

## EU Commission proposal for a Directive on platform work

### *The correct classification of digital labour platforms and service providers is the gateway to ensure a level-playing field*

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#### EXECUTIVE SUMMARY

On 9 December 2021, the European Commission adopted its proposal for a Directive on improving working conditions in platform work. The World Employment Confederation-Europe broadly welcomes the objectives of the proposal and calls for establishing a level playing field between different forms of providing services through the correct classification of online platform labour suppliers at national level and based on a set of European criteria.

#### *Assessment of opportunities and challenges linked to platform work*

The World Employment Confederation-Europe broadly supports the Commission's assessment of opportunities and challenges linked to platform work. When discussing and defining digital labour platforms, it is essential to look at the underlying business model and employment status of the diverse forms of organising work that are being offered through digital labour platforms.

#### *General provisions and legal basis of the proposed Directive*

The proposed Directive is based on Article 153 in conjunction with Article 16, thus the legal basis to regulate minimum working conditions for workers in the European Union. While this is certainly the right legal basis to regulate platform work that is based on an employment relationship, it must be questioned whether it is appropriate to regulate the diversity of online labour platforms based on one legal basis and to use the broad terminology of platform work. In a labour market that is characterised by diverse forms of work, genuine self-employment intermediated via online labour platforms should be fully recognised and remain possible.

#### *Correct determination of the employment status*

The World Employment Confederation-Europe agrees with the European Commission that the correct determination of the employment status is the right approach to improve the working conditions of people offering services via digital labour platforms. Services provided by digital labour platforms can be based on a formal worker status and genuine self-employment. The presumption of an employment relationship can be a suitable way forward, if a balanced approach is taken at national level based on European guidance.

#### *Algorithmic management*

With regard to algorithmic management, the World Employment Confederation-Europe believes that any rules on online labour platforms should be fully consistent with the proposed Artificial Intelligence Act and the EU General Data Protection Regulation. Additional rules on online labour platforms in this area must be carefully assessed and justified.

#### *Transparency on platform work*

The World Employment Confederation-Europe supports the general obligation of transparency on platform work, while specific and additional obligation for the digital way of providing a service must be proportionate.

#### *Remedies and enforcement*

The provisions in the proposed Directive on remedies and enforcement are generally welcomed. Labour inspectorates can play an important role in monitoring digital platforms that apply an employment status.

## 1. General assessment

- 1.1. Following a two-stage EU Social Partner consultation, the European Commission adopted on the 9 December 2021 a proposal for a Directive of the European Parliament and the Council on improving working conditions in platform work. The World Employment Confederation-Europe broadly supports the Commission's assessment of opportunities and challenges linked to platform work. When discussing online labour platforms, it is essential to look at the underlying business model and employment status of the diverse forms of organising work and providing services through digital labour platforms.
- 1.2. The online platform economy is one of the most visible and pronounced features of the changing world of work and characteristic for the trend of digitalisation and automation in the world of work. The World Employment Confederation-Europe, voice of the private employment services industry and EU Sectoral Social Partner for temporary agency work, welcomes this trend as online platform work provides opportunities to companies, to people working via digital labour platforms and to consumers using the services offered. With an increasing number of companies in the private employment services industry starting to deliver (some of) their services through digital labour platforms, there is no sharp differentiation between the private employment services industry and the online talent platform economy. At the same time, some digital labour platforms are also moving away from pure intermediation and into activities of the private employment services industry by using similar business models.
- 1.3. The digital labour platform economy allows people and businesses to organise work in new ways and holds the potential to enhance labour market participation through diverse forms of work, thus also contributing to the economic recovery after the Covid-19 pandemic. Online talent platforms match people with work, improve labour market allocation and efficiency. Online platform work has the potential of enabling inclusive work, prosperity, security and adaptation.
- 1.4. The World Employment Confederation-Europe identifies that working via a digital labour platform is a new way of organising work rather than a new form of work. It can be done through a diverse range of legally recognised contractual work arrangements, either in an employment relationship (fixed term, part-time, agency work, variable hours, etc.) or within the framework of self-employment. Where digital labour platforms operate under a triangular work relationship similar to temporary agency work, workers employed by the digital labour platforms should have the same working conditions and social protection as temporary agency workers. The online/digital way of (1.) the delivery of a service or (2.) the conclusion of a recruitment or work arrangement does not change the nature and requirements of the service provided and/or the work contract concluded. As such 'online talent platform work' is not a new legal form of work or a new business service: It is a new way of organising work that technological development allows. Therefore, there is no need for a third status.
- 1.5. The World Employment Confederation-Europe questions the terminology of "platform work" and "platform workers" in the Commission proposal for a Directive, as this presumes that "platform work" is a rather homogeneous form of work, whereas in fact it is more a technological tool that can be used to organise and match different forms of work. The use of this term risks obscuring the diverse nature of work arrangements that exist in the online platform environment and thus leading to misclassification.
- 1.6. Alongside with discussions on work via digital labour platforms, it is equally important to launch a discussion at level on social protection and social benefits of diverse forms of work, which should be inspired by the principle of ensuring adequate social protection for all workers. Within the agency work sector, adequate social protection is already put in place and can serve as a model on how to combine flexible contracts with social protection coverage. Policy or regulatory initiatives must

