European Economic and Social Committee

AMENDMENT 1

SOC/709
Working conditions package – platform work

Tabled by:
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Replace the whole opinion presented by the SOC section with the following text (explanation/reason at the end of the document):

Amendment
1. Conclusions
1.1 Digital labour platforms promote innovative services and new business models and create many opportunities for consumers, businesses, workers and the self-employed. The digital platform concept covers a wide range of activities, services, tasks and business models. This means that one size fit all solutions may become a barrier for innovation and investment in the setting up and developing digital platforms in the EU.
1.2 The EESC recognises the need to address some of the challenges of digital platform work where they exist. However, any regulation on platform work should be designed to maintain flexibility as a critical motivator while providing the essential safeguards for the adequate protection of workers, taking also into account that for many platform work is a complementary activity[1]. That is why the EESC generally supports the approach used by the EC in the Working conditions package, namely the use of different instruments to create the necessary favourable environment allowing for improved working conditions of the digital platforms. The adequate access to social protection and health and safety conditions through proper implementation of the two Council recommendations[2] is this area is also needed.

1 As regards the pace of development the data collected by COLLEEM I and II surveys concludes that the phenomenon of platform work is increasing slowly but steadily in Europe. Secondly, only a small proportion – around 1.4% - of the working age population – performs platform work as a main form of employment. Furthermore, according to the study referred to in the Commission Impact Assessment Report approximately 5.5 million platform workers out of 28.8 million could be at risk of employment status misclassification. See JRC Publications Repository - Platform Workers in Europe Evidence from the COLLEEM Survey (europa.eu) and JRC Publications Repository - New evidence on platform workers in Europe (europa.eu); See COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT. In the study commissioned by Delivery Platforms Europe couriers largely (72%) say platform work is a complementary activity, with 34% delivering while studying and another third (34%) saying they access platform work to top up income from other full or part-time work. For two thirds of respondents (67 per cent), flexibility is the main reason for working as a courier. It allows them to combine delivery work with other work or studies, with caring for family members and is a way to top up another income. Flexibility is also the most liked attribute in working as a courier (for 58 per cent).

2 Council recommendation on access to social protection for workers and self-employed and Council recommendation on improving the protection of the health and safety at work of the self-employed.

1.3 Whilst the correct determination of the employment relationship is one of the key issues and possible misclassifications needs to be tackled, this matter concerns only a minority of platform workers, as highlighted also by the Commission figures which indicate that 5.5 million platform workers out of 28.8 million could be at risk of employment status misclassification.

1.4 However, the EESC considers that many of the issues covered by the draft Directive are already addressed in existing or forthcoming EU legislation, i.e., data protection, the right of information and consultation for workers etc. This means that the implementation of the existing legislation needs to be strengthened and improved where necessary. A new directive that repeats existing rights only creates confusion and fragmentation of the EU acquis. Should there be a need for clarifications, identified in the process of the implementation, the adjustments must be made in the respective EU acts. In this respect, the EESC reminds the EU institutions that especially now the EU needs real smart regulation and competitiveness checks, that allows businesses to innovate, grow and create jobs and added value to our society and economy.

1.5 In order to enhance legal certainty and avoid unnecessary disputes, focus should be in clarifying the existing national rules and definitions concerning the status of worker while respecting the rules that allow the autonomy of entrepreneurs and other forms of self-employed. A legal EU definition of who is a worker and who is self-employed platform worker would not be appropriate or effective, as it cannot respect the different models in Member States and keep up with the dynamic developments on labour markets. It increases confusion and legal uncertainty and undermines national definitions by introducing a specific definition for a limited group of workers in digital platforms.

1.6 Another source of confusion is the attempt of the Directive to cover both workers and self-employed, by introducing two separate definitions for "persons performing platform work" and "platform workers". Mixing different categories of subjects, covered by the directive, and providing them different sets of rights and obligations also creates legal uncertainties and complexity.

