

ETUC reply to the Second phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work

Resolution adopted at the extraordinary Executive Committee meeting of 9 September 2021

Main messages

This document complements the ETUC reply to the First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work, which was adopted by the ETUC Executive Committee in March 2021 and submitted to the European Commission.

ETUC calls on the Commission to propose an ambitious Directive based on Article 153(2) TFEU that provides for a rebuttable presumption of employment relationship where the burden of proof should be borne by the company, (the platform company) and which must respect national traditions and practices and the autonomy of social partners.

ETUC strongly opposes the creation of a third category differentiating between workers and self-employed. The personal scope of the proposal should encompass all workers, including non-standard workers, not least those working in platform companies, as well as digital platforms operating in the EU.

Platform companies should abide to their labour, social protection, and fiscal obligations as employers, including the sectorial agreements negotiated in collective bargaining by social partners. Also, platform companies should fall under the same rules as other companies do in cross-border situations.

A presumption of employment relationship with a reversal of the burden of proof (from the worker to the employer) will not affect the business model of platform companies operating with genuine self-employed workers, upon validation of the relationship from the platform company side towards the relevant ad hoc administrative or judicial body.

The role of trade unions and collective bargaining is key when it comes to organising work through platforms and to defending the rights and interests of its workers. The EU should encourage Member States and social partners to stimulate social dialogue in platform work and to support capacity building in this context.

With regards to the new rights related to algorithmic management, collective bargaining between the social partners plays a key role in designing and implementing regulation concerning the democratic control and transparency of the algorithm, and the protection of the data of workers. Algorithmic worker surveillance should be prohibited.

I. What are your views on the specific objectives of possible EU action set out in Section 5.1?

ETUC agrees with the overall objective of the European Commission to ensure decent working conditions for people working in platform companies. ETUC also welcomes the references to the European Pillar of Social Rights, which should be the compass of the European policy and legislative action in the social and employment fields.

As stated in the previous reply, ETUC strongly objects to any notion of platform work as a separate form of work which necessitates separate rules regarding employment or social security. In the end, the need to protect workers in platform companies comes down to an issue of enforcement and equal treatment. Dedicated rules are necessary to facilitate the identification of platform companies as employers and the enforcement of their obligations of employers. Workers in platform companies should have the same employment rights and protection as any other worker. As a point of caution, ETUC refers to "workers in platforms" and not to "platform workers" to avoid creating the misunderstanding that we refer to a unique category of workers for which specific labour legislation should be enacted. This confusion would provide for a third category of workers, to which ETUC opposes.

The consultation document of the European Commission addresses digital labour platforms as a "private internet-based company which intermediates with a greater or lesser extent of supervision on-demand services, requested by individual or corporate customers and provided directly or indirectly by individuals, regardless of whether such services are performed on-location or online". However, in this consultation reply, ETUC aims at addressing digital labour platforms, but not digital marketplaces, search engines or social media. Labour platforms are online platforms that allows for individuals, organisations or companies to get in touch with other individuals who provide services in exchange for remuneration. Labour platforms are in fact companies that can be classified as employers, (temporary work) agencies or intermediaries, all too often trying to avoid such a classification and, by that, the applicability of regular employment law.

Despite the ETUC agreeing with the overall objective, when going into detail about the working conditions, the Commission refers to contributing to "fairer working conditions". This phrase could be misleading since it may simply account for a minor improvement of the current situation. No reference is made, inter alia, to the need to provide decent salaries to workers in platform companies, which should be regulated either through national legislation, or through collective bargaining.

The analysis of the European Commission and the possible specific objectives proposed lack the need to recognise as employers those platform companies, with the function of employer when the presumption applies. Platform companies should be liable for their legal obligations in matters related to labour, income tax, financing of social protection, responsibility for health and safety, due diligence and corporate social responsibility. Any move towards the classification of workers in platform companies as employees without tackling the employers' liability would become a lame exercise that would provide for the creation of bogus intermediaries between the workers and the platform company, with the function of employer when the presumption applies, and the unfeasibility of exerting the right of workers to bargain

collectively with their employers, among other trickeries devised by platform companies.

While not opposing the use of platform companies as such, ETUC challenges the statement of the European Commission regarding the creation of jobs. Without seeking to confront workers in platform companies with other groups in the "traditional" labour market, the rise of workers in platform companies in a particular sector of the economy should be seen in a wider context in which the employment removed in the traditional sector of reference is considered, where employment is often stable and with good working conditions. Also, the aspect of the lack of quality of employment in platform companies should be taken into consideration. At the same time, the negative effects on the hourly remuneration within the sector affecting both new workers in platform companies and workers employed in the "traditional labour market" should be equally taken into account.¹ Earnings of workers in platform companies as a rule are impacted by time spent doing unpaid tasks and vary across different types of platform companies.

Another argument, which is often presented when praising the potential of platform companies in the labour market, is the capacity to ease the transition into the labour market, especially for groups facing discrimination. Young people and migrant workers are indeed over-represented among workers in platform companies. However, this category of workers is over-represented in the low-wage sector. The very fact that they are found here thus does not prove lower barriers of entry (such as reduced discrimination) in the platform sector.² While some platform jobs may indeed offer employment with fewer hurdles, which is beneficial for workers who have difficulty entering the labour market, these workers deserve no less labour market protection than other workers. If any barriers to entry exist, these must be removed for access to good quality jobs to integrate the excluded group of workers. Discrimination can equally play a role through the use of ratings to evaluate workers – as there is a clearly documented bias against minorities in ratings. The model of fierce competition propelled by the use of rankings and the variable income, has led to the impoverishment of workers in platforms, forcing them to work in precarious conditions. All workers employed through platforms should enjoy decent working standards and equal treatment independently of their nationality, residence or migration status. ETUC supports innovation and the creation of new companies. However, this should always occur in full observation of human rights and therefore, the labour legislation (including occupational safety and health legislation). Innovation cannot be boosted at the expense of the rights of workers.

The proposal of the European Commission to guarantee that people working in platform companies have – or can obtain – the correct legal employment status considering their relationship with the platform companies and gain access to associated labour and social protection rights is welcomed by ETUC. ETUC wants to put an end to the misclassification of workers, which deprives them of their rights. We cannot ignore the fact that labour protection legislation is a necessary precondition for

¹ BERGER et al. Drivers of Disruption? Estimating the Uber Effect. Lund and Oxford, 2017. This is the evidence provided by ETUI. Further references can be provided if deemed necessary, yet it should be reminded that this is a political document, not a scientific paper.