respect the diversity in the way work is organised, including via digital labour platforms, and have to take account of the different levels of responsibilities for each stakeholder following from the applicable form of work – direct employment relationships, agency work, or self-employment. As for any initiative on employment and social affairs, the principle of subsidiarity must be respected.

- 1.7. In providing guidance to the EU Member States on working conditions in platform work through the proposed Directive, it is essential to allow new forms of organising work to develop and to take advantages of the benefits of the digital transformation. In parallel, a focus must be laid on ensuring fair working conditions, social protection and quality of work.
- 1.8. In the context of the broader discussion on the impact of digital technologies on labour markets and the world of work, EU and national policies should be guided by removing unjustified obstacles for doing business online. In this context, EU Member States should be encouraged to allow for and promote the option of digital signatures for work assignments and labour contracts.

## 2. Assessment of the General Provisions

- 2.1. **Legal basis:** The European Commission has based its proposal for a Directive on Article 153, which provides for EU legislative action to improve working conditions in the European Union. Article 153 TFEU is, however, focused on improving working conditions, the working environment and social protection of workers in the European Union. By choosing the legal basis of Article 153, the European Commission bases its legislative initiative on the premises that the majority of people working via digital labour platforms do so based on an employment relationship. This is also reflected in Article 3 – 5 in the Commission proposal that focus on the employment status.

While the World Employment Confederation-Europe fully agrees that the correct classification of people working via digital labour platforms is essential to ensure a fair level playing field between diverse forms of work and to avoid any unfair competition between digital labour platforms and temporary work agencies, it is still important to fully recognise and acknowledge that digital labour platforms can be based on different business models and various employment statuses, including genuine self-employment and employment relationships in which platform labour suppliers are employed as workers. This diversity could have been stronger and better recognised in the Commission proposal for a Directive and in the choice of the legal basis.

- 2.2. **Subject matter and scope (Article 1):** Article 1 of the European Commission proposal for a Directive on improving working conditions in platform work defines the subject matter and scope. The World Employment Confederation-Europe agrees with the policy objectives of ensuring adequate working conditions and social protection for people performing work via digital labour platforms. Against this background, the private employment services industry also considers the personal scope of the proposed Directive as adequate, as this could help to recognise the different business models and employment status of people performing work via digital labour platforms.
- 2.3. **Definitions (Article 2):** Article 2 of the Commission proposal defines a number of key terms linked to work intermediated by digital labour platforms. As for the Article 1 and the recitals, the World Employment Confederation-Europe would like to stress the importance to differentiate clearly between persons performing platform work on the one hand and platform workers on the other hand, thus those people working via digital labour platforms with an employment status as a worker and in accordance with the jurisprudence of the EU Court of Justice. Reflecting the diversity of digital labour platforms while at the same time ensuring the correct classification will be essential to improve the working conditions of people working via digital labour platforms and establishing a

level-playing field on the labour market. In addressing platform work and providing definitions, it will be important to differentiate between those platforms that are task-based and thus more easily linked to genuine self-employment and those digital labour platforms that are based on a traditional employment status with those performing work being workers under national law.

