POSITION PAPER

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# Commission proposal for a directive on improving working conditions in platform work

## INTRODUCTION

1. BUSINESSEUROPE is the leading advocate for growth and competitiveness at European level, standing up for companies across the continent and actively campaigning on the issues that most influence their performance. We speak for all-sized enterprises in 35 European countries whose national business federations are our direct members.

2. We support the key aim of the proposal for a directive to improve working conditions in platform work, where problems regarding working conditions have been identified. Furthermore, we recognise that in some cases there is legal uncertainty regarding the employment status of platform workers, and therefore welcome increased certainty on the application of the legislation on the topic. Nevertheless, we deem the European Commission's proposal to be the wrong approach as it goes well beyond this objective and intends to impose a one-size-fits-all solution to a very nuanced issue.

3. On the one hand, businesses deem it crucial that EU action on platform work supports the development of this growing part of the economy. As digital labour platforms across Europe continue to rapidly expand both in size as well as revenue, they have become a key element in Europe's emerging social and economic landscape. The directive should therefore avoid at all costs to stifle the future economic development of digital labour platforms or undermine their ability to offer diverse work opportunities reflecting freedom of choice in our societies and at work.

4. On the other hand, ensuring a climate of fair competition with other businesses present on the same markets is of key importance to European companies. Relying on a digital labour platform as a business model can never be vehicle to circumvent national labour law or misclassify workers. Nevertheless, creating a level playing field for all companies should not restrict the competitiveness of European companies and the possibilities to do business inside as well as outside the internal market. Businesses see a significant concern for their competitiveness, however, as this directive will create significant barriers for entry on the market and innovation, in particular for smaller digital labour platforms, as well as result in a price increase, which will likely be transferred to the consumer. In particular, the cost incurred by smaller digital labour platforms to reclassify workers into employees will be difficult to bear.

5. BusinessEurope's position paper of 23 February 2022[1] outlined some of the key proposals of the business community concerning the directive. Most notably, we see an

[1] Commission proposal for a directive on improving working conditions in platform work - a BusinessEurope position paper.

opportunity for the directive to provide a structured and neutral approach to the classification of platform workers through the broadening of the legal basis of the directive to relevant single market. Such 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 legislation concerning the classification of workers without interfering with their national competences.

***N.B. We take note of both the Council draft text on the proposal for a directive as well as the European Parliament's draft report with regard to "Improving working conditions in platform work" (2021/0414)(COD). This document is a living document to be updated based on any further legal opinions from the Council Legal Service and compromise proposals set forward in Council and final proposals from the European Parliament.***

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## KEY MESSAGES

1 The legal basis of the directive needs to be broadened to the relevant single market treaty articles in order to include self-employed persons under the scope of the directive. Against this background, the criteria introduced in the directive should remain non-binding and act as a guidance to Member States to set up their national classification systems for employment and self-employment.

2 More legal certainty is needed regarding the provisions in the directive, by establishing clear definitions and creating a balanced and representative set of criteria.

3 The directive should safeguard the fair and neutral determination of employment status for all platform workers, whilst respecting the basic principles of subsidiarity and proportionality. Eliminating the rebuttable presumption of employment whilst maintaining the reversed burden of proof would be a more appropriate way forward.

4 The directive needs to allow for more flexibility and support for social partners to conclude collective agreements on working conditions in platform work, in line with their national industrial relations practices and social dialogue systems.

5 Algorithmic transparency obligations set out by the directive should not be in contradiction to existing and upcoming EU legislation.

## SPECIFIC COMMENTS AND SOLUTIONS

# What is necessary for a balanced EU Directive on improving the working conditions in platform work

### I.1. Broadening the legal basis

#### Genuine inclusion of self-employed under the scope of the directive

6. The main objective of the directive is to improve the working conditions of all platform workers, regardless of their employment status. It remains uncertain, however, whether the current legal basis has the capacity to be applied to all genuine self-employed persons[2]. As there is substantial concern regarding the proposal achieving this key aim, we deem it crucial to broaden the legal basis of the directive to the single market Treaty articles. Extending the legal base of a directive to the single market would fully ensure that self-employed platform workers benefit from EU action and would erase any legal

[2] The scope of Article 153 Treaty on the Functioning of the European Union and whether it extends to genuine self-employed is currently being investigated by the Council Legal Service.