² World Employment and Social Outlook 2021: The role of digital labour platforms in transforming the world of work International Labour Office – Geneva: ILO, 2021.
HAUBEN et al. The platform economy and precarious work. European Parliament, Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies. Brussels, 2020.

access to social protection, access to lifelong learning and prevention of occupational risks. Workers in platform companies are generally excluded from being covered by this legislation having regard to the fundamental principles of national legal systems with regard to employment.

It should be recalled that one of the arguments used by platform companies in their advocacy strategies is that the heterogeneity of platform companies is so wide, that a one-size-fit-all solution would not be possible. ETUC strongly opposes to this misleading argument. Labour law and/or social dialogue has traditionally been able to regulate heterogeneous forms and patterns of work (from part-time work to home working, to agency work) on the basis of common regulatory principles, common legal institutions, and a broadly universally applicable set of rights. For example, it has dealt effectively with pre-modern forms of 'on-demand' and casual labour (e.g. work in the docks) and has proved effective in decasualising and regulating them. EU law has also dealt with the emergency of 'atypical work' in the 1990s by regulating it on the basis of the blueprint of rights designed for standard forms of employment (and the principle of equal treatment). There is nothing structurally novel about 'work through platforms' (in its many manifestations) that would prevent existing general labour law principles and in relevant cases collective agreements to regulate this social phenomenon. It can also be noted that courts in most cases have classified persons working in platform companies as workers, after scrutinizing the prevalent circumstances. As further elaborated below, those platform companies which operate with genuine self-employed workers should be provided the opportunity to continue doing so once proving through an administrative or judicial procedure that the conditions are met.

Concerning democratic control and transparency of the algorithm, and the protection of the data of workers, a key role in determining and implementing regulation must be played by collective bargaining between the social partners. Moreover, it must be discussed through information, consultation and participation of workers in full compliance with principles of non-discrimination. ETUC therefore agrees with the specific objective of ensuring fairness, transparency and accountability in algorithmic management.

ETUC supports the need to undertake further independent scientific research regarding the developments in platform companies and the need for national and European authorities to track the operations of platform companies to guarantee their observance of labour and fiscal obligations. This research should not prevent the European governing bodies from taking urgent legislative action.

II. What are your views on the possible avenues for EU action set out in Section 5.2 of this document?

ETUC states that a possible EU initiative would be designed in full respect of the autonomy of social partners. With regards to the personal scope of both workers and employers (platform companies), ETUC demands to broaden the scope of the

proposal to cover all workers, including non-standard workers³, not least those working in platform companies, as well as digital platforms operating in the EU.

Non-binding instruments have, so far, delivered little to no protection for workers in platform companies. Besides, there is a risk that this may lead to a fragmented approach across the EU. The solutions to the challenges identified by the European Commission in the previous section will only be brought to practice if these are regulated by legislation. This said, considering an ambitious legislative proposal as the basis of the action, ETUC believes that additional non-binding instruments may provide added value.

The business model of many platform companies is based on the circumvention of labour law and social protection legislation. These economic models based on social dumping provide for unfair competition with the traditional companies in each sector. Hence, binding legislation is needed not only to protect employees and genuine self-employed workers, but also to safeguard the European social protection systems and to guarantee fair competition within the EU's internal market. This is particularly important as digitalisation evolves and more sectors / professions might have to face some sort of 'platformisation' in future.

ETUC agrees with the statement of the European Commission that any initiative on platform work should respect national concepts regarding employment status, including the definition of worker (in opposition to a European definition of worker), yet considering the general principles of the EU legislation and case law established by the Court of Justice of the European Union. The same restraint should apply to seeking a definition to employer, since this could again provide for legal wiles from platform companies to avoid the observation of the legislation.

ETUC strongly opposes the creation of a third category between workers and self-employed, and therefore the intention of the European Commission to not "create a 'third' employment status at EU level" is welcomed. However, besides stating this intention, the European initiative should target all workers, as limiting the scope to only workers in platform companies would provide for the creation de facto of a third status.

5.2.1. Addressing misclassification in employment status

ETUC claims that the employment status, whether a worker is an employee with an employment contract or a self-employed person offering services, is decisive in the access to other rights within EU Member States. We therefore agree with the analysis of the Commission about the gateway effect of the status towards many existing rights and protections, both at Member State and EU level. The document mentions "the imbalance of power between the platforms and the people working through them" as a criterium to consider for the establishment of a potential rebuttable presumption of an employment relationship. More concrete criteria will, however, be needed to guarantee a broad coverage for the potential regulation. ETUC has already proposed, in its previous reply, different possibilities to demonstrate the subordinate relationship

³ The Governing Body of the ILO defines non-standard forms of employment as a term which encompasses work that falls out of the realm of the "standard employment relationship", understood as work that is full time, indefinite, as well as part of a subordinate and bilateral employment relationship. Non-standard employment around the world: Understanding challenges, shaping prospects International Labour Office – Geneva: ILO. 2016

(these are exposed also in this document). It is very important that there is sufficient flexibility on how it can be implemented into national law. Letting member states use their labour code and current practises is crucial when it comes to pinning down parameters for a presumption yet considering the general principles of the union legislation and case law established by the Court of Justice of the European Union.

In many countries, non-standard workers and workers in platform companies (including the self-employed) cannot legally organise themselves in trade unions. The precarious status of these workers is the main cause of the fear of organising themselves collectively. The right to organise is thus concretely violated by precarious conditions of employment, subordination to one employer, economic dependence on low income and lack of trade union protection or protection against "dismissal" (which can be effected by a simple log off from the platform). In recent years, ETUC and its member organisations have been working to organise these workers.

The first option identified is the rebuttable presumption of an employment relationship. ETUC calls for a European initiative that provides for a rebuttable presumption of employment relationship where the burden of proof should be borne by the company (e.g., the platform company), who should abide to its labour, social protection, and fiscal obligations as an employer, including the sectorial agreements negotiated in collective bargaining by social partners.

Member States have different rules for the presumption of employment relationships in their labour codes. For example, in Portugal, the existence of an employment relationship is presumed when, in the relationship between the person providing an activity and another or those who benefit from it, two criteria out of a list of 5 are met and this also applies to platform companies in the sector of transport activity of passengers.