1.7 There is no justification for blurring the line between genuine self-employment and employment by creating rules that have an impact on entrepreneurs/self-employed on the basis of Article 153 TFEU, which is not at all appropriate legal basis for regulating business-to-business relations.

1.8 The proposed presumption in the draft Directive states that once 2 out of 5 criteria are met, any contractual relationship shall be legally presumed to be an employment relationship. At the same time, a good part of the proposed criteria in Article 4.2 contains standard B2B clauses, for example (a) [*upper limit for remuneration and fees*] and (c) [*verifying the quality of the results*], (d) [*timing of the work*] and (e) [*possibility to build a client base*]. This means that even genuine self-employed could be wrongly classified as employees and will then have to

rebut this presumption if they want to continue practising their activities. The status of self-employed could only be confirmed in court or in administrative proceedings which imposes an unnecessary administrative burden on all parties, including the authorities.

1.9 Setting up the mechanism of rebutting the legal presumption is confusing and likely to decrease legal clarity with regard to the fact that similar mechanism is already included in the Directive on Transparent and Predictable Working Conditions[3] as one of the options for Member States.

1.10 Instead of the two-out-of-five criteria, the EESC considers an assessment of the criteria for defining the existence of an employee status at Member States' level and in line with the jurisprudence of the ECJ is the right way forward. In this respect, EESC welcomes the proposed efforts of the Commission to support the sharing of good practices.

1.11 The EESC considers that a separate set of rules on issues related to platform work and algorithmic management is not appropriate or necessary. The existing rules in the General Data Protection Regulation (GDPR)[4] and the forthcoming AI Act will provide also workers with a variety of rights with respect to their personal data together with a comprehensive set of risk management, human oversight and transparency requirements to mitigate the risks for health and safety and fundamental rights. Therefore, unnecessary overlaps and duplications should be avoided.

2. General remarks

2.1 In the process of rapid transformation of the economy and businesses, digitalization has taken on a key strategic role, to the point of becoming pervasive across all sectors of activity, and affecting the entire cycle of the product and service value chain, involving both large companies and small and micro enterprises. The consequences for the world of work –resulting from new forms of working and new forms of business organization, are significant as regards both their nature and the speed of change.

2.2 Digital labour platforms can efficiently match supply and demand for labour and offer possibilities to make a living or earn additional income. For consumers it means improved access to products and services which would be otherwise hard to reach, as well as access to a new and more varied choice of services[5]. However, in addition to opportunities, digital platform work, as an integral part of evolving forms of work, creates possible challenges that may need adapted solutions.

3 Directive on Transparent and Predictable Working Conditions.

4 Regulation (EU) 2016/679 and COM/2021/206 final.

5 See COM/2021/762 final, Explanatory Memorandum, p. 1.

2.3 The labour market status of platform workers is a key issue which has been addressed by Member States and in their national jurisprudence. This development has created a number of different rules and judgements based on different national concepts, models and definitions, thus simply reflecting and respecting the national labour market systems and practices. Focus should be in clarifying the existing national rules and definitions concerning the status of worker while respecting the rules that allow the autonomy of entrepreneurs and other forms of self-employed. In this respect actions at European level could also be promoted, such as exchanges of information, education and training and cooperation between authorities. Also social partners have an important role to play as well as the platforms themselves. Regulatory framework could be adapted at the appropriate level, without undermining well-functioning national practices and legislation. Where necessary, protection for platform workers has to be improved.

3. General comments on the proposed directive

3.1 On 9 December European Commission proposed a set of measures to improve the working conditions in platform work and to support the sustainable growth of digital labour platforms in the EU.[6] The opinion of the SOC section in SOC/709 adopted on 7 March 2022 addresses only the proposal for a directive on improving working conditions in platform work. Therefore, also this counter opinion focusses on that proposal.

