



23 February 2022

### COMMISSION PROPOSAL FOR A DIRECTIVE ON IMPROVING WORKING CONDITIONS IN PLATFORM WORK

#### General remarks

1. BusinessEurope considers important that EU action on platform work supports the development of this growing part of the economy, while ensuring a climate of fair competition with other businesses present on the same markets. We also support the aim to improve the working conditions of platform workers, where problems regarding working conditions have been identified. Given the concrete solutions that were proposed by us during the social partner consultation phase, to improve working conditions on the ground and regarding the issue of classification of platform workers, we are disappointed that the views of employers are described as being against EU action on this topic.
2. In our view, the Commission's proposal is the wrong policy orientation to improve legal certainty, in particular related to the employment status of platform workers. We did not call for a directive as the suitable instrument to deal with this issue in the first place. But we understand that this instrument chosen by the European Commission is now the basis for the legislative debate. With this paper, BusinessEurope sets out an alternative approach aiming to improve the draft directive in a way that better takes into account diverse national labour laws and industrial relations practices with respect to platform work across Europe.
3. Whilst the Commission underlines the importance of digital labour platforms for the Union's economy, the proposal could stifle the future economic development of platforms and undermine their ability to offer diverse work opportunities reflecting freedom of choice in our societies and at work. It is particularly concerning that the issue of employment status is addressed in a way that will harm the flexibility enjoyed by platform workers, by making it very difficult for them to operate as self-employed, which will also have negative consequences for employment, the wider economy and development of entrepreneurship, including other businesses that rely on platforms. A recent study carried out by Copenhagen Economics for Delivery Platforms Europe, supports this possibility and underlines the importance of maintaining flexibility for workers in the delivery sector. More concretely, the study found that an EU-wide policy shift removing the possibility of flexible work could force 250,000 couriers out of delivery work. It is also crucial to highlight that consumer choice will be de facto significantly restricted due to reclassification of platform workers, as is evidenced by real life examples such as in Geneva, where a policy shift regarding the employment of delivery workers caused an estimated 42% reduction in demand for deliveries from local restaurants because of higher delivery fees and longer waiting times. Lastly, this approach may also have negative consequences for the functioning of the labour markets, disrespecting national and social partner competences, by setting binding EU level criteria regarding employment status.



4. In a directive, it is necessary that certain terms such as “a digital labour platform” are clearly defined. Nevertheless, we are concerned that the **proposed definitions** in article 2 of the directive are too broad, which will lead to legal uncertainty and significant difficulties in the implementation of the directive. Against this background, the proposal furthermore does not seem to take into consideration the definition of what constitutes an “online platform” as laid out in secondary legislation, including the Commission’s recent proposal for a Regulation on a Single Market for Digital Services.
5. We recognise that there is a legal uncertainty regarding the employment status of platform workers, including due to different national approaches and divergent court rulings. We therefore welcome the Commission’s recognition of the diversity in the way platform workers have been (re)classified, that digital labour platforms have adapted their business model in different ways to deal with issues around employment status, and that actions to address the risk of misclassification could negatively affect various economic aspects and the flexibility enjoyed by platform workers.
6. The proposed **rebuttable presumption of employment** and the five EU-level criteria determining who is an employer through the new notion of controlling the performance of work in article 5, is not a balanced and acceptable approach. The proposed presumption leads to a de-facto employee status for platform workers. It is important that guidelines and EU legislation allow instead for a more balanced and neutral approach regarding the status of those providing services through platforms, allowing work both as employees and self-employed. Rather than proposing actions that would actually deal with issues regarding working conditions, where they exist, for both self-employed and employees working through platforms, unfortunately a more political approach was chosen.
7. The rebuttable presumption of employment puts the onus on platforms and their workers to prove that they are self-employed. This does not reflect the reality of platform workers, who are in the vast majority of cases correctly classified as self-employed. This is even recognised by the Commission itself, noting that of the 28 million people in the EU working through platforms, only 5.5 million of them are probably at risk of misclassification and would therefore benefit from this clause. However, the vast majority, who are genuinely self-employed, would be seriously disadvantaged, with their self-employed status undermined by the proposed rebuttable presumption of employment, and creating an obligation for platforms that use their services to go to court to rebut this.
8. Whilst we welcome the proposal’s direct reference to national laws and collective agreements regarding employment status, as well as the case law of the European Court of Justice, the **outlined set of criteria** do not correspond to real practice of platform workers and may be in conflict with national regulations. The directive would therefore create a clear risk of legal uncertainty in many Member States, in particular those that have chosen to create a dedicated regime for the self-employed platform workers or to clarify how the pre-existing self-employment category would apply to platform workers.



