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CONSULTATION DOCUMENT

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

{SWD(2021) 143 final}

1. Introduction

The world of work is in permanent change, brought about by both green and digital transitions, and by demographic changes, globalisation, and the impact of COVID-19. New forms of work organisation and employment relationships are emerging, bringing new opportunities and challenges. Platform work is one of these new forms of work organisation, enabled by fast-developing technology.

In her political guidelines, President von der Leyen stressed the need to improve the working conditions of people working through platforms[1]. The Commission is therefore gathering evidence in preparation of an initiative[2], as reiterated in the European Pillar of Social Rights Action Plan, which the Porto Social Summit of May 2021 endorsed as guidance for implementing the Pillar[3].

The envisaged initiative on platform work would aim to ensure that people working through platforms have decent working conditions - in line with the high standards guaranteed in the EU - in terms of occupational safety and health, social protection, fair income, the protection of personal data, transparency and predictability, and equal treatment. It would also aim to create favourable conditions for sustainable growth of digital labour platforms in the EU.

Digital labour platforms[4] are still a developing phenomenon. Over recent years, a growing number of people in the European Union (EU) started to use digital labour platforms to earn their living or complement their income. Given the job creation potential of digital labour platforms in the EU, their sustainable growth could contribute to reaching the target of 78% of the working age population being in employment by 2030[5]. The number of people working to different extent through platforms represented around 11% (or 24 million people) of the EU's workforce in 2018. Out of these, 1.4% (3 million) do it as a main job.

In line with Article 154 of the Treaty on the Functioning of the European Union (TFEU), on 24 February 2021, the Commission launched the first-phase consultation of European social partners to seek their views on the need for, and possible direction of, EU action to address the challenges related to working conditions in platform work. This first-phase consultation ended on 7 April 2021. Having considered the views expressed by social partners in that consultation, the Commission has concluded that there is a need for EU action to address these issues.

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[1] Political guidelines for the next European Commission 2019-2024: *A Union that strives for more - My agenda for Europe*. Available online.

[2] The 2021 Commission Work Programme announces a legislative initiative on 'Improving the working conditions of platform workers' for Q4. Available online.

[3] Action Plan available online here, the Porto Social Commitment here and Porto Declaration here.

[4] Hereby defined 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. For a full list of terms used throughout the document, please refer to the glossary in the accompanying analytical document.

[5] As part of the Action Plan to implement the principles of the European Pillar of Social Rights, the Commission proposed three EU headline targets to be achieved by the end of the decade in the areas of employment, skills, and social protection. The indicator for the employment target includes the self-employed. More information available online.

Therefore, the Commission is now launching a **second-phase consultation of European social partners, in accordance with Article 154(3) TFEU**. The goal of the second-phase consultation is to discuss the possible content of, and relevant EU instruments for, the envisaged Commission proposal, in view of the aims presented above. The consultation also asks social partners whether they wish to enter into negotiations as provided for by Article 154(4) TFEU.

This second-phase consultation document brings together the main results of the first phase, deepens the analysis of identified challenges, discusses the need for, and added value of, EU action, and sets out potential avenues for such action. The accompanying analytical document complements this consultation document with additional evidence[6].

The initiative may also pursue EU action to address platform work challenges for the self-employed. Article 154(3) TFEU does not apply in this case. Therefore, on its own initiative, the Commission also invites social partners to share their views on the possible measures aiming to improve working conditions in platform work for the self-employed.

2. Consultation of social partners - first phase

Fourteen recognised social partners sent replies during the first-phase consultation.

Six trade unions contributed to the consultation: the European Trade Union Confederation (ETUC); the Council of European Professional and Managerial Staff (Eurocadres); CEC European Managers; the European Confederation of Independent Trade Unions (CESI); the European Transport Workers' Federation (ETF); and the European Cockpit Association (ECA). Eight employer organisations sent replies: BusinessEurope; SGI Europe; SMEunited; the Council of European Employers of the Metal, Engineering and Technology-Based Industries (CEEMET); Association of Hotels, Restaurants, Bars and Cafés in Europe (HOTREC); the World Employment Confederation-Europe (WEC-Europe); the European Federation of Retail, Wholesale and International Traders (EuroCommerce); and the Airline Coordination Platform.

