ETUC resolution on the proposal of the European Commission of a Directive on improving working conditions in platform work and way forward ahead of the ordinary legislative procedure

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SUMMARY

This resolution presents the parameters by which ETUC can assess the Commission's proposal as being positive for workers. It will guide the advocacy work of ETUC towards the European ordinary legislative procedure (principles that are not questionable for the European trade union movement and that the European legislation should respect), as well as the shortcomings that should be improved.

ETUC general assessment of the Directive on improving working conditions in platform work

The proposal for a Directive on improving working conditions in platform work presented by the European Commission on December 9th, 2021, includes the core ETUC demand of the setting up of a rebuttable presumption of employment relationship for workers in digital labour platforms, which is completed with a reversal of the burden of proof. This means that a platform will be considered an employer unless otherwise proven by the digital labour platform.

This is the correct approach to guarantee the protection of the labour rights of these workers (providing that the legislation eventually provides for a general presumption of employment relationship, as detailed further below). Furthermore, a Directive is the appropriate tool to ensure the effective reach of this policy option and its harmonised implementation across the EU. Also, protecting the rights of employees of digital labour platforms will provide for better conditions for genuine self-employed workers, for whom digital labour platforms will be prevented from imposing limitations to their autonomy.

Currently, digital labour platforms operate with the opposite assumption, whereby all workers are presumed to be self-employed and it is their responsibility, or that of their trade unions, to challenge their status in court. Few workers can undergo this expensive and extensive procedure. Not surprisingly, those in a more vulnerable situation are unlikely to undertake any legal action. In any case, when the court eventually rules in favour of workers, a long time would have elapsed (workers have reported that the process takes years) and the results – most of time restricted to some economic compensation calculated on the basis of the minimum wage – only benefit the litigants. These cases do not result in a change of business and consequently workers continue facing the same precarious working conditions. ETUC believes that this situation can only be changed by establishing an effective presumption of employment relationship.

ETUC welcomes that the proposal introduces laws that will make it compulsory for digital labour platforms to show the functioning of their algorithm to workers and their trade unions on issues appertaining to working conditions and work management. So far, algorithms are not subject to public scrutiny under the excuse of protecting business secrecy.

This proposal should be seen in the light of the report of the European Parliament "on fair working conditions, rights and social protection for platform workers - new forms of employment linked to digital development", adopted in September 2021. This report backed many of the proposals of ETUC, such as: A rebuttable presumption of an employment relationship for platform companies; the reversal of the burden of proof; the clarification that establishing a new EU so-called third status between worker and self-employed person cannot be considered; and the right of workers in platform companies to organise collectively and being represented by trade unions.

ETUC therefore assess the proposed Directive as a good point of departure for a European law that needs to be substantially improved during the ordinary legislative procedure.

Conditions for ETUC to assess the Commission's proposal as positive for workers and to guide ETUC action in its advocacy action in the ordinary legislative procedure:

ETUC will engage in the parliamentary process to guarantee that the rebuttable presumption of an employment relationship is maintained. Any other option of those identified by the European Commission in the consultation documents for the European social partners will not result in the game changer that workers through digital labour platforms deserve.

We will aim at achieving a general presumption, therefore without criteria.

Under the current cumulative and narrow definitions of digital labour platform and algorithm management proposed by the European Commission, it is likely that many of these companies will state that the definition proposed does not cover them.

The definition of "digital labour platforms" is cumulative and therefore reduces the scope of the definition since all conditions must be met, which could result in many digital labour platforms falling outside the scope of the Directive. The references to "organisation of work" and "as a necessary and essential component" are too narrow and do not capture the manner in which work, through digital labour platforms, is performed. Also, the reference to a service which "at a distance" adds weakness to the definition and could provide digital labour platforms to circumvent the definition. The current definition therefore risks that the objectives of the Directive will not be met, since with such broad formulation digital labour platforms will manage to evade falling within its scope of application.

The definition of a digital labour platform should clearly state that digital labour platforms are undertakings and therefore should abide to their responsibility as employers. Otherwise, digital labour platforms could design the algorithm in such a way that the worker becomes – under this definition – a platform within the platform. This should be avoided at any cost. It must be very clear that the digital labour platform is the employer of the platform worker. Also, not only EU law should apply, but - once the presumption is triggered - all national labour law should also regulate the employment relationship of the digital labour platform and the platform worker (instead of the sole reference to Union law). Otherwise, it would allow Member States to establish de facto a third group of workers. ETUC proposes the formulation of "business activity is enabled by the provision of work performed by individuals".

As any other worker, those through digital labour platforms should have access to social protection. The proposal for Directive should prevent that digital labour platforms develop their own schemes of private protection, all the more when this is done to evade their

liability as employers. The current reference in the recitals of the Directive that the voluntary decision for digital labour platforms to decide to pay for "social protection, accident insurance or other forms of insurance, training measures or similar benefits to self-employed persons working through that platform (…) should not be regarded as determining elements indicating the existence of an employment relationship" is a very dangerous statement which blurs the liability of digital labour platforms as employers and provides for the creation of a third category of workers, something to which the Directive itself opposes. The Directive should actually spell out the opposite: such behaviour from digital labour platforms should be an indication of subordination. Therefore, this consideration should be included as a criterion for the rebuttal under article 5.

