POSITION PAPER

Reply to the second-phase consultation on possible action addressing the challenges related to working conditions in platform work

General comments

On 15 June, the European Commission launched the second-phase consultation of the social partners on possible action to address the challenges related to working conditions in platform work. In its reply, SMEunited explains its position on the various elements presented in the consultation document.

The European Commission rightly recognises that the platform economy is an opportunity for companies. This is also the case for micro and small enterprises as well as for the self-employed to further develop innovative business models and new markets opportunities. Platform work also facilitates access to employment of different types of workers, young, disadvantaged groups or migrant workers, provides additional revenue to other jobs or activities and gives the opportunity for an easier work-life balance.

In fact, according to the European Commission, digital labour platforms are increasing and now represent a growing part of the European economy in all its diversity. Since 2016 the size of digital labour platforms has grown almost five-fold from €3 billion in 2016 to almost €14 billion in 2020. Around three-quarters of platform economy revenues in the EU are generated through ride-hailing and delivery platforms[1].

At the same time, the European Commission insists on the challenges, in particular, when it comes to the employment status of platform workers. One issue that the EC particularly mentions in connection with platform work, is the employment status of platform workers and the lack of legal clarity if the people working on platforms should be classified as workers or self-employed. While the Commission recognises in principle that people offer their services on platforms as self-employed, the Commission is of the opinion that there is a certain number of so-called "bogus" self-employed, which would justify the need for further action at European level.
SMEunited recalls that the choice for self-employment is rooted in the will to take the entrepreneurial risk, the wish for more autonomy, for flexibility, and a self-chosen work-life balance and this choice should be fully respected. Self-employed are not workers, therefore

[1] SWD (2021) 143 final

labour law designed for an employment relationship as worker does not apply to them. This entails that it is up to the Member States, in line with the subsidiarity principle, to define the different statuses and the notion of workers and of self-employed, as the status of the self-employed is tied to the functioning of the national legal systems in each Member State. Self-employed working through platforms should be fully respected.

We recognise the importance of a broad European debate on the issue of working conditions in platform work. However, existing European legislation that ensures a fair and efficient market for all with well-functioning competition must be preserved. Furthermore, many of the areas addressed by the Commission in the consultation are already covered by an extensive acquis of European legal instruments. Such instruments, if consistently applied at national level, offer solutions to most of the challenges presented.

On the specific questions put forward by the European Commission

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

SMEunited supports the analysis that adequate working conditions for platform workers are important for the well-being and dignity of people working through platforms, alongside fair competition. At the same time, it should not discourage people to become self-employed and improving their working conditions especially through a better access to social protection, as already largely expressed by SMEunited supporting the Council Recommendation 2019/C 387/01 on access to social protection for all workers and the self-employed at the national level.

- **Ensure that people working through platforms have – or can obtain – the correct legal employment status in light of their relationship with the platform and gain access to associated labour and social protection rights**

We do not see the need to provide legal clarification at European level on the classification of self-employed or employed, given the breadth of national law in this area. The current national measures which exist in the different Member States concerning the issue of a potential misclassification of self-employed are sufficient to adequately determine the correct employment status. This basic principle against bogus self-employment has always been defended by SMEunited. It should also apply to activities on platforms without restriction.

- **Ensure fairness, transparency and accountability in algorithmic management**

The Directive 2019/1152/EU on transparent and predictable working conditions (TPWC Directive), to be transposed into national law by 1 August 2022, already lays down minimum requirements for employees that apply to all types of employment, including employment as

platform worker. This directive should thus fulfil the guarantee of fair and transparent working conditions also for platform work.

According to the Regulation (EU) No 2019/115095 on promoting fairness and transparency for business users of online intermediation services (P2B Regulation), which entered into force on 12 June 2020, self-employed "business users" of the intermediary services of an online platform should be treated in a transparent and fair manner, while having access to effective remedies in the event of a dispute.

The combined effect of the TPWC Directive and the P2B Regulation should reduce a possible asymmetry of information between the platform and the employee or the self-employed. Therefore, it is difficult to understand why the EC deems it necessary, before the transposition deadline of the TPWC Directive, to already consult on the working conditions of platform workers and to announce a legislative proposal in its work programme for Q4 2021.

Finally, the draft Artificial Intelligence Act proposed in April 2021 to establish harmonised rules on artificial intelligence should further build trust in artificial intelligence and, hence, provides further guidance and legislative elements in this context.

- **Enhance knowledge of developments in platform work and provide clarity on applicable rules for all people working through platforms operating across borders**

SMEunited supports the collection of sound data on the extent of platform work. However, we point out the need to use appropriate survey methods to statistically capture the phenomenon of platform work. Purely internet-based questionnaires addressed exclusively to platform workers are insufficient.

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

It is essential that any initiative on platform work respects national concepts of employment status. The distinction and correct classification between self-employed and employed work is determined by national law. Therefore, we welcome and support that the European Commission, according to the feedback from the European social partners, does not attempt to regulate the concept of “worker” at the European level.

2.1 Addressing misclassification in employment status

The European Commission proposes four different options for facilitating the correct classification of employment status in line with national definitions, while taking into account the imbalance of power between the platforms and the people working through them: 1) a rebuttable presumption of an employment relationship, 2) a shift in the burden of proof, 3) an administrative procedure to examine the employment status of people working through

platforms and 4) the certification of work-related contracts carried out at the request of either party, by labour authorities or by independent bodies.

The objectives of the different tools are to balance the asymmetry of bargaining power between the worker and the platform and to ensure a level playing field within the internal market between platforms and between platforms and other businesses.