Trade unions and employer organisations generally agree with the issues identified. Trade unions note nonetheless that the Commission's consultation document does not raise certain issues of interest: for example, ETUC mentions that the Commission has not addressed the status of platform companies as employers, (temporary work) agencies or intermediaries.

Trade unions are generally supportive of an EU initiative on platform work. They highlight that employment status should be at the core of such action and they are in favour of a binding EU instrument. Regarding personal scope, ETUC and Eurocadres would like to see the initiative extended to all non-standard forms of work. CEC European Managers notes that the enjoyment of rights should not depend on the distinction between employment and self-employment. ETUC further notes that the level of rights for the self-employed needs to be decided nationally in cooperation with social partners.

[6] SWD(2021) 143. The accompanying Staff Working Document provides additional evidence on the problem that EU action should address, analyses impacts of the potential measures under consideration and explores the added value of EU action.

Employer organisations are generally sceptical of an EU initiative on platform work. They argue that it is not appropriate to introduce one-size-fits-all rules. They recognise that there is a need for action, but that this should generally be taken at national level and within the framework of the various national systems for social and industrial relations. BusinessEurope notes potential action should respect the diversity of needs and desires of those working through platforms.

Regarding the *types of platforms* the possible initiative could cover, **trade unions** point out that EU action should cover both online and on-location platforms. **Employers** point to the diversity of platforms business models and the fact that platforms are not a distinct economic sector, arguing therefore against a one-size-fits-all solution. BusinessEurope calls for the EU to promote dialogue and facilitate exchanges of experience and best practice, which could cover all types of digital platform work.

Social partners have diverging views on the *material scope* of an initiative. Regarding **employment status**, trade unions would like to see the introduction of a rebuttable presumption of employment status with a reversal of the burden of proof. For some trade unions (ETUC, Eurocadres and ETF), the recognition of platforms as employers with sector-specific obligations is just as important and necessary as the clarification of employment status of people working through platforms.

Employer organisations note that the determination of status should be done on a case-by-case basis at national level in order to respect the different Member State models. BusinessEurope and SGI Europe in particular highlight the need to respect individual decisions, and that a possible initiative should not force people working through digital labour platforms into an undesired employment relationship.

Trade unions oppose the introduction of a third status for people working through platforms. Among employers, EuroCommerce and WEC-Europe are also against a third category.

Regarding the proposed objective to ensure fair **working conditions** for all, trade unions agree that a minimum level of protection should apply to all people working through platforms irrespective of their employment status. CEC European Managers contend that the level of protection afforded to those working through platforms should not depend on the sector or activity. ETF recalls that people working through on-location platforms should have rights related to wages and occupational safety and health. In particular, it proposes wages based on an hourly rate that also accounts for waiting time, and suggests that platforms provide safety instructions and equipment, and cover maintenance costs.

Employer organisations agree that all people should work under fair conditions, but note that where people working through these platforms are classified as employees, existing labour laws already apply. They do agree that there may be a need for platforms to provide, in a transparent way, clear information to people working through them, for instance on how the platform functions and its terms and conditions.

Trade unions recognise the need to facilitate **access to social protection**. ETUC and Eurocadres reassert that the initiative should cover all non-standard workers. Employer

organisations agree that access to social protection is important, but note that EU instruments, such as the Council Recommendation on access to social protection[7], already exist.

Trade unions agree that people working through platforms should enjoy certain rights when it comes to **automated decision-making and the use of algorithms**. Employer organisations refer to existing EU legislation and initiatives, such as the General Data Protection Regulation (GDPR)[8] and obligations to platforms in the Platforms to Business Regulation[9] on ensuring clear terms and references, as well as the recently proposed regulation laying down harmonised rules on artificial intelligence (AI)[10].

Trade unions recognise the need to make access to **collective bargaining and representation** easier. For their part, employer organisations also recognise the need to make access to collective bargaining easier, but for this to be assessed on a case-by-case basis and only for those classified as employees.