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uncertainty in this regard. In turn, this could reduce the risk of decreasing job and economic opportunities of self-employed platform workers and the negative impact on digital labour platforms.

7. The European Commission's proposal is based on a combination of Articles 16 and 153(1)(b) of the Treaty on the Functioning of the European Union (TFEU). Whilst the former allows the EU to intervene on matters related to data protection, the latter empowers the EU to support and complement the activities of the Member States with the objective to improve working conditions. Nevertheless, it is clear that the directive's objective to improve the working conditions of all platform workers, contains several components which are indissociably linked to internal market issues. The directive should therefore be based on different corresponding legal bases. In order for the directive to not lead to any confusion or inconsistency with internal market regulation, it is paramount that the legal basis of the directive is extended to include article 53 TFEU, which constitutes the legal basis for the harmonisation of national provisions for the exercise of activities as self-employed persons. Importantly, article 49 TFEU provides for the right to freedom of establishment, which would clearly be directly hindered by the directive's rebuttable presumption of employment, as proposed in articles 4 and 5.

8. In case there would be no broadening of the legal basis, significant amendments would be needed to the proposed directive, to deal with the fact that some provisions, which are normally rights for employees are also provided for self-employed, in particular protection from dismissal. This blurs the distinction between these separate statuses and creates a *de facto* third status in between the two, whereas this option is contrary to the law and practice in a number of Member States. It is paramount that the legal order does not treat companies with either a digital or analogue business model differently and consequently alters the labour market structures of Member States.

## Respect for diversity of classification structures across member states

9. There is a diversity of national practices and legislation in place, which regulate the classification of workers in platform work in line with national industrial relations systems. It should be noted that Member States are in charge of defining employment and self-employment in their national labour law and therefore retain the right to do so in varying ways. This includes different legal approaches and solutions to avoid misclassification of workers and tackling bogus self-employment.

10. This is of particular importance for several member states, such as:
    - France, which has opted for the introduction of a presumption of self-employment of platform workers, under certain conditions[3].
    - Greece, which have set simple criteria for confirming the self-employed status of a platform worker[4] based on the objective criteria set out in the ruling of the case C-

[3] Article L. 8221-6 of the French Labour Code.
[4] Greek Law no. 4808/2021.

692/19 - Yodel Delivery Network. These criteria include 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[5].

- Spain, which have opted for a presumption of employment for certain platform workers under certain conditions.

11. As the directive aims to create a European-wide list of criteria for determination of employment status in platform work, this would restrict the Member States' diverse legal frameworks on the topic and exceed the competence of the EU. It should furthermore be underlined that employment status entails significantly varied rights and obligations in the individual Member States. The proposed approach may therefore not only disrespect national competences but also have negative consequences for the functioning of the labour markets as well as collective agreements on the topic. Finally, given the diversity of regulatory actions taken by Member States in recent years, digital labour platforms will most likely be faced with legal uncertainty in addition to significant financial hardship if they have to adjust their model and invest in a new structure in rapid succession.

12. It would therefore be more appropriate for any criteria developed at EU-level to remain non-binding and act as a guidance to Member States to set up their national classification systems for employment and self-employment instead of introducing a one-size-fits-all list of binding criteria. Any other structured approach to develop a list of compulsory criteria at EU-level through which workers can be defined as employees would be a grievous encroachment into national labour law.

## Compatibility with primary and secondary legislation

13. A directive which also includes relevant single market treaty articles could provide for a more 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 is warranted. This directive 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 49 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 Article 49 of the Treaty.

