Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work

(COM(2021) 761 final)

and the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work

(COM(2021) 762 final)

(2022/C 290/16)

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1. Conclusions and recommendations

1.1. The pandemic has highlighted some changes in the world of work, which were already underway, and accelerated the expansion of all kinds of platform work, thus reinforcing the growth and impact of the digital economy.

1.2. The EESC welcomes the European Commission's proposal for a Directive on improving working conditions in platform work (COM(2021) 762), in the framework of the implementation of the European Pillar of Social Rights. This regulatory intervention should aim to set clear definitions of the criteria for classifying employment relations and for governing the use of algorithms, and should provide access to social and labour protections and rights.

1.3. The EESC has already highlighted in a number of previous opinions, which remain relevant for this opinion, the opportunities and challenges that accompany platform work, and the need to set clear and fair rules in order to ensure fair competition in the internal market, effective implementation of workers' rights and improved working conditions. The overall aim is to enforce and strengthen the internal market by securing a level playing field for all actors.

1.4. The EESC underlined that the platform economy opens up opportunities for both businesses and workers. Companies can reach new markets, reduce costs, and capitalise on innovations in digital technologies and access to global and local workforces to improve efficiency and enhance productivity. Workers have new income-generating and job opportunities, which are increasingly important and even critical for vulnerable groups such as young people, migrants and women. These opportunities have to be addressed in a socially sustainable way.

1.5. The concerns expressed related to the working conditions in the platform economy include more limited access to social protection and social security coverage, health and safety risks, insecure work, fragmented working hours and inadequate levels of income and difficulties in ensuring the recognition of collective rights. These concerns need to be addressed and balanced solutions need to be developed at appropriate levels — European, national and through collective bargaining involving platforms. The EESC deems it necessary to ensure equal treatment between 'traditional' companies and

those using digital means based on the functions of algorithmic management when used in order to manage work organisation and employment relations: direction, control and/or organisational power.

1.6. Digital labour platforms differ in size. For platform SMEs, other challenges exist, which have to be taken into account, including challenges related to the costs associated with infrastructure and administrative burdens and with adapting to the digital transformation.

1.7. The EESC recognises that flexibility in working hours can be a positive feature of platform work, welcomed in particular by those relying on platform work as an additional source of income. However, flexibility should always be based on the respect of fundamental social and labour standards guaranteed by EU law.

1.8. The EESC agrees that the legal classification of the employment relationship and its clear distinction from genuine self-employment is key to ensuring legal certainty for both businesses and workers and to ensuring workers' rights and protections. However, this issue is dealt with differently in different Member States. Law provisions on specific areas, court rulings following labour disputes, and collective agreements in targeted segments of platform work are causing a fragmentation of existing regulation within the EU and disparities in the way platform workers are treated in the various Member States. It is necessary to clearly identify the legally responsible employer, both in terms of taxation and social contributions and in view of establishing collective bargaining processes.

1.9. Europe cannot have different regulatory approaches to the same challenges. The EESC supports the aim of the European Commission's legislative proposal to address these very diverse regulations in the Member States.

1.10. The EESC stresses that the new rules of the Directive must be based on the EU social *acquis* and must include clear definitions, which should not conflict with the legal *acquis*, collective agreements or the case-law of the courts in the individual Member States. The Directive should be a clear legal framework to be adapted at national level according to national laws and practices, encouraging in particular collective bargaining processes.

1.11. Moreover, this opinion addresses in particular the following aspects of the proposed Directive:

Classification criteria: the EESC emphasises that the classification criteria set out in Article 4 of the proposal do not reflect the dynamic and rapid evolution of the digital market and would need to be constantly updated, making them vague and ambiguous. It would be more appropriate to state that the presumption of employment operates in favour of individual workers who provide their labour and/or services under the specific functions of direction, control and/or organisational power carried out through algorithmic management exercised by the digital platform in question and therefore to set the criteria according to these functions. The EESC agrees that platforms have the possibility to rebut the presumption of employment.

1.12. The EESC points out that the specific dimension of algorithmic management, which has substantial influence on workers, might not apply to defining the presumption of an employment relationship involving registered professionals or members of national professional associations, where these exist.