Similarly, trade unions are supportive of **access to training** for all people working through platforms and on an equal footing with employees. ETUC and Eurocadres, in particular, stress the importance of recognising platforms as employers when it comes to financing access to training. Employer organisations, meanwhile, recognise the importance of training but highlight that the EU should not determine how training is organised or financed.

Regarding **cross-border** dimensions, some trade unions highlighted the importance of cooperation between Member States. ETUC specifies that the possibility to establish a presumption of employment relationship should be made in the country where the worker operates and in accordance with national legislation.

Employer organisations recognise the cross-border aspect of the platform economy. They welcome initiatives that work towards a better digital infrastructure and a less burdensome regulatory approach, which particularly affects smaller European platform providers. BusinessEurope notes the need for a risk-based approach, while applying corrective measures on markets only when this is necessary and so long as they are not disproportionate.

Neither side indicated willingness to enter negotiations at this stage of the consultation process**. Trade unions** bring up the need for urgent action, the low chances of successful negotiation among European social partners, and issues with collective representation in platform work. **Employer organisations** note that implications for the self-employed from platform work challenges preclude them from entering negotiations. Some mention the need for more clarity on the measures the Commission intends to propose, and others bring up the June 2020 framework agreement on digitalisation as explicitly applying to platform work[11].

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[7] Council Recommendation (2019/C 387/01) of 8 November 2019. Available online.
[8] Regulation (EU) 2016/679. Available online.
[9] Regulation (EU) 2019/1150. Available online.
[10] COM(2021) 206 final. Available online.
[11] The European Social Partners Framework Agreement on Digitalisation was signed by BusinessEurope, ETUC, CEEP and SMEunited to support the successful digital transformation of Europe's economy and to manage its large implications for labour markets, the world of work and society at large. The agreement supports the successful integration of digital technologies at the workplace, investment in digital skills, skills updating and the continuous employability of the workforce. The agreement enables employers and unions to introduce digital transformation strategies in partnership in a human oriented approach at national, sectoral,

3. The challenges

Platform work creates many opportunities. It can help people complement their revenue from other jobs, expand their entrepreneurial activity and acquire new clients. The flexibility in working hours that platform work often brings enables many people to combine work with family or other care responsibilities or with studies. Platform work also often represents an entry point for people who otherwise have difficulties accessing the labour market, for example people of a migrant background[12].

Still, important challenges exist. Due to the specific features of platform work, many of the people working through platforms face problems that are sometimes difficult to address within existing legal frameworks. These challenges include: *1) employment status of the person providing platform work and the resulting obligations of the platform; 2) issues stemming from the algorithm-based business models of platforms; 3) issues related to the cross-border nature of platform work; and 4) gaps in coverage of existing (and forthcoming) legislation with regards to platform work challenges*. As a result, some of the people working through platforms face poor working conditions and inadequate access to social protection.

The challenges outlined in this consultation document and the accompanying analytical document are not evolving in a vacuum. They are also affected by certain developments and external drivers, such as globalisation, digital transformation and societal changes. These developments and external drivers, which the accompanying analytical document further explains, have an impact on the issues this initiative aims to tackle, but would not be directly addressed through it.

The size of the digital labour platform economy in the EU has grown almost fivefold from an estimated EUR 3 billion in 2016 to about EUR 14 billion in 2020. Three quarters of all active digital labour platforms originate in the EU. On-location platform work represents over 90% of intermediated services; around three quarters of EU platform economy revenues originate from ride-hailing and delivery platforms. The top 25 platforms account for about four fifths of the total earnings of people working through platforms in the EU[13].

The number of people working to a various extent through platforms grew from 9.5% to around 11% (or 24 million people) of the EU's workforce between 2017 and 2018[14]. For the majority of them, this does not constitute full-time employment[15]. A study estimates

company and workplace levels, including on the modalities of connecting and disconnecting and respect of working time rules and appropriate measures to ensure compliance. Available online.