The definition proposed for algorithm management – which limits the scope to fully automated systems – is also restrictive and gives digital labour platforms, and other companies using algorithm management, the possibility to fall outside the threshold by operating with non-fully automated systems. ETUC will put forward a more encompassing definition of algorithm management, as the following one: "Any predictive system, software, or process that uses computations to aid or replace management decisions or policy that impact opportunities, access, liberties, rights and/or safety of workers".

Shortcomings that ETUC endeavours to improve in the ordinary legislative procedure:

The proposal for a Directive on improving working conditions in platform work includes many shortcomings, which ETUC undertakes to improve.

The Directive should clearly describe how the presumption will be activated. Member states must include digital labour platforms on a list for which the presumption applies. New digital labour platforms arriving must also be subject to the presumption of employment relationship. The presumption should therefore be applied automatically, without any buffer period.

The Directive should provide clear instruction about the operation of the rebut. The digital labour platform should be given the possibility to activate a legal or administrative proceeding, or both, to demonstrate that they are mere digital intermediaries between genuine businesses falling outside the scope of the protection of the directive, should they wish to do so. In these situations, the digital labour platform should assist the proper resolution of the proceedings, notably by providing all relevant information held by it. Whereas opposing the criteria included in the proposal for a Directive in article 4 (which should be removed from this article), ETUC believes that a set of criteria should be used to guide the rebuttal (for those digital labour platforms wishing to do so) towards the competent administrative or judicial authorities. ETUC therefore demands to remove the list of criteria in Article 4 (general presumption) and transfer them to Article 5 so as to guide the rebuttal (where the list of criteria should be open to more entries following national definitions and relevant development in jurisprudence), considering both the characteristics leading to the status of an employee and also those of a self-employed worker. The result of the potential rebuttal should clearly define that a worker through a digital labour platform is either an employee or an undertaking. The possibility for a rebuttal of an employment relationship should be focused on the characteristics of an undertaking.

The reversal of the burden of proof should be connected to the transparency of the algorithm. Whereby to rebut the existence of an employment relationship with their workers, digital labour platforms should open up their algorithm to the relevant administrative or judicial administration to show the elements that have an impact on workers and organisation of work: criteria for assigning work, for proposing more

advantageous conditions and orders, for disconnecting and selection, for evaluation purposes, for statistics and profiling and which data is collected, among others.

The possibility that it is a worker who rebuts the presumption should be removed from the legislative initiative. It is absurd to conceive that a worker would rebut the presumption before the digital labour would have done so. This envisages a scenario in which workers would rebut their own employment status under the instructions of the digital labour platform. This is also a misunderstanding of the nature and aims of the presumption: If a digital labour platform cannot rebut it, it proves the existence of an employment relationship between the employers (the digital labour platform) and the workers concerned.

Collective labour rights should be strengthened in the Commission's proposal. Whereas the role of trade unions (inaccurately referred to as "workers' representatives") is acknowledge in different sections of the proposal, when it comes to information and consultation rights and enforcement, the full access for workers through digital labour platforms to the right to create and join a union, to organise, and to bargain collectively should be clearly spelled out in the law. Also, platform companies shall comply with the remuneration and other working conditions established by law or collective agreements for the relevant sector and/or geographical area and with the statutory minimum wages where they exist (all references in the text are related with minimum wages and floor of rights, without alluding to the rights provided by the applicable sectorial collective agreement). The right to collective bargaining must be enforced for all platform workers, whatever their working status; Member States should organise this collective bargaining according to their national rules and mechanisms.

The proposal for a Directive refers throughout the document to “workers representatives” instead of trade unions. This would open the door to “sweetheart” unions set up by employers, and even “workers representatives” chosen by employers. Workers' representatives should mean trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions in accordance with national legislation and practice and elected representatives, namely, representatives who are freely elected by the workers of the organisation, not under the domination or control of the employer.

Since work in platform companies does not single itself out when it comes to algorithmic management, the right to information, consultation, participation of workers, and to collective bargaining with regards to algorithm control should be extended to all workers (including traditional companies). Also, genuine self-employed workers should be granted the right to be informed, especially in matters of access of transparency of the algorithm.

Member States should support their labour inspectorate services to equip it with the skills and resources necessary to investigate the algorithms and automated management systems in the light of the applicable laws and regulations (e.g., anti-discrimination legislation).

Many workers in platform companies are undocumented migrant workers as well as asylum-seekers, who access these jobs through the sub-contracting of accounts. Their precarious and vulnerable position needs to be taken into account in the European legislative proposal, including fast-track avenues for their regularisation. Undocumented migrant workers should access justice without fearing any retaliation or risk of deportation. This requires the need to establish a division between the work of labour legislation enforcement and courts, and migration control mechanisms.

Exemptions to SMEs and start-up companies are granted in different articles of the draft Directive. The Directive should refrain from establishing thresholds to exempt SMEs from the scope of application of any of the provisions of the Directive. These potential exceptions would be loopholes for digital labour platforms, as many of them are either SMEs or “start-ups”; this is mainly due to the artificial presentation of the vast majority of their workers as external contractors, and not as their employees”.