14. Lastly, we underline that the legal basis for the directive, article 153 TFEU, only covers the improvement of the "working conditions". As the directive will significantly alter or influence the social protection systems of many Member States[6], we see an alternative

[5] CJEU, 22 April 2020, case C-692/19, Yodel Delivery Network.

[6] As is evidenced by the numerous references made by the Commission's Impact Assessment as regards the effect of the proposed directive on social and tax incomes. Furthermore, the terms "social protection" and "social security" were mentioned 51 times in the proposal for a directive and 204 times in the Impact Assessment, underlining the importance of these aspects to the directive.

possibility for the legal basis to be broadened to include article 153, paragraph 1 (c) TFEU, which covers social protection and social security. In this regard, it is crucial to highlight that article 153 TFEU requires unanimity instead of qualified majority and would therefore have significant procedure consequences for the directive[7].

## I.2. Providing legal certainty and access to rights

### Clear definitions (article 2)

15. Given the stringent obligations the directive imposes, it is crucial that certain terms have a clear definition and demarcation. Against this background, it should be noted that several proposed definitions in article 2 are too broad or not in line with already existing legislation and should therefore be amended.

16. Most notably, the directive introduces a very broad and non-specific definition of what constitutes a "digital labour platform". Including "*all platforms in the EU who provide a commercial service at a distance through electronic means, at the request of a recipient of the service and whose service involves the organisation of work performed by individuals*" in the scope of the directive, would result in a myriad of companies who do not classify as digital labour platforms to fall under the obligations set out by the directive. Moreover, there seems to be a clear contradiction between the definition of a "digital labour platform" as laid out by this proposal and the definition of 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. This creates legal uncertainty for companies as regards to whether they are affected by the provisions set out by the directive.

17. It is therefore imperative that a stricter definition of "digital labour platform" is introduced in the directive, which clearly emphasizes the crucial and unique triangular relationship between the digital labour platform (as intermediaries), the client (as demand) and the platform worker (as supply) more prominently. Unfortunately, the European Parliament's draft report only exacerbates the situation by opening up the definition of "digital labour platform" beyond the Commission's proposal for a directive to "any natural or legal person using computer programs and procedures for intermediating, supervising or organising in any way the work performed by individuals, irrespective of whether that work is performed online or in a certain location", thus completely ignoring this crucial element of the triangular relationship.

### Balanced and representative set of criteria (article 4)

18. Whilst the directive does not introduce a definition of what constitutes a "worker", which is in line with European Court of Justice jurisprudence, it does lay down the characteristics of what makes an employer in article 4. The directive introduces the following five criteria for determining whether a digital labour platform acts as an employer by controlling:

    - the upper limits for the level of remuneration;

[7] As required by Article 153 (2), paragraph 3.

- the appearance, conduct towards the recipient of the service or performance of the work;
- the supervision of the performance of work or verification of the quality of the work results;
- working time, acceptance and refusal of tasks or the use of subcontractors or substitutes;
- the possibility to build a client base or perform work for any third party.

19. In line with the social policy directives based on article 153 TFEU that the EU has adopted in the past, it is clear that the EU does not intend to create a uniform definition of what constitutes a "worker". In fact, these directives most often refer to national definitions, which remain fragmented across Member States. However, introducing strict criteria of when a digital labour platform should be considered an employer in practice will most likely ensure the same result as regulating what constitutes an employee at EU-level. This focus on the "employer" as opposed to the "employee" can therefore be seen as a way to circumvent the European legislator's lack of competence in this area and therefore goes directly against national and social partner competences, as was already clarified by the EU during the negotiations on the Transparent and Predictable Working Conditions Directive.