[12] International Labour Office (2021), *World Employment and Social Outlook 2021: The role of digital labour platforms in transforming the world of work*, particularly section 4.1.4. Available online.

[13] Willem Pieter de Groen, Zachary Kilhoffer, Leonie Westhoff, Doina Postica and Farzaneh Shamsfakhr (2021): *Digital Labour Platforms in the EU: Mapping and Business Models*. Study prepared by CEPS for DG EMPL under service contact VC/2020/0360. Available online.

[14] Based on a two-wave online survey by the Commission's Joint Research Centre. First wave – JRC (2018): *Platform workers in Europe - Evidence from the COLLEEM survey*. Publications Office of the European Union, Luxembourg. Available online. Second wave - JRC (2020): *New evidence on platform workers in Europe - Results from the second COLLEEM survey*. Publications Office of the European Union, Luxembourg. Available online. It should be noted this is an estimation based on the specificities of the COLLEEM survey: 1) estimates are based on 16 countries and 2) the survey is not representative of the working population.

[15] COLLEEM I and II data on the total number of people working through platforms includes people who might do so on a main, secondary, marginal or sporadic basis (for more on how these categories are defined, see footnote in Section 2.3 of the accompanying analytical document).

the 2019 earnings of people working through platforms active in the EU at EUR 7 billion (representing almost two thirds of the total size of the EU platform economy in 2019), having more than doubled since 2016[16], while the digital labour platform economy has increased almost fivefold.

People working through digital labour platforms have diverse socio-economic backgrounds. Their average age in 2018 was 33.9 years in platform work and 42.6 years in traditional businesses[17]. They might be more educated than the general population, but this does not necessarily translate into higher-skilled work opportunities and career development. Many of them have a migrant background.

Platform work can have particular effects on various groups of people. Among people who started working regularly through platforms in 2020, half were women[18], but this does not reflect a gender balance in platform work overall. **Gender challenges remain**. These include a gender pay gap in some types of platform work, and inadequate access to social protection because of the disproportionate burden of care responsibilities falling on women. Limited social protection coverage also presents particular problems for other people in a disadvantaged situation, such as persons with disabilities or migrants[19]. Urban population growth and the spread of related urban lifestyles drive the growing consumption of on-demand services such as food delivery, ride-hailing and household/cleaning services[2021].

3.1. Challenges stemming from employment status[22]

The key challenge in platform work relates to employment status. It is a key determinant of the access of people working through platforms to existing labour rights and protection.

Platforms most often classify the people working through them as self-employed. However, with most platform work combining features of subordination and autonomy, and pay levels often determined by the platforms, it is not always clear whether people should be classified as workers or self-employed**,** and what obligations would fall on platforms as employers or as contracting entities. Because of a lack of legal clarity, people working through platforms have been overwhelmingly classified as self-employed, as digital labour platforms often characterise those working through them as independent contractors, third-party service providers, or freelancers. Nine out of ten digital labour platforms active in the EU[23] currently do so[24].

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[16] Willem Pieter de Groen, et al. (2021): *Digital Labour Platforms in the EU: Mapping and Business Models*. Study prepared by CEPS for DG EMPL under service contact VC/2020/0360. Available online.
[17] JRC (2020) report on COLLEEM 2nd wave survey (available online), based on 16 surveyed Member States.
[18] EIGE (2021, forthcoming): *Gender equality prospects in labour markets transformed by artificial intelligence and platform work*.
[19] ILO (2021). The role of digital labour platforms in transforming the world of work. Available online.
[20] JRC (2020). New evidence on platform workers in Europe. Results from the second COLLEEM survey. Available here.
[21] See also Section 2.3 of the accompanying SWD (2021) 143 analyses in further detail the diversity of people working through platforms, while looks into the consequences arising from the challenges.
[22] See also Section 3.6.1 of the accompanying SWD(2021) 143
[23] Accounting for 93% of all earnings of people working through platforms active in the EU.
[24] Willem Pieter de Groen et al. (2021): *Digital Labour Platforms in the EU: Mapping and Business Models*. Study prepared by CEPS for DG EMPL under service contact VC/2020/0360. Available online.

