the EU and member states, to take account of different national social systems and practices. The Commission itself also recognizes that "possible EU legislative action can only set minimum standards in the labour and social affairs field and cannot ensure full harmonisation in the internal market". However, it then fails to explain how article 53 (1) or Article 114 can be applied, given that they concern coordination or harmonization.

48. From a more technical point of view, article 53 in fact foresees coordination of national provisions rather than harmonization. Also, since it applies to all companies and self-employed in general who are moving in the internal market or establishing in another member state, creating specific rules for self-employed providing services through platforms is likely to create an unlevel playing field in the internal market compared to other companies and in particular in comparison to off-line provision of services.

49. However, we welcome the option suggested by the Commission for it to "facilitate a dialogue with platform operators aimed at developing principles for good quality platform work by way of a code of conduct or a charter, possibly accompanied by a voluntary label. Such a self-regulatory tool could cover social benefits and training on digital labour platforms and complementary aspects in relation to working conditions and algorithmic management". We suggest that this should be complemented by a guidance document agreed in a dedicated forum of commission, social partners and member states, highlighting criteria to help Member States determine country by country how new forms of work qualify in terms of the pre-existing legal categories.

    - ***Are the European social partners willing to enter into negotiations with a view to concluding an agreement under Article 155 TFEU with regard to any of the elements set out in Section 5.1 of this document?***

50. 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 mandate.

51. At the same time, regarding the issue of employment status, which falls within the remit of social affairs, the approach we propose for a dedicated forum would naturally involve social partners, in a tripartite social dialogue setting.