The most outstanding national case for a strong presumption of employment relationship for workers in platform companies can be the Spanish Royal-Decree Law 9/2021, which extends the application of the labour code to workers in delivery platform companies. The law, which unfortunately applies only to workers in delivery platform companies, establishes that "the activity of persons providing paid services consisting of the delivery or distribution of any product or merchandise, by employers who exercise the entrepreneurial powers of organization, direction and control directly, indirectly or implicitly, by means of algorithmic management of the service or working conditions, through a digital platform".

While supporting the work of Portuguese and Spanish trade unions to complete the above-mentioned agreements, ETUC recalls the limited personal scope of these laws, which apply only to workers in the activity of transport of persons or delivery platform companies. These examples are presented to show the feasibility of a legal presumption of employment relationship, however a European regulatory framework for workers that should cover all platform companies operating in the EU is needed, among other reasons, to overcome the mentioned shortcomings as well as the potential legal fragmentation at a European level.

At European level, cases of employment presumption are analysed through the Directive 2009/52/EC on Sanctions and measures against employers of illegally staying third-country nationals, and the Directive 2019/1152 on Transparent and

predictable working conditions. These, once again, aim at proving the feasibility of an employment presumption at European level, yet for the specific case of the former directive it should be recalled it does not apply to Ireland and Denmark.

EU legislation and case law support the elements to determine whether a person is a worker or a self-employed person, thereby abstracting from the party's intention and looking into the actual design of the employment relationship.

ETUC agrees with the proposal that it should be the responsibility of platform companies to raise the case to the court or the relevant administrative body to prove that the person is in fact self-employed. The presumption of an employment relationship would set the status of employee as the point of departure for the labour and contractual relation between the platform companies and their workers, unless it is rebutted.

ETUC opposes to the introduction of administrative procedures seeking to establish or control the employment status of people working in platform companies, as well as the introduction certification processes for work-related contracts. ETUC however believes that the necessary corollary to the establishment of a legal presumption of status (backed by a high standard of proof to discharge that presumption) would be the introduction of a judicial or an ad hoc administrative binding procedure that would be triggered by platform employers seeking to rebut the statutory presumption in order to demonstrate that they are mere digital intermediaries between genuine business falling outside the scope of the protection of the directive⁴.

ETUC believes that in the absence of this type of ad hoc administrative or judicial bodies for platform companies, the value of the introduction of a presumption of status would be severely diminished if not wholly frustrated. In essence it would only assist workers that have the resources and determination to seek judicial or administrative redress against their contractual misclassification at the hands of their – invariably better resourced – platform employers. Workers employed by platform companies are often some of the most precarious and vulnerable workers in the labour market, and their ability to access judicial and administrative dispute resolution processes is effectively hampered by a combination of factors, including discrimination against ethnic groups, low pay, job insecurity, and lack of union representation (often due to their employers' hostility towards unions). ETUC maintains that in order to fulfil its purpose and objectives, one of the consequences of the employment status presumption should be that a person employed through a platform company is presumed to be its worker until the platform employer rebuts that presumption before an appropriate administrative or judicial body, to be established according to national labour codes and industrial relations. The decisions of such bodies should be reviewable, by either party and by the most representative trade unions operating the sector acting on behalf of their members, without delaying the application of such decisions.

The primary effect of a rebuttable presumption is to establish that somebody (e.g. a worker) has a certain employment status, until a different status is proven by the other

⁴ To provide evidence on the existence of European legislation regulating the introductions of similar administrative bodies, it should be pointed that, occasionally, EU Directives have mandated the introduction of specific administrative bodies tasked with performing certain objectives and tasks (Cf. for instance Article 20 'Equality Bodies' of Directive 2006/54; Commission Recommendation 2018/951), and similar ad hoc bodies could be created by the Directive for the purposes of ensuring a fast-track assessment by employers seeking to reverse the employment status presumption. As an alternative, existing publicly funded, administrative enforcement and/or dispute resolution bodies could be tasked with performing this function.

party (e.g. the employer). The level of evidence expected by the employer to rebut the presumption can vary from system to system.

ETUC calls for European regulation to guarantee a strong presumption of an employment relationship, in which the presumption is generic, in the sense that work provided via a platform company presupposes the existence of an official employment relationship, and that platform companies should establish, before the court, extensive facts to rebut it. The reason for such strong presumption is based on the structural bargaining inequality between workers in platform companies and platform companies. Although regulation would help, to a great extent, workers in platform companies, the regulation should apply to all workers, so as not to create a third category and to prevent the bogus self-employment.

The second option identified by the European Commission is the “shift in the burden of proof”. Typically, one of the incidental effects of a presumption is to shift the onus to prove that the worker is not a worker, away from the employed person and onto the employer. In most systems, this shift happens automatically as a consequence of the legal presumption (i.e. without the worker having to establish any particular facts). The shift in the burden of proof completes the employment presumption and provides for an effective protection of workers in platform companies, with specific reference to those in a vulnerable situation and who are less likely to undertake legal action to challenge their employment status. ETUC therefore underlines that a “shift in the burden of proof” is linked to, and complimentary to the rebuttable assumption of an employment relationship and the recognition of platforms as companies with all the obligations it entails.

The reversal of the burden of proof places the responsibility to prove the not appliance of the presumption on the employer/company’s side. Therefore, ETUC wants to stress that if the platform company has been hiring genuine self-employed and they can prove it, their business model will not be affected. However, if the platform company cannot reverse the presumption of employment, it means that workers have been employed from the beginning. Thus, the reversal of burden of the proof only shifts the weight of the burden of proof from the most vulnerable in the labour relationship (the worker) to the most able to prove the opposite (the company)”. This explanatory statement aims at underlying that a presumption of employment relationship with a reversal of the burden of proof (from the worker to the employer) will not affect the business model of platform companies operating with genuine self-employed workers. A periodical monitoring system to examine whether the relationship between the company/ employer and the workers have changed will need to be established.

It should be noted that the rebuttable presumption of employment relationship will also provide for improving the working conditions of genuine self-employed workers, since it will prevent platform companies from imposing further subordination in the relationship.

ETUC recalls that in the context of sex discrimination, the European Court of Justice had introduced a reversal of the burden’ of proof through its case law⁵ and that this was later incorporated in the Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. More recently, article 18 of the Transparent and

⁵ Some countries, e.g. Sweden, see this reversal as amounting to a shared reversal.