20. An employment relationship can furthermore be easily presumed under the proposed criteria. Against this background, it is worth noting that the European Court of Justice has always been consistent with the legal test used to qualify the employment relationship. Since the Lawrie-Blum jurisprudence, and as recently underlined in the Yodel case, it has consistently held that the classification of a worker as a self-employed person must rely on numerous indicators of each individual case and all the factors and circumstances characterising the relationship between the parties. The status of an employee therefore cannot be presumed based on only two criteria while other features of the self-employment relationship are fulfilled as this will result in classifying most genuine self-employed workers as employees, with a litigious escape as the only option out. Lastly, we underline that the proposed five criteria have an insufficient link to direction or control over the performance of work by an employer and are therefore not a balanced reflection of the realities of the workplace in many Member States.

21. It would therefore be more appropriate for the outlined set of criteria at the EU-level to be a guideline for Member States to develop their own national criteria to be verified and enforced by the competent national bodies on the basis of applicable national law and national legal practice. Against this background, we underline the relevance and importance of the criteria outlined in the recent Yodel case, which could serve as inspiration for a balanced set of criteria at EU-level. In any case, national criteria should always take precedence over any criteria identified at EU-level in light of the subsidiarity principle. We firmly underline that the approach taken by the European Parliament to introduce a one-size-fits-all rebuttable presumption of employment, which disregards any guiding criteria at EU-level, is unacceptable and will not be expedient as a massive reclassification of most self-employed would take place as a consequence.

22. In case the option to introduce guiding criteria at EU level rather than compulsory criteria would not be accepted, we would strongly advocate to require a majority of criteria, in other words three out of five criteria, to trigger the presumption instead of two criteria. This approach would be more in line with the jurisprudence of the European Court of Justice as well as reduce the likelihood of divergent rulings by national courts.

### Access to rights through social dialogue (article 3)

23. We reiterate that without broadening the legal basis to the single market treaty articles, the proposed directive does not meet its main objective to improve the working conditions of all platform workers, regardless of their employment status. A key oversight of the proposal in this regard, is the crucial role that social dialogue plays in improving the working conditions and granting rights to workers, including access to social protection. This is already the case in Member States such as Sweden, where successful collective agreements have been concluded between digital labour platforms and unions with the intent to provide more rights to self-employed platform workers and more are expected to be negotiated in the future.

24. Against this background, it is absolutely imperative that the directive introduces in article 3 more flexibility for social partners to conclude collective agreements on working conditions in platform work, in line with their national industrial relations practices and social dialogue systems. This flexibility for social partners therefore needs to be considerably broader than the involvement of social partners in the implementation of the directive, as introduced in article 21, but should be based on the primacy of collective agreements at the national, sectoral or local level instead of binding EU-criteria.

## I.3. Ensuring a fair and balanced determination of employment status

### Respecting subsidiarity principle (article 3)

25. 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, in line with their national law and practices as well as collective agreements. 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.

26. Nevertheless, there seems to be ample room for legal and practical uncertainty as there might be discrepancies in the application of article 3 on the one hand and articles 4, which sets out the presumption of employment, and 5, which sets out the rebuttable nature of the presumption, on the other hand. In order to avoid any legal uncertainty, article 4 and article 5 should be fully merged into article 3 to completely respect diverse national labour laws and industrial relations practices. Article 3 would then allow for Member States to choose whether they opt for a dedicated regime for self-employed platform workers or employed platform workers or a combination of both with clarity on how platform work would fit into both categories, on the condition that the general objective sought by the directive is ensured at all times. We reiterate that such a neutral approach is more consistent with respecting the alternative national models already developed in several Member States, including France, Greece and Spain.

27. Creating a European wide rebuttable presumption of employment not only disregards the Member States' competence in setting up their own legal structure on the topic but would furthermore undermine the digital labour platform's 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 digital labour 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.

28. In addition to the different national approaches taken by Member States on this topic, the list of criteria is furthermore open to interpretation and consequently, to divergent court rulings. Due to differences in interpretation between courts regarding the various criteria, contradictory rulings regarding the same contractual relationship might occur. This might result in unequal and even discriminatory treatment of workers and would *de facto* not lead to the legal certainty this directive aims to provide.