It is in this context that the World Employment Confederation-Europe is concerned that the definitions of digital labour platforms might be overly broad, in summary, “a commercial service, provided wholly or in part via website or an app, at the request of a client, involving the organisation of work” could very well cover some services of traditional temporary work agencies. The Directive 2008/104/EU on temporary agency work should be applied as “lex specialis” with regard to agency work services, independent of the fact whether these are provided online or offline. In this context, it is welcomed that the Directive 2008/104/EU on temporary agency work is explicitly referred to in the Directive on platform work in recital 10. The World Employment Confederation-Europe is doubtful whether this will fully eliminate the risk of overlap between the two Directives and calls upon legislators to explicitly carve out agency work services in the Directive.

The underlying business model of digital labour platforms should determine the applicable legislation. For temporary agency work, the core characteristic is that the temporary work agency is the employer of the agency workers while the work is performed under the supervision and control of the user company. In many European countries, there is a strong tradition of social dialogue and collective bargaining for agency workers. It should also be recognised that agency work is a comprehensively and overall well-regulated form of flexible employment. The World Employment Confederation-Europe is convinced that conditions and restrictions for providing agency work services must always be proportionate and objectively justified. Unjustified restrictions such as too strict maximum length of assignments for agency work services should be removed, also to maintain a level-playing field compared to certain categories of digital labour platforms. When digital labour platforms and temporary work agencies perform adequately similar services, there should not be significantly different rules to be applied.

Looking at genuine self-employed people obtaining work opportunities via digital labour platforms, the highly specialised, independent IT consultants are a good example to illustrate the need for a differentiated policy approach. There is a need to recognise the freedom of genuine self-employed to use innovative tools such as digital labour platforms. IT consultants and other highly specialised experts do not need and often do not want to work under an employment status as a worker, while still benefiting from the innovative solutions for labour market matching that are offered by digital labour platforms using the genuine self-employment model.

The World Employment Confederation-Europe agrees with the definitions provided in the European Commission proposal for a Directive regarding ‘representatives’ (Article 2, paragraph 1, no. 5) and of ‘micro, small or medium-sized enterprises’ (Article 2, paragraph 1, no 6). At the same time, the size of a digital labour platform should not be a criterion to determine the working conditions of people performing work via these digital labour platforms.

### 3. Classification and the employment status

**3.1. General comment on the employment status chapter:** Taking into account the need to recognise the diversity of digital labour platforms, their business models and the related employment status, the World Employment Confederation-Europe sees a potential for tensions and frictions between Article 3 and 4 of the European Commission for a Directive on platform work. Article 4, paragraph 2 needs to ensure that the presumption of an employment relationship is not applied to the genuine self-

employed. While clarity on the employment status is important as underlined earlier, it is equally important to recognise the genuine self-employed performing platform work. In the application and implementation of Article 3, 4 and 5, it will be important to maintain a balanced approach both with regard to the proposed EU Directive on platform work and its implementation at the national level by the EU Member States.

**3.2. Correct determination of the employment status (Article 3):** The World Employment Confederation-Europe agrees with the European Commission approach that the correct classification of the employment status is the essential element and gateway to improve working conditions and social protection for people providing work via digital labour platforms. Digital labour platforms can be based on different business models, which are having strong impacts on the employment status. It is essential to recognise the genuine self-employed, to tackle misclassification and to protect those people working via digital labour platforms that have an employment status as a worker.

For the private employment services industry, it is essential to avoid any unfair competition between digital labour platforms and the agency work industry and to prevent particularly competition to the detriment of workers. Providing adequate and appropriate social protection and security to all workers in diverse forms of work is fully supported by the World Employment Confederation-Europe. The agency work sector has a leading role in providing the most secure form of flexible work.

**3.3. Legal presumption (Article 4):** The rather general criteria for a legal presumption of an employment relationship as defined in Article 4 are broadly supported by the World Employment Confederation-Europe. These reflect the common approach of the jurisprudence in the EU Member States. The legal presumption can also be an important tool to prevent misclassification. As such, the World Employment Confederation-Europe sees the legal presumption further defined at national level as proposed in Article 4 as a tool and instrumental to enable a level-playing field between providers of digital labour platforms and traditional temporary work agencies. That being said, the legal presumption should not be used as an instrument to limit or restrict genuine self-employed to provide services and find work assignments through digital labour platforms. Even within a policy approach based on a presumption of an employment relationship in the context of digital labour platforms, the option of genuine self-employment should be maintained. In line with the EU principle of subsidiarity, there is a need to balance the general, European approach for the legal presumption of an employment relationship and flexibility for the EU Member States to determine national provisions on a legal presumption of an employment relationship in accordance national labour market traditions and practices.