Predictable Working Conditions Directive also introduced a reversal of the burden of proof in the competence of labour law (unfair dismissals).

Article 153 of the Treaty on the Functioning of the European Union provided the legal basis of the Transparent and Predictable Working Conditions Directive and can therefore equally apply to putting forward legislation on a rebuttable employment presumption for workers in platform companies in Europe.

The Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation of 2006 also included a reversal of the burden of proof in article 19, in the context of fighting against discrimination. The legal basis of this Directive was 157 TFEU. In this situation (unlike with a typical legal presumption) there is no ex-ante presumption that, say, the employer has unlawfully discriminated somebody (or unlawfully misclassified their employment status). But if a prima facie case can be made by the claimant, then the burden to actually prove that this was not the case shifts to the employer, and it is usually expected that he must prove conclusively the opposite.

As the documentation of the consultation indicates, a shift in the burden of proof without a presumption of an employment relationship “would, however, still require individuals to start court proceedings, with the associated costs and risks”. Platform companies attract vulnerable groups in the labour market who have very low levels of incomes, like students and migrants, they are unlikely to undertake legal action. The main problem on relying on the national court to requalify the bogus self-employed is that it is a reactive answer, and the aim of labour law and employment status should be a preventive one. A requalification would not be enough to solve the challenges. The result of a requalification may be the payment of a compensation to the worker, usually based on the minimum wage, and the payment of extra working time and the annual leave. Requalification before the court does not mean enforcement of employment law, but a recognition that a particular situation was wrong, without changing the structural problem. At European level and in many EU member states, there are no means, established by law, to guarantee that individual court victories of workers in platform companies contesting their labour status will provide for a change of the bogus business model of these platforms. Therefore, a rebuttable presumption of employment relationship is needed.

The current situation in which platform companies operate is based on a presumption of a self-employment relationship, where the responsibility of the enforcement of labour law is placed on the most vulnerable party. Failing to position in favour of a presumption of employment relationship implies the support of the current status quo, in which a self-employment relationship is presumed. Only those workers with the resources and the patience to go before a court will obtain this recognition, while the platform company will continue to do “business as usual”. More importantly, workers in platforms bringing their cases to court are not protected against dismissals. Vulnerable, precarious / bogus self-employed need the presumption of employment with its complementary shift in the burden of proof, and the recognition of platform companies as employers with all the obligations it entails, because requalification before the court is an obstacle for them to access the market and benefit from the employment protection that they deserve.

ETUC reiterates that these instruments (presumption of employment relationship and reversal of burden of proof) do not require changes in the definition of a worker set by Member States, nor does it take a stand on a definition of subordination criteria. It thus respects the principle of subsidiarity and the autonomy of social partners⁶.

A digital (labour) platform is an employer, a (temporary employment) agency or an intermediary. Any platform company can be assigned to one of these categories. A separate status is unnecessary and undesirable. ETUC notes that it is possible that the other party (i.e. the presumed employer) may not be able to prove that the worker is not a worker/employee, but may still be able to prove that it is not the employer of that worker e.g.: a temporary work agency or an association). Just like “regular” companies, platform companies should therefore be linked to their sector of activity and must abide to their labour and fiscal obligations as employers, including the sectorial agreements negotiated in collective bargaining by social partners. To recognise platform companies as employers, ETUC is in favour of defining the employing entity that would impose labour law obligations on the party that in practice largely determines the terms and conditions.

At first glance often 3 parties seem to be involved: the worker, the client and the platform company, with the function of employer when the presumption applies. However, when the worker is an employee of the platform company, only 2 parties are involved (the worker and the platform, i.e. the employer).

If platform companies do not abide to their responsibilities as employers, an employment presumption would only create a loophole for the creation of intermediary companies that would hire workers. Platform companies would still circumvent their fiscal and labour obligations social security and these intermediary systems would be detrimental to collective representation and the promotion of collective bargaining at company level. Besides, in those countries where no sectorial collective agreements exist or where company agreements prevail over the sectorial ones, the creation of intermediary companies would contribute to downgrading the working conditions. Such malpractices that allow platform companies to avoid the observation of labour law already exist in Germany and, outside the EU, in Switzerland. Platform companies in Spain already envisage the possibility of establishing such intermediary companies to avoid the observation of the above-mentioned “Rider law”.

Whether a platform company is an employer or (temporary) employment agency depends on the digital platform fulfilling an active allocation function in the labour market. If the platform company only plays the role of mediator in the realisation and financial implementation of the agreement between the worker in the platform company and user, then the platform should in any case be liable as mediator for doing of the tax payments and premiums for the worker in the platform company. An

⁶ Article 18 of the Transparent and Predictable Working Conditions Directive, on “protection from dismissal and burden of proof”, already establishes the following:

- Member States shall take the necessary measures to prohibit the dismissal or its equivalent and all preparations for dismissal of workers, on the grounds that they have exercised the rights provided for in this Directive.
- Workers who consider that they have been dismissed, or have been subject to measures with equivalent effect, on the grounds that they have exercised the rights provided for in this Directive, may request the employer to provide duly substantiated grounds for the dismissal or the equivalent measures. The employer shall provide those reasons in writing.
- Member States shall take the necessary measures to ensure that, when workers referred to in paragraph 2 establish, before a court or other competent authority or body, facts from which it may be presumed that there has been such a dismissal or equivalent measures, it shall be up to the employer to prove that the dismissal was based on grounds other than those referred to in paragraph 1. (...)

assessment is necessary to explore in which cases the Temporary agency work Directive is applicable.

ETUC opposes the proposal of an administrative procedure (option 3 of the consultation document provided by the European Commission) to examine the employment status of people working in platform companies. This procedure is not binding and would therefore only add one extra layer in the process for workers to access their employment status and would still be disadvantageous for the vulnerable communities of workers, who are overrepresented in platform companies. This said, a legal or ad hoc legally binding administrative procedure should be set up for all platform companies once European legislation is enacted and subjected to regular monitoring.

The same applies to the certification of work-related contracts (option 4 of the Commission's consultation document), whereas this measure is presented as a less burdensome procedure than undertaking legal action, still it would have a chilling effect on vulnerable workers. Such procedure would add unnecessary complexity to the system, which could be easily solved with the implementation of a rebuttable presumption of employment relationship. Here, the experience with the A1 certificate in the context of postings shows that the issuing practice in the member states is very susceptible to abuse. In addition, the classification of a contractual relationship as an employment contract or self-employment depends on the actual practice and not on the formal designation certified at the beginning of this contractual relationship.