1.13. **Rules on algorithmic management:** the EESC agrees that algorithmic management has a significant impact on working conditions and should be transparent and accountable for workers and businesses. Algorithmic management oversees, assigns tasks, provides direct instructions limiting the level of autonomy and evaluates workers, including their performance and behaviour, as well as their earnings and working conditions and can even lead to dismissal. The Directive should explicitly state that the rights established in Chapter 3 apply to all situations where algorithmic management is used in an employment context.

1.14. The EESC believes that all platform workers should have the guaranteed right to data portability and to download their data from platforms, including data regarding skills. Additionally, further provisions should be added in order to exercise the right to review an automated or semi-automated decision. Decisions that could substantially impact on a labour relationship should be taken by human beings. The EESC appreciates the fact that the European Commission's proposal goes in this direction.

1.15. The EESC stresses the importance of effective enforcement through stronger cooperation between data protection authorities and labour inspectorates and the need to clarify where responsibilities lie, including in cross-border situations.

1.16. **Collective rights:** the EESC stresses that Article 14 of the Directive should explicitly refer to trade unions, which have the right to carry out collective bargaining. Furthermore, information and consultation rights and the right to collective bargaining should be extended to all platform workers.

1.17. The Directive should ensure fair termination processes for platform workers and information and consultation procedures in case of collective dismissals.

1.18. In line with the targets of the European Skills Agenda, the EESC underlines the importance of adequate training and information for platform workers, which could be available in various languages, on how to use and work in the platform in question, and on improving their digital skills.

2. **Introduction — The context**

2.1. The COVID-19 pandemic has accelerated the use of platform work, and made more evident, some changes in the labour world that were already underway. The EESC has already stressed that the platform economy opens up opportunities for both businesses and workers. Digital labour platforms which mediate work have rapidly penetrated a number of economic sectors. Companies can reach new markets, reduce costs, and capitalise on innovations in digital technologies and access to global and local workforces to improve efficiency and enhance productivity. Workers have new income-generating and job opportunities, which are increasingly important and even critical for vulnerable groups such as young people, migrants and women.

2.2. However, there are also challenges linked to workers' rights, taxation, wealth distribution and sustainability, which need to be tackled at European level ([1]). Platform work is becoming an important element of the new productive map of economic activities linked to digital development and the digital transition. The EESC has already highlighted the opportunities and risks in a number of previous opinions ([2]), which are relevant for this opinion, and called for regulatory intervention at European level with clear definitions of the criteria for classifying employment relations, governing the use of algorithms, and providing access to social and labour protections and rights.

2.3. The weak economic position of a great number of workers operating on a wide diversity of digital labour platforms increases health and safety risks ([3]) and job precariousness ([4]), a phenomenon that is hard to define within precise and specific national geographical boundaries. Moreover, in most EU legal systems, there is a weakening of general protection and social protection mechanisms for non-standard and atypical workers.

2.4. The EESC recognises that flexibility in working hours can be a positive feature of platform work, welcomed in particular by those relying on platform work as an additional source of income, in particular young people. However, flexibility should always be based on respect for fundamental social and labour standards guaranteed by EU law and can be regulated by national law or collective agreements on the basis of the relevant EU legal framework. This is particularly necessary for young people who have fragmented working periods, low and inadequate levels of income and who need to collect their social contributions for their future pensions ([5]).

2.5. The disparate nature of the employment relations that arise and develop on digital labour platforms within each Member State is not conducive to a uniform national solution in recognising the necessary social protection, the required occupational health and safety measures, adequate levels of income, appropriate working time and decent working conditions. These different forms of labour relations, and of low individual and collective protection at national level are multiplied at EU level, thus creating conditions for social dumping and unfair competition that threaten the very effectiveness of European and national labour protection standards.

([1]) OJ C 286, 16.7.2021, p. 70, point 2.7.
([2]) OJ C 429, 11.12.2020, p. 173; OJ C 220, 9.6.2021, p. 1; OJ C 194, 12.5.2022, p. 50; OJ C 517, 22.12.2021, p. 61; OJ C 286, 16.7.2021, p. 70.
([3]) JRC COLLEEM II Survey.
([4]) Commission Study (2021).
([5]) European Youth Forum — Position paper on Platform work.

2.6. Digital labour platforms can be classified into two broad categories: online web-based platforms and location-based platforms. They differ in size. For platform SMEs, other challenges exist, which have to be taken into account, including challenges related to the costs associated with infrastructure and administrative burdens and with adapting to the digital transformation.