3.2 The EESC acknowledges that the recent developments of the labour platform economy has brought new challenges to those who work through them. As the Commission notes, these can range from a lack of transparency and predictability of contractual arrangements to health and safety challenges, the misclassification of the employment status, or inadequate access to social protection[7] as well as algorithmic management challenges in platform work.

3.3 However, the proposed directive is not the right instrument to answer to the challenges. In addition, it seems that the main focus of the proposal is clearly on the activities of deliverers, riders and lower skilled on-location services in general, omitting the fact that the variety of platform work is much larger. The proposed regulation is not at all adapted for those working through platforms for online work. Furthermore, the possible effects of EU legislation on online platforms that can deliver their services from outside the EU are not taken in account[8].

6 They include: 1) a proposal for a directive on improving working conditions in platform work; 2) draft guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, which cover those working through digital labour platforms; 3) calls for new measures, as outlined below, on national authorities, social partners and all relevant stakeholders to achieve better working conditions for those who work through digital labour platforms (Communication on Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work).

7 Idem (Communication) p. 2.

8 According to the Commission study "*Even if all freelance services provided through platforms were discontinued across the EU-27, these businesses could still rely on freelancers in other parts of the world*". See Study to support the impact assessment on improving working conditions in platform work.

The possible loss and relocation of those activities outside EU (e.g. UK) should at least be evaluated.

3.4 The challenges should be addressed primarily using, and where necessary, reinforcing the implementation of the existing regulations and practices. In addition, there is a large potential for actions to be pursued by platforms themselves together with local partners as well as with social partners. This is something that the Commission should support.

3.5 A legal EU definition of who is a worker and who is self-employed platform worker would not be appropriate or effective, as it would not be able to respect the different models in Member States and keep up with the dynamic developments on labour markets. It would just add confusion and legal uncertainty and undermine national definitions by introducing a specific definition for a limited group of workers.

4. Specific comments on the proposed directive

4.1 Scope and definitions

4.1.1 There is a clear risk that the scope and definitions of the proposed directive would cover a much wider range of digital platform activities than intended. Its main target seems to be the low skilled activities but the proposed definitions and criteria would cover all categories of platform work, even when performed by genuinely self-employed persons.

4.2 Correct determination of employment status and legal presumption

4.2.1 The EESC agrees that the Member States should have necessary mechanisms to ensure "correct determination of the employment status of persons performing platform work (…)". However, the EESC has serious doubts as regards the proposed framework for legal presumption of an employment relationship if two of the five criteria listed in the directive would be fulfilled.

4.2.2 The EESC considers that the criteria especially in points (a) [*upper limit for remuneration and fees*] and (c) [*verifying the quality of the results*], (d) [*timing of the work*] and (e) [*possibility to build a client base*] are regularly used in B2B contracts and would lead to a situation where genuine self-employed would be subject to the employment presumption and thus forced to become employees.

4.2.3 This approach is in contradiction with the practice of overall assessment of employment relationship criteria applied by the jurisprudence in Member States. Furthermore, as stated above, platform workers would by default be classified as employees and this would take away individual´s choice to be self-employed. Hampering entrepreneurial activity should not be in the interest of anybody. Given that majority of platform workers consider themselves and want to be considered as self-employed, this approach would be in contradiction with the

fundamental rights and freedoms such as the right to choose an occupation and the right to engage in work and the freedom to conduct a business.

4.2.4 In view of diversity of national labour market systems, labour law traditions and jurisprudence as well as different definitions e.g. in labour law, tax and social security systems, there is a risk that the five criteria of the proposed Directive do not adequately mirror the complex reality of various situations. Instead of the two-out-of-five criteria the EESC would opt for an overall assessment of the criteria for defining the existence of an employee status as generally applicable approach in Member States and in the jurisprudence of the ECJ.

4.3 Possibility to rebut the legal presumption

4.3.1 The EESC considers the possibility to rebut the legal presumption as an instrument which is likely to create more problems than to clarify complex legal situations. Setting up this mechanism is confusing with regard to the fact that similar mechanism is already included in the directive on transparent and predictable working conditions as one of the options for Member States.