The European Commission proposes that different options could also be combined in different ways and that these could apply either to all platform companies or only to specific categories. The only combination possible for ETUC is the presumption of employment relationship with the shift of the burden of proof on the platform company and the recognition of platforms as companies with all the obligations it entails. Any cherry-picking solution for platform companies, based on their alleged unique nature, would go against the establishment of a level playing field between platform companies and those of the "traditional economy". Besides, it should be reminded that different categories of platform companies have been proposed for research purposes only and these have no legal nature. ETUC reiterates the previous statement in its answers to the first phase consultation document, whereby it cannot support a distinction between on location labour platform companies and digital labour platform companies. It can only help identify additional challenges and issues that must be tackled over the minimum floor of rights.

The criteria to determine the employment status should be regarded as the legal compass to guide the court or relevant administrative body in cases where companies rebut the employment relationship. ETUC has already proposed criteria based on ECJ decisions for the status of self-employment, these being:

- To use subcontractors or substitutes to perform the service, which they have undertaken to provide;
- To accept, or not accept, the various tasks offered by the putative employer, or unilaterally set the maximum number of those tasks;
- To provide their services to any third party, including direct competitors of the putative employer; and

- To fix their own hours of 'work' within certain parameters and to tailor their time to suit one's personal convenience rather than solely the interests of the putative employer.

ETUC has also looked, with interest, into the criteria introduced by the California Assembly Bill 5, yet unfortunately, the lobby of many platform companies for exemptions, resulted in the virtual exclusion law of workers in platform companies from the scope of this. However, the current US administration reintroduced these criteria in the Pro Act that has already been passed by the House of Representatives. The criteria, which represents a holistic approach to employment status presumption, states that the following criteria should be met for genuine self-employed workers:

- The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in reality.
- The worker performs work that is outside the usual course of the hiring entity's business.
- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Aspects which are recognisably used as instruments of external determination, such as pricing, control of the awarding of contracts, disciplinary methods in the form of reputation or rating systems, close-meshed monitoring of the work process, specific specifications of the platform company, with the function of employer when the presumption applies with regard to the content, execution, time and place of the activity, should also be mentioned as indicators. Another indicator is the fact of being (or not being) integrated into the employer's undertaking for the duration of the employment relationship, whether or not worker and employer form an economic unit with it.

5.2.2. Introducing new rights related to algorithmic management

ETUC agrees with the proposals of providing improved information to workers affected by algorithmic management and the need to reinforce information and consultation rights on algorithmic management systems, ensuring full involvement of social partners. The democratic control and transparency of the operation of the algorithm of intermediate work applications in traditional companies (work in platform companies does not single itself out when it comes to algorithmic management) and platform companies, should be discussed through information, consultation and participation of workers in full compliance with principles of non-discrimination. In determining and implementing the respective rules regarding algorithmic management, collective bargaining and the social partners should play a key role. Moreover, labour law and collective bargaining must recognise artificial intelligence and the use of algorithms as a form of modification of working conditions, providing mechanisms for worker representatives and workers to defend their rights.

Quality work in platform companies requires sufficient transparency about how the work is organised via platforms through algorithmic control, ranking and reputation systems, and pricing. ETUC demands that workers, irrespective of their status, are given information rights regarding the steering and control mechanisms towards platform companies, in particular which data is collected and to what extent workers

are controlled, which information is collected about the work processes and results. Transparency should be established regarding all rankings, ratings, categorisations, prioritisations, etc. It is necessary to clarify that all rankings, ratings, categorisations, and reputation systems consist of personal data within the meaning of the GDPR, which must be disclosed to platform employees, and that this disclosure may not be denied with reference to trade secrets.

There is an obligation for any platform company, with the function of employer when the presumption applies, to make available to trade unions and the social inspectorate all parts of their algorithm that have an impact on workers and organisation of work: criteria for assigning work, for proposing more advantageous conditions and orders, for disconnecting and selection, evaluation criteria, statistics and data collected. This is to ensure that there is no discriminatory treatment in line with relevant EU Directives.

ETUC remains sceptical about the efficiency of internal redressing mechanisms set up by platform companies and it is concerned about the chilling effect that this procedure may have when further legal action may be needed.

It is regrettable that the European Commission has omitted any reference to the intrusive surveillance that is carried out by some employers, including some platform companies. Surveillance is not, by default, legitimate, necessary or proportionate at the workplace. Tracking and surveillance technologies are increasingly present in society, which puts workplace privacy, data protection and fundamental rights at risk. They often impact workers unduly and threaten their rights, such as the freedom of association and of expression, non-discrimination and digital freedoms. They also amplify existing inequalities. ETUC demands that algorithmic worker surveillance is prohibited.

Access to algorithms is often restricted, so that it is difficult to counteract algorithmic control. The right to collective bargaining and information, consultation and participation rights at EU level must be respected, thus granting workers and trade unions access to the algorithms of digital platform companies. Workers and trade unions should know which data is gathered, why it is collected, where it is stored and how it is used to control their labour. This access to data should be permitted in the country where the services of the platform are provided and in the language of the worker.

ETUC demands that GDPR issues such as 'purpose limitation' (data should be used only for the purpose for which it is collected), data portability, 'profiling', transparency and rights of the workers as data subject are specifically regulated in the context of platform work.

ETUC would like to recall its position on the Commission's proposal for a Regulation on Artificial Intelligence, which fails to address the specificity of AI uses in employment, including platform work. The European Commission should ensure that trade unions and workers' representatives participate actively in the building of AI at work, which is essential to achieve a robust AI framework that guarantees the protection of workers' rights, quality jobs, and investment in worker's AI literacy.

The monitoring of workers is regulated by national laws that often predate GDPR and do not cover modern and intrusive people analytics. Digital tools have brought this to a new level which we can define as algorithmic worker surveillance: advanced analytics (biometrics, machine learning, semantic analysis, sentiment analysis, Emotion Sensing Technology, etc.) can measure biology, behaviours and emotions. Algorithmic surveillance does not passively scan but 'scrapes' the personal lives of workers, actively builds an image and then makes decisions. ETUC demands that algorithmic worker surveillance is prohibited.