9. Although the directive does not include criteria for determining who is a worker, it does include criteria for determining an employer, which also goes against national and social partner competences. This was already clarified by the EU during the negotiations on the Transparent and Predictable Working Conditions Directive. Moreover, some provisions of the directive, which are normally rights for employees are also provided for self-employed, blurring the distinction between them and creating de facto a third status in between the two, whereas this option is contrary to the law and practice in a number of Member States.
10. Furthermore, the proposed **guidelines on the application of competition law and collective bargaining for solo self-employed** will apply to solo self-employed providing services through platforms. The sole focus on platform workers as employees in the directive creates a lack of clarity regarding the application of the guidelines. Ensuring that the directive allows platform workers to be either employees or self-employed, in a neutral way would also remedy this. It is also crucial that coverage of a solo self-employed by a 'collective agreement' is not used as a justification of employment status.
11. We support the more balanced approach taken in article 3 of the proposed directive, which encourages Member States to adopt procedures aiming to ascertain the existence of the employment status based on the facts related to the actual performance of work. This is important, as such an approach takes into consideration the differences in national industrial relations systems throughout the European Union, by setting a framework for action whilst giving Member States the discretion on how to put measures in place. However, it remains unclear what will be the interplay between the national and EU competences, including between national criteria and those laid down in article 4 of the EU directive, which causes legal uncertainty.
12. Besides the stringent rules regarding the employment status of platform workers, the directive also proposes **heavy transparency and information requirements** on platforms. As the bulk of these issues are already being dealt with in existing EU legislation, including the GDPR, the Platform to Business regulation and the proposed Artificial Intelligence Act regulation, it is crucial that overlaps and inconsistencies are avoided. In particular, the proposed regular risk and impact assessments, providing reasons for decisions in writing, the need for additional trained staff to ensure human oversight of these systems and the establishment of special experts for consultation and information of workers and their representatives, will place excessive additional administrative and financial burdens on platforms.

**Proposed alternative approach for the draft directive**

13. Whilst we remain concerned about various elements of the proposal, we see an opportunity for an improved directive to provide a structured approach taking into account diverse policy choices and realities across all member states and more clarity in the classification of platform workers, by including the possibility for them to be employees or self-employed in a neutral way along with the relevant criteria. This would be a more appropriate and balanced way forward than the presumption of employment status, by reflecting the correct statuses of platform workers, in line with the characteristics of the actual performance of work. To do so, we believe it is necessary to ***broaden the legal***



***basis of the directive to relevant single market Treaty articles.*** Against this background, we would therefore like to ***request the Council legal service to provide an opinion on the proposed legal base and possible extension.***

14. BusinessEurope's proposed approach aims to provide for an EU legal framework enhancing clarity for Member States when introducing or developing their national solutions, including to avoid misclassifications. A future directive on platform work should also fully recognise that a diversity of national solutions is legitimate and in line with the fact that Member States are in charge of defining employment and self-employment, and that they in fact choose to do so in fairly different ways.
15. As the proposal does not achieve its key objective of improving the working conditions of all platform workers, regardless of their employment status, extending the legal base of a directive to the single market would also ensure that self-employed platform workers benefit from EU action. In turn, this could reduce the risk of decreasing job and economic opportunities of self-employed platform workers and the negative impact on platforms.
16. A reversal of the burden of proof could be a more appropriate way forward than a combination of the rebuttable presumption and reversed burden of proof. The combination creates legal and practical uncertainty not only for the platforms themselves and their users, but also for the Member States. Broadening the legal base whilst maintaining the reversed burden of proof would be a better option.
17. To combine a structured EU approach with respect of national competences on the definition of employers and workers and different approaches to regulating platform work, the criteria in the directive regarding self-employed/employer/employee should rather be guidance to member states in setting up their national classification systems for employment and self-employment instead of binding criteria. It should furthermore be noted that national criteria should take precedence in light of the subsidiarity principle.
18. Following our proposed alternative approach, it is important to change the proposed definition in article 2 of 'platform worker' into 'platform employee' and introduce a new concept of "self-employed providing services via platforms".
19. This approach would allow for member states who have already set up their own national legislation to adhere to their current structure, in line with their national industrial relations system. This is of particular importance for member states such as Greece, who have set simple criteria for confirming the self-employed status of a platform worker based on the criteria set out in the ruling of the case C-692/19 - Yodel Delivery Network (namely, the ability to accept or reject assignments, the ability to set working hours, non-exclusivity to one platform, and the ability to use subcontractors or substitutes), as well as France, which has opted for confirming self-employed status of platform workers, under certain conditions. In contrast, for those Member States such as Spain that have opted for a presumption of employment for certain platform workers under certain conditions, this would still be feasible with the neutral approach to employment status in the directive.



20. In this context, a well-designed EU initiative, without political bias in favour of either self-employment on the one hand or employee status on the other hand, could have value in supporting Member States to adapt where appropriate and necessary their national laws, and for platforms to correctly classify their workers, according to up-to-date national rules/criteria, European Court of Justice rulings, and based on the facts related to the actual performance of the work. Only this approach can provide the necessary clarity for platforms to change their practices, where necessary, to avoid misclassification of workers. At the same time, it is crucial that it remains possible for platform workers to be employees or self-employed.
21. A directive which also includes relevant single market treaty articles could also provide for a more well-balanced EU approach supporting the harmonious development of platform work and overall provision of services across Europe by ensuring compatibility with existing internal market legislation. In particular, **compatibility with the secondary legislation such as the Services Directive 2006/123/EC**. This clearly states in recital 87 that member states have the prerogative to determine the distinction between self-employed and employees, should be aimed for. The Directive guides further, that the essential characteristic of an employment relationship within the meaning of Article 39 of the Treaty should be the fact that for a certain period of time a person provides services for and under the direction of another person in return for which he receives remuneration. *Any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity* for the purposes of Articles 43 and 49 of the Treaty.

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