**3.4. Possibility to rebut the legal presumption (Article 5):** The World Employment Confederation-Europe fully supports the Article 5 on the possibility to rebut the legal presumption. This option to be established at national level is essential to preserve and protect business models of certain digital labour platforms that are based on a genuine self-employment model. At the same time, the Article 5 of the Commission proposal provides for the possibility to rebut the legal presumption "in legal or administrative proceedings or both", which is a rather vague description. More clarity on the approach at the national level to rebut the legal presumption would serve the overall aim to ensure a correct classification of people working via digital labour platforms.



## 4. Algorithmic management

**4.1. Transparency on and use of automated monitoring and decision-making systems (Article 6):** The World Employment Confederation-Europe supports the general principles of the transparency on and use of automated monitoring and decision-making systems. At the same time, it is essential to ensure business confidentiality with regard to the set up and design of algorithms used by digital labour platforms, as these are part of their business model and also increasingly used in the private employment services industry.

As also outlined in the reply to the social partner consultations, the World Employment Confederation-Europe questions the usefulness and added value of specific provisions on automated decision-making systems in an EU Directive on improving working conditions in platform work. It would be appropriate to address and regulate these elements in the EU Act on Artificial Intelligence and via the existing General Data Protection Regulation. The current provisions on algorithmic management are consistent with the proposed Artificial Intelligence Act and the General Data Protection Regulation and therefore a suitable way forward.

**4.2. Human monitoring of automated systems (Article 7):** The World Employment Confederation-Europe supports the principle of human monitoring of automated systems. National rules on the human oversight of digital labour platforms should be proportionate, non-discriminatory and objectively justified.

**4.3. Human review of significant decisions (Article 8):** The World Employment Confederation-Europe supports the Article 8 of the European Commission proposal for a Directive on platform on the human review of significant decisions. The World Employment Confederation-Europe is convinced that digital labour platforms should be based on a human centred approach, which allows and provides for a human review of significant decisions. European rules in an EU Directive on working conditions in platform work regarding algorithmic management should be fully consistent and aligned with the EU Artificial Intelligence Act that is currently subject to the EU ordinary legislative procedure. The World Employment Confederation-Europe does not see a need for specific or stricter rules on automated decision-making linked to digital labour market platforms compared to other areas in which technology and artificial intelligence is being used to run business processes more effectively. It is in this context that the World Employment Confederation-Europe questions the European Commission's approach of classifying all artificial intelligence applications related to employment as "high risk". A more differentiated approach would be beneficial, ensuring on the one hand the human review of significant decisions and at the same time capitalising on digitalisation and innovation to organise certain business processes more effectively.

**4.4. Information and consultation (Article 9):** As European employers' organisation and EU sectoral partner for temporary agency work, the World Employment Confederation-Europe attaches great importance and values sectoral social dialogue and the information and consultation of workers' representatives in accordance with national law and practices and the EU Directive 2002/14/EC. Formal information and consultation rights of people performing work via digital labour platforms should be focused on those workers that are formally employed by a digital labour platform and have an employment status as a worker in accordance with national law.

The World Employment Confederation-Europe has taken note of the guidelines published by the European Commission on self-employed and competition law. While supporting a social policy approach that allows for social protection and social security for all workers, the World Employment Confederation-Europe is convinced that collective representation and collective bargaining are most appropriate for and thus should be focused on those people having an employment status as a worker.

- 4.5. Persons performing platform work who do not have an employment relationship (Article 10):** The World Employment Confederation-Europe is not convinced that the provisions of the Directive on the transparency and use of automated monitoring and decision-making and the human review of significant decisions should be applied to people performing platform work based as self-employed. Self-employed providing services via digital labour platforms have significantly more freedom compared to those who are employed by the digital labour platforms as workers. Furthermore, the business confidentiality of algorithms must be ensured and maintained.