2.7. The number of people working for employers using online platforms is steadily increasing, not only in the European Union but in the world ([6]). As the ILO and Eurofound have shown, the challenges for traditional businesses include unfair competition from platforms, some of which are not subject to conventional taxation and other regulations relating to their workforces. Moreover, a considerable amount of case-law has proved that some platform business models build their competitive advantage by seeking to avoid applicable regulations, be it social, environmental or economic legislation ([7]). This strategy is not conducive to long-term economic sustainability and is detrimental to fair competition, in particular between large and micro or small platform companies.

2.8. With the digital transition, strongly supported by the EU, in the future ever more sectors and professions will be impacted by the model of 'online platforms'. The EESC has repeatedly stressed ([8]) that good internal market regulation must be enforced and strengthened by ensuring a level playing field for all players and that digitalisation must benefit workers and companies. It is essential to develop a regulatory framework that ensures safe, fair and healthy working environments and conditions through a system of clearly defined rights, responsibilities and duties.

2.9. All workers have the right to fair and decent working conditions. This is a fundamental principle of international labour law and EU law. The worker has the right, in accordance with Article 4 of Directive (EU) 2019/1152, to be informed by the employer on the essential elements of the labour contract or employment relationship. Workers employed by a platform must be subject to the same labour law provisions as those in force in the country where the service is provided.

2.10. The key issue is therefore the clear definition of 'employee' and its clear distinction from genuine 'self-employed worker'. The efficacy and effectiveness of the entire regulatory framework of the draft directive depends on the clarity of these definitions. The studies referred ([9]) to, show that in many cases workers are asked to register as self-employed, and the challenge is to avoid bogus self-employment. Workers should get the necessary information to be able to choose whether they want to be genuinely self-employed or not. The European Commission study referred to in the Commission Staff Working Document Impact Assessment Report on improving working conditions in platform work shows that 5,5 million platform workers are estimated to be incorrectly classified as self-employed.

2.11. The issue of the legal classification of the employment relationships is dealt with differently in the Member States. The risk of mistakes in the legal classification of the employment relationships is mainly due to the scarcity of legislation in the national legal systems and the lack of legal clarity. So far, no Member State has comprehensively addressed the issue of the legal classification of platform work. Some Member States (Italy, Spain and France) have opted for sectoral legislation focusing on transport and delivery platforms. A large number of Member States (Belgium, Germany, Greece, Spain, France, Ireland, Italy, the Netherlands and Sweden) have tried to clarify labour relations of uncertain classification through legislation, administrative acts or case-law, but these refer to general labour market situations and do not take into account the specificities of platform work. In Italy and Spain, collective bargaining has played an important role with specific agreements and protocols that have anticipated specific legal provisions.

2.12. The opinion that the existing regulatory system at national level, in the various EU countries, is currently not suitable for regulating the various profiles of work through digital platforms, is confirmed by almost 100 legal disputes brought by workers and/or their union representatives, and in the diversity of the solutions provided by the case-law of many European countries, divided between those that reaffirm the self-employed nature of the employment relationship

([6]) ILO report The role of digital labour platforms in transforming the world of work; Eurofound Report 2018; EC staff document — data on the numbers and turnover that tripled with the pandemic (according to the ILO data, in the EU a 12-billion euro turnover was recorded in 2020); CEPS Final Report 2021; Digital labour platforms in the EU; ETUI Study 2021; The definition of worker in the platform economy: exploring workers' risks and regulatory solutions.

([7]) OJ C 123, 9.4.2021, p. 1, point 3.2.7.

([8]) OJ C 440, 6.12.2018, p. 1; OJ C 123, 9.4.2021, p. 1; OJ C 286, 16.7.2021, p. 70; OJ C 367, 10.10.2018, p. 15.

([9]) See footnote 6.

and the increasingly numerous ones that recognise its employment nature, without excluding those that place this specific case in an intermediate legal situation ([10]). Although these procedures have often led to contradictory results, they concern mostly delivery and driver services (on-location platform services) and most of them agree in defining people working on platforms as employees (particularly in the transport and delivery sectors, which are probably those in which there is the most contractual and union protection).

2.13. Another key issue regards the impact of algorithmic management on working conditions, which is inherent in the business model of digital labour platforms ([11]). Attention should be paid to ensuring transparency and accountability in relation to algorithms for workers and businesses.