Workers and their trade union representatives should also be able to understand the role of data and the algorithm management in their workplace and its impact on the organisation of their work; they should be critically aware about the role and impact of working with AI systems and have full access to the relevant data. To this end, a legal obligation for companies to set up the necessary processes is required. The introduction of AI technologies at the workplace should involve trade unions and workers' representatives before introducing those technologies.

Many forms of algorithmic management are truly invasive and pose serious risk to worker's physical and mental health and safety (such as worker surveillance through biometric recognition, productivity scoring and worker assessment through rating and all kinds of tracking (eye movement, key strokes, copy and past behaviour, etc.). Algorithmic management by its nature leads to generalisation of workers, losing sight of the human scale and individual circumstances.

The promise of AI lies in augmenting human decision making and human intelligence, rather than replacing it. The consultation document (and the proposal for a regulation on Artificial Intelligence for that matter) works from the premise that, once certain requirements are met, AI can largely replace human decision making in the workplace. Certain work-related decisions and activities should remain the prerogative of humans, particularly in domains where these decisions have legal implications, or impact, worker's fundamental rights. Artificial intelligence (with the use of algorithms) to organise the work should be seen as the main indication of employment relationship if the company organises all the activity, manages the data and sets the prices. This situation should prevent both autonomous work and outsourcing of the activity to third party companies.

It is unclear whether algorithmic management brings actual benefits and if so, to whom (workers or employers/work providers); it is for example unclear whether these systems lead to fairer assessments, better work-life balance, improved productivity, reduced absence from work, or whether they merely increase profits, ease the ability to fire workers, and lead to constant worker surveillance.

It is unfortunate that no reference is made to Art.88 of the GDPR, on processing data in the context of employment, which could be used as leverage for enhanced data protection for workers. Such data could specifically relate to recruitment, performance, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, and dismissals. Furthermore, trade union representatives should be involved in monitoring compliance with the GDPR of the algorithms of platform companies. It remains the responsibility of the company - and ultimately of the authorities - to ensure enforcement of the GDPR.

OSH rights of workers in platform companies

Workers in platform companies may be subject to increased health and safety risks for both on-location platform work (such as road accidents or physical injury caused by machinery or chemicals) and online platform work (for example related to ergonomics of computer workplaces), which are not limited to physical health but can also affect psychosocial health with unpredictable working hours, intensity of work, competitive environments (rating systems, work incentive through bonuses), information overload and isolation as emergent risk factors.

The EU initiative to improve the working conditions of people working in platform companies was also announced in the new EU Strategic Framework that the Commission presented in July 2021. One key aim of the initiative will be to ensure adequate working conditions, including in terms of health and safety, of all people working in platform companies. This will notably clarify the situation as regards to the OSH acquis that applies to people recognised as workers while it does not for people qualified as self-employed. By acknowledging platform companies as employers, workers will enter directly into the domain of the OSH legislation, where employers have the responsibility to protect their workers.

Just like temporary agencies, platform companies that operate as genuine temporary work agencies, because they fulfil an active allocation function in the labour market, should be obliged to protect and inform workers in platform companies on health and safety. Again, platform companies must be seen as employers, who have to observe all the OSH regulations.

For ETUC it is unacceptable that workers in platform companies, who often perform dangerous and precarious work and are the least protected, fall outside the scope of the EU OSH regulation and therefore have no legal protection.

Therefore, the Commission proposal must address the occupational health and safety of workers in platform companies in line with the European Health and Safety legal framework and enable them to exercise their rights, including a right to disconnect in line with implementation of the European Social Partners Framework Agreement on Digitalization.

5.2.3. Tackling cross-border challenges

First of all, the Commission notes that national authorities face challenges when it comes to cross-border platform work, inter alia in relation to labour inspection, social security and taxation. Against this background, the Commission indicates that the envisaged initiative could contain transparency obligations for platform companies (point 1). This is not only relevant for cross-border situations, but in no way is itself sufficient to address the relevant challenges.

Secondly, the Commission also considers various reporting obligations as a way forward to improve the enforcement of applicable rules (point 2). However, this raises two issues: What are the applicable rules? And where should they be enforced? Reporting obligations may require information exchanges across borders, since obligations might be dependent on requirements in place in the Member State of the

worker, whereas their enforcement might necessitate the cooperation from the Member State of the platform.

When it comes to the issue of rules applicable to the employment relationship, platform companies should fall under the same rules as other companies do in cross-border situations. This also holds true for conflict-of-law rules, determining by which jurisdiction the employment relationship and the platform company, with the function of employer when the presumption applies, are governed. There is no need for special rules in this regard. As a starting point it should be noted that online companies have the same basic transparency and reporting obligations as offline companies, including SMEs. Both online and offline employers are obliged to declare their workers, be it for reasons of employment, social security, company or tax law, etc. The obligation to ensure that the work is declared resides with the employer. Platform companies cannot operate in a vacuum, building their competitive advantage on a business model that would be immune to applicable rules, be it social, environmental or economic legislation. The obligations of platform companies should be the same as for 'offline' companies and based on what is necessary to ensure the protection of workers and a level playing-field in the market, not based on a logic of what would not be too burdensome for platform companies.

As pointed out by the European Commission, uncertainty regarding employment status may pose challenges for determining the law applicable to contractual obligations (Rome I) and the jurisdiction competent for resolving disputes (Brussels Ia) in cross-border situations. More favourable provisions apply in disputes between employers and workers "derogating from the general rules concerning contracts and providing certain safeguards, with the aim of protecting workers as the weaker party to a contract. Such favourable provisions do not apply to self-employed whose transactions are governed by the general rules." However, these two Regulations do not feature any formal notion of an 'employment contract' but must be given a rather contextual interpretation. For the purpose of identifying the weaker party, the Court of Justice e.g. in case *Holterman Ferho* C-47/14 held that "the essential feature of an employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he receives remuneration" (§ 41). Therefore, taking into consideration the imbalance of power between the platform company, with the function of employer when the presumption applies, and its workers, more favourable provisions under Brussels Ia and Rome I should apply to all workers, regardless of formal employment status, be they employees or non-standard workers (including self-employed workers).