## Respecting proportionality principle (article 5)

29. The proposed presumption of employment leads to a *de facto* employee status for platform workers, despite its rebuttable nature. Given the proposed directive does not follow a case-by-case assessment of each disputed employee status of a platform worker, this will lead to substantial questions concerning social protection and other rights flowing from employment status, including occupational safety and health, tax benefits, right to minimum wage, etc. Taking into consideration the extensive period it can take for courts to render their final decision in a dispute on employment status, this could have financially catastrophic impacts on digital labour platforms who will have to pay social contributions for their workers pending legal procedures. This rebuttable presumption may therefore not only lead to precarious situations for platform workers but also to legally and practically uncertain situations for digital labour platforms.

30. Despite the directive's aim to increase legal certainty for platform workers, this rebuttable presumption of employment might therefore have the exact opposite effect as it will considerably increase the number of individual litigations. It should furthermore be noted that in several Member States, separate judicial bodies are responsible for the reclassification of the employment status on the one hand and the reassessment of the social security contributions on the other hand. This could result in multiple litigations before different judicial bodies for a single case.

31. Furthermore, the reclassification of digital labour platforms to employers will undoubtedly lead to the requirement to make substantial changes to their structure as well as impose additional financial and administrative burden on them, in particular smaller ones. Such additional costs will furthermore result in a price increase, which is likely to be transferred to the consumer and could therefore *de facto* lead to a significant decrease in demand. This 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.

32. Broadening the legal base whilst maintaining the reversed burden of proof therefore would be a more appropriate way forward than a combination of the rebuttable presumption and reversed burden of proof. Eliminating the rebuttable presumption of employment will decrease the risk of fostering a litigious working environment, whilst maintaining the reversed burden of proof will remove any deterrent effect platform workers might encounter when seeking reclassification of their employment status.

33. In case this option is not retained, it is absolutely crucial that the presumption of employment should be suspended whilst being rebutted in order to avoid excessive costs for digital labour platforms.

## I.4. AI and algorithmic transparency

### Ensuring consistency with other EU legislation (article 6-10)

34. We support the directive's aim to grant tailored rights to platform workers regarding transparency of automated monitoring and decision-making systems. Nevertheless, the provisions introduced by the directive which impose new transparency and information requirements on digital labour platforms might cause legal uncertainty if consistency with other EU regulations is not guaranteed. In particular, the bulk of these issues, in particular those set out in articles 6-10[8], are already being dealt with in existing EU legislation, most notably article 22 of General Data Protection Regulation (GDPR), which provides protection against automated decision-making systems for all citizens. However, article 6 (5) of the proposed directive seems to narrow down the legal basis of data processing as provided by the GDPR by possibly excluding the possibility for digital labour platforms to collect and process personal data based on "legitimate interest" and "consent". Instead, the directive sets out that no personal data concerning platform workers can be processed unless it is "intrinsically connected to and strictly necessary for the performance of the contract". In order to avoid any confusion or inconsistencies, it is imperative that more clarification is provided on this exact wording as well as the link of these provisions to the GDPR.

35. Furthermore, in order to decrease the administrative and financial burden on digital labour platforms the directive should aim to develop more synergies concerning the obligations on transparency and automated monitoring and decision-making systems already set out in the Platform to Business regulation and the upcoming Artificial Intelligence Act regulation. In particular, the proposed regular risk and impact assessments, providing reasons for decisions in writing within a very short period of time, 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 burdens on digital labour platforms and should therefore be simplified.

[8] Article 6: algorithmic management; Article 7: human monitoring of automated systems; Article 8: right to explanation and compensation; Article 10: provisions for the solo self-employed.

36. Lastly, while we are generally supportive of more transparency in algorithms, we deem it crucial that such provisions do not lead to the disclosure of trade secrets and sensitive information of digital labour platforms. It is therefore imperative that platforms should not be obliged to disclose full algorithms or sensitive commercial information but that the information requirements are limited exclusively to data relevant to the working conditions of the platform worker.