2.14. Individual Member States have taken measures to improve this situation by implementing legislative initiatives that specifically address algorithmic management in the workplace, (IT, ES). Meanwhile, a number of Member States (AT, BE, CY, CZ, DK, EE, FI, DE, IE, LV, LT, LU, NL, SV) address algorithmic management by undertaking measures within the framework of privacy, data protection and non-discrimination policies. Pertinent court decisions have been made in several countries (FR, IT, NL, PL and LU) ([12]). The fragmentation of existing regulation within the EU also leaves digital labour platforms operating in different countries subject to different regulations. Given the flexible, mobile and rapidly evolving nature of the platform economy, this lack of a common approach will create difficulties in maintaining a level playing field among the Member States.

2.15. In this context, the European institutions' initiative is to be welcomed, with specific reference to the package of measures submitted by the European Commission on 9 December 2021 for improving the working conditions on platforms, in the framework of the implementation of the European Pillar of Social Rights. The European Commission's initiative recognises the urgency of addressing the disparities in treatment between Member States, addresses the problematic aspects outlined above and puts forward a regulatory proposal with a directive.

3. **General considerations**

3.1. The EESC agrees with the Commission's decision to draw up a proposal for a directive, the scope of which extends to platform-based work developed both through on-line web-based platforms (e.g. legal services, translation services, freelancers, etc.) and through on-location-based platforms, which require the worker to provide a physical service (e.g. taxis, deliveries, home services). As clearly stated in recital 49 of the proposal for a directive, the need for a directive rather than non-binding legal instruments is justified by the extreme diversity of situations, working conditions and legislation in each Member State, particularly with regard to ensuring formal and actual coverage, and the adequacy and transparency of social protection systems, especially as Member States provide for different levels of social protection. The large and growing number of court cases and judgments in favour of classifying this work as employment is a clear demonstration of the fact that the matter is not regulated in a sufficiently clear manner even within the individual national legal systems. The objective of improving working conditions through digital platforms cannot therefore be sufficiently achieved by each Member State alone but, in accordance with the subsidiarity principle, can be better achieved at EU level.

([10]) Among the rulings in favour of the employment nature of the working relationship it is sufficient to recall, by way of example: the ruling of the French Court of Cassation (*Chambre sociale*, No 374 of 4 March 2020), which recognised the employment nature of the work performed by an Uber driver; the ruling of the Spanish Supreme Court (*Tribunal Superior de Justicia de Madrid, Sala de lo Social, Sentencia* 40/2020 of 17 January 2020), which recognised the employment nature of the working relationship between riders and the Deliveroo platform; the ruling of the Barcelona Court, of 13 January 2021, which acknowledged the employment nature of the employment relationship of as many as 748 riders. According to the latter ruling, it is necessary to examine new indexes on which to base the judgement on the nature of the relationship, thus concluding that the hourly flexibility is, in any case, the result of a choice that aims to identify the most profitable time slots for the company and is certainly not aimed at preserving a better work/life conciliation for riders and that riders are therefore to be considered employees. In addition to these rulings, the Belgian, Italian and Dutch ones have ruled out that the work relationship is self-employment on the basis of the relativisation of riders' alleged freedom in the concrete performance of the service.

([11]) Commission Study to support the impact assessment on improving working conditions in platform work.

([12]) Commission Study to support the impact assessment on improving working conditions in platform work.

3.2. Quite rightly, the proposal for a directive notes in recital 9 that 'When digital platforms operate in several Member States or across borders, it is often unclear where and by whom work is carried out via digital platforms. Moreover, national authorities have no easy access to data on digital work platforms, for instance on the number of people carrying out work via digital platforms, their employment situation and their working conditions. This makes the implementation of the relevant rules more complex, also with regard to labour law and social protection'. The EESC has already pointed out ([13]) that it would be necessary to set up a register of platforms in every Member State and a Europe-wide database of large and small platforms.

3.3. These legal uncertainties may in some situations favour the emergence and proliferation of undeclared forms of work and deplorable situations of exploitation and competition between the workers themselves, who might be under illegal subcontracting practices. These workers are often migrants, who are objectively weak and unaware of the minimum protection rights envisaged. The proposed Directive does not contain a provision on subcontracting, hence it does not offer those platform workers any protection against those practices ([14]).