4.3.2 The possibility of rebutting the legal presumption falls short of setting fair balance between the parties of the rebuttal process since - with the burden of proof on the side of the platform - the legal presumption as defined by the five criteria would be difficult to challenge in practice. Given the diversity of national definitions, the five criteria and their relevance are likely to be interpreted in different ways in Member States thus leading to even more complex patchwork of jurisprudence across Europe. As this process could be pursued both in courts dealing with labour law issues and administrative courts dealing with tax and social security issues, the result could be less legal clarity, not more.

4.4 ***Algorithmic management***

4.4.1 The EESC shares the aim of the Commission to add information and transparency as regards the use of algorithms in the platform work. The EESC considers, however, that a separate set of rules on issues related to platform work is not appropriate or necessary. The existing rules in the GDPR[9] and the forthcoming AI Act[10] will provide also workers with a variety of rights with respect to their personal data together with a comprehensive set of risk management, human oversight and transparency requirements to mitigate the risks for health and safety and fundamental rights. Therefore, unnecessary overlaps and duplications should be avoided.

4.4.2 As regards the form and contents of the information to be given by the platforms it should be ensured that the platforms have the necessary room for manoeuvre in terms of defining the

9 Regulation (EU) 2016/679.

10 COM/2021/206 final.

technical means to provide the information. The same applies to the methods of evaluating the risks and human reviewing of significant decisions. Furthermore, it should be ensured that the disclosure requirements concerning the algorithms do not apply to any kind of business secrets or confidential information of any sort. The EESC also underlines the need to allow mitigations tailored to SMEs on administrative procedures required by the algorithmic management[11]. Notably, these include longer deadlines to provide requests of review of algorithmic decisions and the reduction in the frequency of updating relevant information.

4.5 Collective rights

4.5.1 The proposal seeks to ensure information and consultation of platform workers or their representatives on decisions likely to lead to the introduction of substantial changes in the use of automated monitoring and decision-making systems referred to in the article 6(1) of the Directive. For this purpose the proposal refers to the Directive 2002/14/[12]. As this reference allows the application of existing information and consultation mechanisms as defined at national level and also promotion of social dialogue without establishing any new or duplicate mechanisms this solution can be supported. However, the responsibility of the digital labour platform to bear the expenses for the expert (Art. 9(3)) is not compatible with general rules on information and consultation based on Directive 2002/14/EC.

4.6 Remedies

4.6.1 The EESC stresses the need to clarify the distinction between "workers" and "persons performing platform work" especially as regards remedies and enforcement of the Directive. Article 18 contains similar rules for protection from dismissals for both categories which may lead to confusion and lack of legal certainty as judicial remedies for labour law and contract law in Members States are based on different sets of legislations and are thus not similar. In the same vein, Article 17 (Protection against adverse treatment or consequences) may lead in unwanted consequences and problems in the judicial systems of Member States if different contractual relationships are forced to be treated according same rules.

4.7 *Non-regression and more favourable provisions*

4.7.1 For the promotion of fair working conditions in digital platform work the EESC emphasizes the role social dialogue and collective agreements at appropriate levels and within the scope, mandate and autonomy of social partners in Member States. Therefore, the EESC questions the limitation of the scope of collective agreements only to agreements which are more favourable to platform workers (Article 20). This limitation interferes in the autonomy of social partners.

11 See COM/2021/762 final, Explanatory Memorandum, p 13.

12 Directive 2002/14/EC.

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Reason
This text comprises an amendment which aims to set out a generally divergent view to an opinion presented by the section and is therefore to be described as a counter-opinion. It sets out the reasons why the Commission proposal is not the right instrument to address challenges of digital platform work and why it does not adequately mirror the complex reality of various situations in the rapidly changing world of platforms. Furthermore, the counter opinion seeks to highlight the major flaws and challenges in the draft directive especially as regards the legal presumption of employee status and the algorithmic management.