## 5. Transparency on platform work

- 5.1. General remark:** The World Employment Confederation-Europe generally welcomes the provisions covering the transparency on platform work. It should be taken into account that the European Union has already established an EU Directive on transparent and predictable working conditions in 2019 ([Directive \(EU\) 2019/1152](#)), which is to be transposed into national law by 2022. The general rules related to transparency and predictability of work should also apply to digital labour platforms that operated under an employment relationship and employ people as workers.
- 5.2. Declaration of platform work (Article 11):** The World Employment Confederation-Europe generally supports the requirement of digital labour platforms to provide a declaration on the work performed by platform workers to the competent labour and social protection authorities. Given the relative short work assignments that are characteristic for many people performing work intermediated by digital labour platforms, it should be possible to provide these declarations in a digital and simplified format.
- 5.3. Access to relevant information on platform work (Article 12):** In cases where digital labour platforms employ labour suppliers as workers, the World Employment Confederation-Europe supports the approach that labour, social protection and other relevant authorities must have access to the relevant information to exercise their duties and must be informed about the number of persons performing platform work through a digital labour platform and the general terms and conditions applicable to those contractual relationships.

## 6. Remedies and enforcement

- 6.1. General remarks:** Throughout the EU Social Partners' consultation phase, the World Employment Confederation-Europe has always highlighted that one of the key instruments to improve working conditions and social protection for work intermediated by digital labour platforms is the correct classification of people work working via digital labour platforms and of the platforms themselves. The World Employment Confederation-Europe supports a proactive, risk-based enforcement, building on the role of labour inspectorates to control and enforce labour law in cases where digital labour platforms are based on an employment status and employ people as workers. Against this background, the World Employment Confederation-Europe generally welcomes the provisions in chapter V on remedies and enforcement.
- 6.2. Right to redress (Article 13):** The World Employment Confederation-Europe considers the right to redress as an adequate provisions for all those digital labour platforms that operate based on an employment model and high digital labour platform labour suppliers as workers.
- 6.3. Procedures on behalf or in support of persons performing platform work (Article 14):** In line with the comment and assessment on the information and consultation rights for those performing work via digital labour platforms, the World Employment Confederation-Europe supports the need for

procedures on behalf or in support of persons performing platform work for those cases in which representatives of people performing platform work do exist.

- 6.4. Communication channels for persons performing platform work (Article 15):** The World Employment Confederation-Europe supports the setting up of communication channels for persons performing platform work as provided for in Article 15. These communication channels can contribute to enhancing transparency and accountability of digital labour platforms.
- 6.5. Access to evidence (Article 16):** The World Employment Confederation-Europe would like to recall that it attaches great importance to the correct classification of people working via digital labour platforms and of the digital labour platforms themselves. To ensure that this classification is applied correctly and complied with in practice, Member States need to ensure access to evidence in proceedings concerning a claim regarding the correct determination of the employment status. National courts must have the power to order the disclosure of evidence.
- 6.6. Protection against adverse treatment or consequences (Article 17):** The World Employment Confederation-Europe supports the provisions on the protection of people performing work via digital labour platforms against adverse treatment or consequences and the European Commission's approach of leaving the exact form and shape of this protection against adverse treatment or consequences to the national level and the competence of the EU Member States. National provisions to ensure protection against adverse treatment or consequences should be designed in a similar way as for traditional forms of work and providing services.
- 6.7. Protection from dismissal (Article 18):** With regard to the protection against dismissal, the World Employment Confederation-Europe would like to recall that digital labour platforms can be based on different business models and employment statuses, including digital labour platforms that employ people as workers to provide platform work and digital platforms that operate on a self-employment model. The correct classification of digital labour platforms based on their business model and de facto activity is essential to also determine the protection from dismissal, which should only be applicable to those people performing platform work as workers.
- 6.8. Supervision and penalties (Article 19):** The World Employment Confederation-Europe supports the provisions on supervision and penalties, while underlining that supervision and penalties of digital labour platforms should be proportionate, non-discriminatory and objectively justified.

***About the World Employment Confederation-Europe***

The World Employment Confederation-Europe is the voice of the employment industry at European level, representing labour market enablers.

The World Employment Confederation-Europe includes in its membership national federations from all across Europe, as well as several of the largest international workforce solutions companies. It is therefore fully representative of the industry, both in size and diversity. The World Employment Confederation-Europe brings a unique access to and engagement with European policymakers (EU Commission, European Parliament, and Council) and stakeholders (trade unions, academic world, think tanks).

The World Employment Confederation-Europe strives for a recognition of the economic and social role played by the industry in enabling work, adaptation, security and prosperity in our societies. Its members provide access to the labour market and meaningful work to almost 11 million of people in Europe.