3.4. The text of the Commission proposal, however, is vague, generic and ambiguous on a number of points. It does not reflect the objectives of protecting and guaranteeing social and labour rights clearly stated in the recitals, in particular, the definition of a worker operating through digital platforms (Articles 2 and 5) and the rights of both workers and union representatives to information and consultation (Article 9, which, however, makes explicit reference only to Directive 2002/14/EC). As a preliminary point, it should be noted that the proposal for a directive often equates the protection of workers' rights with the principle of the freedom to conduct a business. The rights of workers and fundamental freedoms must be properly safeguarded, in accordance with legislation and in line with the Charter of Fundamental Rights.

3.5. The EESC deems it necessary for the directive to include specific provisions on working conditions and social security based on the principle of non-discrimination, also with regard to similar and comparable workers employed in the same sector. This would encourage the development of uniform contractual protection for sectors and combat forms of social and fiscal dumping.

3.6. The EESC welcomes the proposed efforts of the Commission to support the sharing of good practices in the context of its mutual learning programme, as well as support to the activities of the European Labour Authority within the scope of its mandate; to support Member States with the application of, and guidance on, social security coordination rules, where necessary and through EU programmes (such as Horizon Europe) ([15]).

3.7. The EESC believes that the draft Directive should set out clear reference criteria and principles to guide national lawmakers and to encourage collective bargaining in order to lay down rules that provide certainty, security and predictability to a highly digitalised production environment. These rules must aim to create a level playing field between digital labour platforms and offline service providers. They should not conflict with the legal *acquis*, should not change the content and scope of the rules defining the employment nature of a service relationship in accordance with national laws, collective agreements, national classification systems or the case-law of the courts of the individual Member States, and should not undermine fair competition between companies.

3.8. The EESC also deems it necessary to ensure equal treatment between 'traditional' companies and those using digital control means based on algorithmic data management, on the basis of transparent and fair competition between them, clarifying the employee status for workers providing services and/or performing activities in these sectors. The EESC also welcomes the aim of the Commission to clarify and support the genuine self-employed. 'When necessary, the self-employed will also receive support to clarify their status'. The Directive is expected to cement the autonomy of the self-employment and support their ability to take advantage of their entrepreneurial possibilities, e.g. by developing their client pool. Those who are already genuinely self-employed will retain the benefits related to their employment status ([16]).

([13]) OJ C 429, 11.12.2020, p. 173, point 1.15.
([14]) Report Fairwork (2021); Fairwork response to the European Commission's Proposal for Directive on Platform Work.
([15]) See the Commission Communication.
([16]) 9.12.2021 COM(2021) 761 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work, p. 10; the box down the page.

3.9. It is therefore crucial that the scope of application (in Article 1) is improved and made less ambiguous, to ensure that the directive applies to all digital platforms that provide a mediated supply of labour. It is necessary to clearly identify the real and legally responsible employer also in terms of tax and social contributions and in view of establishing collective bargaining processes, taking into account the specificities of micro and small platforms.

The reference to the concept of organisation of the work performed by individuals may lead to the undesired exclusion of certain digital platforms.

4. **Chapter 4 — Specific considerations**

4.1. In this opinion, the following aspects of the proposal for a directive will be analysed in particular:

— the criteria for classification as an employee

— algorithmic management

— collective rights.

4.2. *Classification criteria*

4.2.1. Article 4 of the proposal sets out the criteria on the basis of which the presumption of the employment of the work relationship is established. The EESC notes that the proposed criteria should reflect the dynamic of the digital market, and the evolution of business models and working methods, and that they would need to be constantly updated. We regret to note that the criteria set out in Article 4 are still predominantly expressions of different forms of control exercised by the digital platform over the employee's work activity. The EESC believes that anchoring labour protection to the exercise of control does not adequately capture and correct the power imbalance between the platform and the workers.

4.2.2. Besides, Article 4 of the proposal leaves too much discretionary power to platforms to decide — as the presumption of employment is linked to the presence of at least two of the five criteria — but in a context that is constantly evolving, it would be easy to circumvent these criteria. The EESC believes that a clearly defined employment status, even for those working few hours, would guarantee the right to social protection, health and safety, the right to organise and the right to collective bargaining in relation to the working hours performed, therefore guaranteeing the necessary flexibility.

4.2.3. The criteria should more punctually address the risk of downward labour standards. For this purpose, it would be desirable to have a single criterion for the presumption of employment, which can be rebutted by the platform on the basis of Article 5, which places the reverse burden of proof on the digital platform, proving the self-employment nature of the work relationship. The EESC agrees with the European Commission's proposal that it should be the platforms to rebut the presumption of employment.