SMEunited agrees that there should be criteria or indicators to clarify the employment status either binding or indicative, exhaustive or non-exhaustive which should not interfere with national definitions of general labour law.

SMEunited does not consider the measures proposed by the Commission to prevent misclassification of workers as the right approach. We especially oppose the rebuttable legal presumption of employment status that platform activities are dependent work, coupled with a reversal of the burden of proof. These would lead to difficult situations in practice.

The European Court of Justice has already established a series of criteria that speak for the existence of a dependent employment relationship, and which must be taken into account by the respective national legal systems. However, a concrete examination of the true economic content must always be carried out in individual cases. Anticipating this examination through a rebuttable presumption of an employment relationship represents an undue interference with national labour and social law.

This rebuttable presumption would mean that any kind of self-employed activity would automatically be classified as being done in an employment relationship, thereby creating a serious obstacle to genuine self-employment and entrepreneurial activity. Furthermore, this approach is highly questionable in terms of proportionality and subsidiarity.

In addition, the national courts in the Member States dramatically increased their work on the topic of platform work, showcasing the efficiency and increasing expertise of national systems. National courts are fully capable of proceeding based on existing national legislation and systems, without the need for an EU legislation.

We finally do not support certain types of procedures, such as administrative procedures or the certification of employment contracts, to determine employment status. A guideline addressed to Member States is sufficient to set up relevant out-of-court procedures without compromising national well-functioning procedures. This guideline addressed to Member States would help to reduce unfair competition between misclassified workers and genuine self-employed.

2.2 Introducing new rights related to algorithmic management

SMEunited disagrees with the introduction of new rights related to algorithms in light of the already existing full body of legislation and legislative proposals in the area of artificial intelligence (AI) and digital services, in particular, the draft Artificial Intelligence Act which is

dealing with AI high risks[2]. The draft Act contains a full set of risk management, human oversight and transparency requirements for health and safety risks and fundamental rights for high risk of AI systems that would apply to platforms and be valid for self-employed. Furthermore, algorithms are part of trade and business secrets and are subject to the provisions of the respective legal system, depending on the purpose for which they were written. Thus, algorithms must also respect the limits of labour law.

Before talking about new rights related to algorithmic management, the GDPR rules have to be fully respected and applied by platforms especially the specific rules for automated processing (AI) of personal data (Article 22).

Making such rights applicable to self-employed persons in a P2B relationship with the platform, for which the Regulation on promoting fairness and transparency for business users of online intermediation services applies, leads to mixing up self-employed and employed activities.

2.3 Tackling cross-border challenges

EU tax transparency rules are extended to digital platforms. Member States are expected to automatically exchange information on income earned by sellers on digital platforms from 1 January 2023, regardless of the location of the platform, inside or outside the EU. This will allow national authorities to determine in which cases taxes should be paid. Based on this exchange of information, it will be possible to identify the transactions carried out on the different platforms and the people working on the various platforms.

With regard to the relevant competent social security, Regulation 883/04 is and will be crucial. Alternatively, the determination of primary insurance and cross-border activity can be done with the help of the 25% rule.

2.4 Strengthening enforcement, collective representation and social dialogue

SMEunited is very critical concerning the issue of self-employed and collective bargaining. If one assumes that two parties - employer representatives and employee representatives - are necessary to conclude a collective agreement, unless self-employed are requalified as workers, negotiations of collective agreements meant between employers and workers should not apply.

Furthermore, addressing collective bargaining for self-employed in view of improving the "precarious situation of self-employed" will not be achieved through a forthcoming possible initiative aimed to ensure that EU competition law does not impede collective bargaining for self-employed[3]. According to SMEunited, the EU competition law is not an obstacle to improve

[2] COM(2021) 206 final
[3] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_988

the situation of some platform workers since some agreements already exist at national level and do not go against EU competition law, in particular, in the context of an economic dialogue. The restriction of the term "undertaking" seems also problematic, as it would lead to unequal treatment between entrepreneurs within a sector who offer their services on the same market.

Irrespective of the problematic identification of who to negotiate such "collective agreements" with, such exemptions could lead to competitive disadvantages and legal uncertainties on the part of those enterprises that do not fall under the exemption, if they are small or micro enterprises and act as employers.

The Commission should consider other measures, such as, for example, the P2B Regulation, which aims to ensure that self-employed "business users" of the intermediation services of an online platform are treated in a transparent and fair manner and that they have access to effective remedies in the event of a dispute. We would explicitly support an improvement of the P2B Regulation in order to improve the protection of the rights of self-employed.

Platform workers do not require a European legal framework that goes beyond already existing law. The self-employed, in turn, already have alternative ways to take care of their interests.

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

SMEunited is of the opinion that **there is no need for a binding EU legislation on platform work or on employee status on platform** since the definition of the employment status of platform workers is the sole responsibility of the Member States. This is also the case for social protection.

SMEunited could, however, accept a Council Recommendation which will not set specific mandatory requirements. More specifically, SMEunited would support non-binding instruments as part of the European Semester, EU guidelines for platform work, exchange of good practices and a joint work with Member States and social partners on the development of appropriate monitoring tools.

4 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?

Considering all the elements presented in the current consultation paper, SMEunited does not see scope for negotiations since it would deal with self-employed and therefore Article 155 of the TFEU does not apply.

In addition to support and foster the implementation of the European social partners Digitalisation Framework Agreement, SMEunited considers that monitoring in the framework of the European Semester for ensuring fair platform work as well as reinforcing mutual learning between Member States, would be the right approach.

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