Determining the applicable social legislation in cross-border situations should depart from a worker-centred approach, building on the premise that the platform company, with the function of employer when the presumption applies, is the employer. As affirmed by Article 8 of the Rome I Regulation, an individual employment contract shall be governed by the law of the country in which, or from which, the employee habitually carries out his work. Any derogation from this principle must not have the result of depriving the worker of protection otherwise afforded to him. Likewise, as a general rule, Article 11(3)(a) of the 883/2004 Regulation on the Coordination of Social Security Systems states that a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State. In other words, it should prima facie not be relevant where the platform company, with the function of employer when the presumption applies, is established,

but where the worker habitually works. Also, in cases where the worker physically pursues activities in two or more Member States, he should primarily be subject to the legislation of the Member State of residence (Article 13(1)(a)), whereas the Member State of the registered office of the employer is only of secondary relevance (Article 13(1)(b)).

By analogy, this goes hand in hand with the conclusion of the Court of Justice in cases such as C-434/15 *Elite Taxi v Uber*, where the Member State of destination was held competent to enforce its applicable rules on the physical service offered by Uber. In its ruling, the EU Court held that

“the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.” (§ 39)

“That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as ‘an information society service’ within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as ‘a service in the field of transport’ within the meaning of Article 2(2)(d) of Directive 2006/123.” (§ 40).

This case law demonstrates that in order to determine the applicable rules at national level the nature of the service and the sector in which the platform company, with the function of employer when the presumption applies, operates should be considered.

The need to ensure effective enforcement of applicable rules also necessitates improved cooperation and information exchange between competent authorities in the Member State of establishment (of the platform company, with the function of employer when the presumption applies) and the Member State of destination (where the worker is habitually active and/or where or from where the service is carried out). In this regard, the European Labour Authority must play a key role, including through support and coordination of cross-border inspections. While the Member State of the worker has the primary competence to verify compliance with applicable social legislation, transparency and reporting obligations of the platform company, with the function of employer when the presumption applies, might also require enforcement in the Member State of establishment. When it comes to inspections, it must be possible to inspect at the premises of the platform company, with the function of employer when the presumption applies, in both the Member States of establishment and destination, regardless of where the directions given to the workers are coming from.

The same goes for social security entitlements. EU social security coordination rules only apply in genuine cross-border situations, where a worker physically crosses the border to carry out a service. However, if the service is delivered digitally from the place where the worker habitually works, social security rules should apply in the same way as for any other work that can be conducted remotely. If on the other hand it is a question of telework, whereby the worker is digitally conducting his work from another place than where he habitually works, social security coordination rules should apply in the same way as for any other cross-border telework. Likewise, if the worker performs their work from more than one Member States, the regular rules for pluri-activity should apply.

Consequently, the European Commission's pilot project for a European Social Security Pass (point 3) seems relevant in situations characterised by a genuine cross-border dimension, where the worker physically crosses borders. However, it is important that any future initiative of the European Commission in this regard (be it in the form of a European Social Security Number or Pass) is not limited only to the portability of rights, but also serves to equip enforcers with concrete tools to ensure identification and verification of workers and their rights and entitlements through real-time access to, and exchange of, data. The ESSN should be supplemented with a European labour card to better enforce labour rights.

5.2.4. Strengthening enforcement, collective representation and social dialogue

ETUC agrees with the statement of the European Commission that the enforcement of rules and collective action are key, given the imbalance of power between platform companies and people working for them. The reference to the "absence of any support from trade unions or other organisations" should however be commented upon. Trade unions across the European Union are engaged in organising and representing workers in platform companies. The role of trade unions and collective bargaining is key when it comes to organising work in platform companies and defending the rights and interest of its workers. ETUC and its member organisations have been working towards attracting such workers in order to organise them, a detailed repository of these practices is available at the following website, run by ETUC: digitalplatformobservatory.org. Platform companies however oppose to the organisation of their workers as they claim this would put in jeopardy their bogus business model. This resistance from platform companies ranges from outright hostility, or more indirectly, to the setting up of alternative representation arrangements controlled by them to compete with independent representative trade unions. Trade unions have however overcome these difficulties to enter into negotiations with platform companies, which the latter have often refused, but accepted in a few cases. There are therefore also some examples of platform companies that conclude proper collective agreements on working conditions for their workers after negotiations with trade unions (also available in the above-mentioned ETUC run website).

The EU should encourage Member States and social partners to stimulate social dialogue in platform work and to support capacity building in this context. This is yet one more argument in favour of the liability of platform companies as employers. Currently, platform companies deny their employers' responsibilities so as to circumvent the social and fiscal obligations, which have been outlined earlier. They present themselves as a mere virtual marketplace that connects offer and demand of

two or more parties. For platform companies to be engaged in social dialogue and collective bargaining with trade unions, they should acknowledge their role as employers and get organised with the other employers' organisations around their respective industrial sector. In accordance with the law and practice of Member States and national labour market models, only organised, recognised, representative and independent trade unions can legitimately bargain collectively on behalf of employees, self-employed and other non-standards workers⁷.

Non-standard workers and workers in platform companies (including the self-employed) must be enabled to exercise these rights and enjoy the protection of applicable collective agreements. These rights should be guaranteed and promoted in all EU member states. Non-standard workers and workers in platform companies (including the self-employed) represented by a trade union when bargaining collectively must not be considered as undertakings for the purpose of competition law. Trade unions are not cartels and collective agreements are not agreements between undertakings resulting in anti-competitive business practices.

The initiative should be accompanied with measures to ensure compliance. The meaningful participation of social partners at national level to establish this compliance and enforcement mechanisms will be key to guarantee the effectiveness of the system.

With regards to the creation of communication channels to allow worker representatives to provide information to workers in platform companies, trade unions and workers councils should be given digital access rights to ensure effective and sufficient communication channels between trade unions and workers in platform companies.

Competition law

In matters of the references to removing obstacles to collective bargaining, ETUC highlights that EU competition rules must never stand in the way of collective bargaining, workers' rights, national labour market systems and practices and decent working conditions.

Regarding the separate EU initiative on competition law and collective bargaining for the self-employed, ETUC recalls its demand to the Commission to issue interpretation guidance, clarifying that collective agreements fall completely outside the scope of competition law, regardless of whether they protect employees, self-employed or other non-standard workers, including workers in platform companies.

Collective bargaining is the exclusive competence of national social partners, representing employers' associations/single employers and trade union organisations. It is not the role of competition law to regulate working conditions, to define what constitutes collective bargaining or what can constitute a collective agreement, and who can engage in such negotiations or enjoy protection under collective agreements. Collective agreements derive from social dialogue and collective bargaining, consisting in negotiations between management and labour for the purpose of improving working conditions in full respect of social partners' autonomy and national industrial relation systems.