4.2.4. Indeed, self-employed workers and genuine self-employment relations, for which there is no definition in the directive, must also be adequately protected. There are many different forms of platform work, which cannot fall within one single category. There are forms of work that can be considered similar to employment and there are forms of work which require skilled professionals, even highly skilled workers, which in some countries are comparable to those who are listed on professional registers or who are members of national professional associations. The specific dimension of algorithmic management, which has substantial influence on workers, might not apply to defining the presumption of an employment relationship involving registered professionals or members of national professional associations, where these exist.

4.2.5. It would therefore be more appropriate to state that the presumption of employment in the field of digital labour platforms operates in favour of the individual workers who provide their labour and/or services under the direction, control and/or organisational power of a digital platform using algorithmic management.

Platforms should be able to rebut this presumption of employment by proving that they do not exercise commercial powers of organisation, even indirect or implicit, over the provision of the service/labour by the worker ([17]).

([17]) See definition in recital 30 of the Guidelines of the Commission on competition law and collective bargaining: (iii) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location. Platforms which do not organise the work of individuals but simply provide a means through which the solo self-employed persons can reach end-users, do not constitute digital labour platforms. For example, a platform that merely aggregates and displays the available service providers (e.g. plumbers) in a specific area, thereby allowing customers to use their services on demand, is not considered a digital labour platform, as it does not organise the work of the service providers.

4.2.6. A common argument in court rulings recognising the employment nature of the work relationship — and, indeed, issued by high national courts — is that the platform, and more specifically algorithmic management, fully exercises a form of oversight over the performance of the service executed by the worker. This, in fact, indicates that the service performed by work is fully integrated into the business of the platform. This element in itself reinforces the need to counterbalance the aforementioned control power by providing adequate individual and collective guarantees to all workers providing their labour and/or services through digital platforms.

5. **Specific comments and recommendations on algorithmic management**

5.1. Algorithmic management processes a significant amount of data, oversees, assigns tasks, provides direct instructions limiting the level of autonomy, and evaluates workers, including their performance and behaviour, as well as their earnings and working conditions and can even lead to dismissal. The EESC welcomes the fact that the draft Directive adopts the GDPR — General Data Protection Regulation — principles, and in consistency with GDPR Article 9, the Directive should clearly prohibit the processing of sensitive personal data, including political opinions and trade union membership. The Directive should explicitly state that the rights established in Chapter 3 apply in all cases of algorithmic management, also when the platform manages to prove that they do not exercise commercial powers of organisation, even indirect or implicit, over the provision of the service by the worker, and thus, the presumption by the platform that there is no employment relationship.

5.2. The systems used by digital labour platforms often rely on elements of artificial intelligence (AI). As platforms will have to abide by both the provisions of the Directive and the AI Act (a product-market regulation), the EESC invites the Commission to cross-reference the proposed directive and the AI Act, and vice-versa, in order to avoid or clarify possible inconsistencies and loopholes.

5.3. The EESC encourages once again ([18]) the Commission to clarify the responsibilities of all parties involved in matters such as health and safety, data protection, insurance and legal liability, with a view to evaluating, adjusting and harmonising existing regulations. The EESC has already noted that algorithms used by platforms should also be considered in the same way as spoken or written instructions in conventional work ([19]).

5.4. The right to review an automated or semi-automated decision is highly welcome. However, the EESC believes that to practically exercise this right, the Commission should add provisions that require digital labour platforms to: (a) develop their algorithms and systems under the 'safe-by-design' principle; and (b) following the rationale of the proposed AI Act, envisage provisions that require digital labour platforms to undergo a conformity assessment of their algorithms, not only before they deploy them but also during the provision of labour /or service by the worker. The conformity assessment should be carried out with a multidisciplinary approach in order to promote a joint assessment by the experts nominated by the trade unions, the platform and the labour, social protection and other relevant authorities. When a conflict arises in the review of an algorithm-assisted decision, workers should have the possibility to have access to an independent arbitration.

5.5. However, the EESC believes that Article 8 should provide that the worker could be represented by the trade union in case of human review of significant decision.

5.6. As the platform work model relies on customer review, platform workers should have the ability to transfer and use reviews, as a key element of data, across platforms. The EESC believes that right to data portability should be guaranteed to all platform workers. Even more importantly, the Directive should guarantee their ability to use their profile, including skills, to obtain employment outside the platform economy.