⁷ As an example, on the 15 September 2020, Assodelivery (the main Italian platforms' association) signed with UGL, an association not representative of platform workers, a collective agreement in order to rule out the Italian legislation aimed to protect platform workers. After the three Italian confederations CGIL, CISL and UIL declared that Assodelivery's behaviour was "inacceptable and incomprehensible" and that it actually worsened riders' working conditions, on 30 June 2021, the Bologna court has ruled that meal delivery platforms cannot force bike delivery workers to accept the national collective agreement (NCA) that was signed by the employers' organization Assodelivery and the UGL Rider union, because that trade union body is not representative.

In accordance with the law and practice of Member States and national labour market models, only organised, recognised, representative and independent trade unions can legitimately bargain collectively on behalf of employees, self-employed and other non-standards workers. Competition law must not open up for social dumping by legitimising alternative bargaining actors, e.g. 'yellow' company unions, wage-fixing practices between employers, so-called 'workers' forums' or 'charters of good work' one-sidedly introduced by platform companies.

Lastly, data collection would indeed be needed with the aim of promoting the creation of a public register of legal personalities that displays a complete list of online platform companies. For those platform companies that are employers or temporary work agencies, the general employers' obligation of a company should be a requisite for their operation in an EU member state.

Furthermore, proposals, such as the one to create a European Quality Label for platform companies that adopt good practices in favour of their workers, are not useful. No such label exists for "traditional" companies and the criteria for granting (and monitoring) the quality would open an unnecessary debate at this stage.

III. What are your views on the possible legal instruments presented in Section 5.3?

The consultation document suggests that both legislative and non-legislative actions are possible.

It is evident that a Council Recommendation, without binding requirements, would not deliver the improvements necessary to reach the abovementioned objectives. In order to achieve those objectives, a binding legislative initiative at European level is urgently needed. Without binding minimum requirements, the initiative would fail to ensure the necessary steps forward to guarantee fair working conditions for workers in the platform economy.

ETUC is always ready to enter into dialogue with employers on how to improve working conditions. However, as long as platform operators acting as employers do not recognise their employer status, dialogue makes no sense and serves no purpose. It is evident that, in spite of some successful practices, like the German "Code of Conduct" supported by the German Crowdsourcing Association with the participation of IG Metall, voluntary instruments like code of conducts, charters or labels are in no way suitable to improve the working conditions in an entire sector across the EU and in the long term. If anything, they window dress and they delay the urgently needed legislative action. For these reasons, ETUC strongly believes that fair working conditions for people working in the platform economy can only be achieved if the legislator acts by means of adopting ambitious Directives to enforce the existing employment, social protection, social security and equality rules and which respects national labour market systems and traditions as well as the role and autonomy of national social partners.

ETUC calls on the Commission to propose an ambitious Directive based on Article 153(2) TFEU. The core aim of the Directive should be to put platform workers on equal footing as traditional workers and thereby ensure their right to freedom of

association, including collective bargaining; thus strengthening the enforcement of existing rules. The Directive would need to define binding minimum standards and requirements for workers. Amongst others, the Directive has to codify the criteria for a rebuttable presumption of employment relationship and the shift of burden of proof to the platform companies instead of workers. The clear classification as a worker ensures that all social and employment regulations are applicable. The Directive must respect the national traditions and practices.

ETUC believes that it would be appropriate to set standards for the protection of self-employed persons employed by platform companies on the basis of Article 153(2), in the context of an instrument aimed at setting minimum standards regarding the working conditions of employees (and employees misclassified as 'bogus self-employed') working in platform companies. As noted by AG Wahl in his Opinion in *FNV Kunsten*, '*preventing social dumping [between employees and self-employed] is an objective that can be legitimately pursued by [...] rules affecting self-employed persons*' (Para 70 of his Opinion). Mutatis mutandis, it could be argued that a Directive seeking to protect the working conditions of employees working for platform companies would not be able to achieve its stated policy objectives unless the same working conditions were also applicable to self-employed persons providing the same type of work or services. A failure to apply the same standards to self-employed workers would de facto generate the scenario identified by AG Wahl, since '*from the perspective of a worker, there is really no difference if he is replaced by a less costly worker or by a less costly self-employed person*' (Para 70 of his Opinion).

ETUC therefore believes that Article 153(2) should serve as the main legal basis for an instrument setting minimum standards primarily for employees working in platform companies and incidentally for self-employed working through platform companies. The main or predominant aim of the instrument would be to protect employees working in platform companies, and the protection of self-employed persons working through platform companies would be incidental to that predominant or main aim (as well as being necessary to its attainment; Judgment of 6 May 2014, *Commission v Parliament and Council*, C-43/12, EU:C:2014:298, paragraph 29, and judgment of 14 June 2016, *Parliament v Council*, C- 263/14, EU:C:2016:435, paragraph 43, and case law referred to therein).

IV. Are the European social partners willing to enter into negotiations with a view to concluding an agreement under Article 155 TFEU with regard to any of the elements set out in Section 5.1 of this document?

As most of the objectives laid down in the Commission's document can only be achieved through legislation and as European employers' organisations refuse, since more than a decade, to enter discussion on legal frameworks, ETUC is most reluctant to start social dialogue proceedings that might end, after many delays, in a voluntary agreement, which is unable to fulfil the expectations of people working in platform companies. Another argument is that most platform companies deny that they are employers and are not members of employer associations; a voluntary agreement with a traditional employer association would not cover many platform companies and so its implementation would fail. Moreover, most recent court cases acknowledge that there is an employment relationship.

Last but not least, during the social dialogue on digitalisation it was impossible to raise the question of workers in platform companies due to a rigorous opposition by BusinessEurope. Under these very specific conditions it would be preferable that the European legislator takes the initiative to avoid lengthy empty talks, which will only delay legislation and harm workers in platform companies instead of giving them the necessary support.

Were platform companies to observe their responsibilities as employers and be affiliated to the recognised European employers' organisation, ETUC would be open to consider engaging in fruitful social partners consultations in virtue of the Fundamental Treaty of the European Union.

An ambitious and binding EU regulation is needed that provides for a rebuttable presumption of employment relationship where the burden of proof should be borne by the company, (the platform company, with the function of employer when the presumption applies) and which must respect national traditions and practices and the autonomy of social partners. Once the legislation is enacted and transposed at national level it will be enforced thanks to the continuous work of trade unions to improve the working conditions of workers in platforms.