5.7. The success of the Commission's proposal will depend on its effective enforcement. Cooperation between data protection and labour authorities is required by the proposed Directive. However, the EESC would like to draw the attention of the Commission to the fact that Data Protection Authorities in several countries do not have the task to carry out in-depth examinations of labour issues, and vice-versa, in particular as far as oversight and redress are concerned. Therefore, the EESC invites the Commission to further clarify the allocation of competences, including cross-border considerations, and to take into account labour inspectorates.

([18]) OJ C 429, 11.12.2020, p. 173.
([19]) OJ C 429, 11.12.2020, p. 173, point 1.8.

6. **Collective rights**

6.1. In the chapter on enforcement, Article 14 of the Directive refers to workers' representatives and not to trade unions. This is a critical issue since it is important to explicitly refer to trade union representatives so as to avoid creating unions of convenience and providing workers with rights to collective representation, also in the event of a dispute.

6.2. The EESC notes that the Directive provides information and consultation rights. However, Article 9 only refers to Directive 2002/14/EC establishing a general framework. A direct reference to Directive 2001/23/EC on transfers of undertaking, Directive 98/59/EC on collective redundancies and to Directive 2009/38/EC on the European Works Council should also be made. The EESC notes that Article 10, that extends the labour rights established in Chapter 3 of the Directive to all platform workers (also to those not having an employment relationship) excludes the information and consultation rights set out in Article 9. This derogation cannot be justified. A clearer definition of information and consultation rights is required in order to support collective bargaining, which is a right that must be recognised for all platform workers too ([20]).

6.3. The EESC underlines that the rights of information and consultation of workers' union representatives (Article 9) should be guaranteed, also with regard to the parameters, rules and instructions that underpin algorithms or artificial intelligence systems that influence decision-making or the adoption of decisions that may affect working conditions, access to work and the preservation of employment, including profiling.

6.4. The EESC notes that platform workers should receive adequate and specific training available in various European languages on how to use and work in the platform and should be trained in the relevant digital skills. As highlighted in a previous opinion ([21]), the implementation of the 2021-2027 Digital Education Action Plan needs to ensure effective social dialogue and consultation with stakeholders, respect for and enforcement of labour rights and workers' right to information, consultation and participation, and workers' ability to develop their digital and entrepreneurship skills, in particular through vocational education and training (VET), adult learning and employee training, in order to reduce the skills gaps companies face.

6.5. As stated in a previous opinion, in connection with the introduction of new technologies such as robots and smart machines, the EESC highlights in its study the importance of informing and consulting workers' representatives in advance and the need for collective bargaining to accompany the changes generated by these technologies ([22]). It also points out that the Directive on European works councils makes such consultation mandatory ([23]).

6.6. Bargaining also concerns sectoral collective bargaining, which constitutes a large part of the definition of workers' rights, but there is no reference to sectoral agreements in the proposal for a directive.

6.7. Ensuring fair termination processes for platform workers and access to independent dispute resolution mechanisms are important objectives that should be included in a regulatory framework. The proposed Directive only refers to individual dismissals, while it should also address the issue of information and consultation procedures in the case of collective dismissals, referring to existing EU legislation ([24]).

Brussels, 23 March 2022.

The President
of the European Economic and Social Committee
Christa SCHWENG

([20]) OJ C 123, 9.4.2021, p. 1, point 3.2.8.
([21]) OJ C 286, 16.7.2021, p. 27.
([22]) EESC Study (2017).
([23]) OJ L 122, 16.5.2009, p. 28.
([24]) Directive 98/59/EC; Directive 2001/23/EC.

ANNEX

The following counter-opinion, which received at least a quarter of the votes cast, was rejected during the discussions (Rule 43(2) of the Rules of Procedure):

AMENDMENT 1

SOC/709 — Working conditions package — platform work

Replace the whole opinion:

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.

1.3. 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]) 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 the self-employed and Council recommendation on improving the protection of the health and safety at work of self-employed workers.

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]) 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, the 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]). 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.

([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.

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.

([9]) Regulation (EU) 2016/679.
([10]) COM/2021/206 final.

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 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/EC ([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.

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.

Outcome of the vote:

In favour: 149

Against: 80

Abstention: 17

([11]) COM/2021/762 final, Explanatory Memorandum, p. 13.

([12]) Directive 2002/14/EC.