There is also genuine self-employment in platform work, given the wide variety of digital labour platforms and their business models. Highly qualified professionals - such as software developers, graphic designers, translators, plumbers, electricians or lawyers - offer their services via certain types of platforms, using them as a channel to acquire new clients. Platform work is often a conscious choice for people who wish to enjoy the flexibility to organise their work and a self-chosen work-life balance. Such entrepreneurial activity and freedom is characterised by significant autonomy in setting the price for services offered and rendered, and executing work without instructions from anyone other than the client.

Nevertheless, categorisation as self-employed does not always correspond to the type of relationship that truly exists between the platform and the people performing work through it. Various aspects of the provision of services through some platforms resemble working conditions in an employment relationship. In fact, **platforms may unilaterally regulate conditions** pertaining to pay, working time, dispute resolution and other issues through their terms of service agreements, while simultaneously using technological means to monitor and evaluate the work[25].

There is therefore a high risk of misclassification, with some people working through platforms classified as self-employed despite not always enjoying the autonomy and freedom that comes with such status, for instance to set their own rates. Most platforms allow the freedom to decide whether to log in - and thus when to work - but determine the actual organisation of work. This can result in **false self-employment**, depriving incorrectly classified people from basic workers' protection and often limiting their access to social security schemes.

People working through platforms often do not have a choice but to accept the work status proposed by platforms. The lack of any significant bargaining power in the pre-contractual stage (and beyond) therefore often results in a platform's terms and conditions unilaterally determining the rights of people working through it. The possibility for genuine contractual negotiations, on the other hand, is often associated with genuine self-employed activity.

Grey zones between workers and self-employed people, as well as a blurred distinction between employers and clients, might lead to uncertainty over applicable rules. Many people working through platforms might fall between the cracks of labour and social protection. This can also lead to a lack of equal treatment between those whose employment status is not correctly classified and traditional workers, and a lack of a level playing field between platforms and traditional companies. Despite often providing analogous services, some platform companies do not have to meet sector-specific obligations that apply to traditional companies. This could place traditional companies at a competitive disadvantage.

National responses to platform work are diverse and are developing unevenly across the EU. Only very few Member States have adopted national legislation specifically targeting improvement of working conditions and/or access to social protection in platform work.[26][27]

[25] ILO (2021), particularly Section 5.1.1.
[26] See also Section 3.5.3 of the accompanying SWD (2021) 143

In other Member States, people working through platforms may be impacted by legislative initiatives not specifically targeting platform work. In some Member States, platform work and a possibility to introduce legislative changes is currently being debated.

Recent national legislation, which has directly or indirectly affected working conditions and social protection of people working through platforms, varies in terms of adopted approaches[28]. In addition, national legislation has mostly been adopted in specific sectors, notably in ride-hailing or food-delivery services.

Determining the employment status of people working through platforms is often done on a case-by-case basis. Most Member States do not have specific provisions on platform work, but rely on general labour law definitions to determine the employment status (including, in some cases, legal presumptions). A few Member States have created a third status – falling between worker and self-employed - to provide dependent or employee-like self-employed people with more rights.[29]

People working through platforms often do not have a straightforward path to clarify their employment status. In some cases, Member States offer a specific, extrajudicial procedure to confirm the employment status of a person involved in a contractual relationship.[30] In other cases, labour inspectorates can provide guidance or support but the resources of such administrative bodies are limited. The most frequent way for someone to question the status laid down in the platform's terms and conditions is through the courts. In such cases, the individuals bear the burden to prove all elements that are constitutive of an employment relationship, even if they often only have limited insight into how the work is organised through the platform's digital infrastructure.

Litigation has been on the increase. To date, more than 100 court decisions and 15 administrative decisions dealing with the employment status of people working through platforms have been identified in nine Member States[31]. Most of these cases concern ride-hailing or food-delivery platforms, but some also cover other forms of on-location platform work. Court rulings have gone in different directions, but most judges have decided in favour of reclassifying nominally independent contractors as workers and platforms as employers. A few have confirmed the self-employed status. All five cases that have reached courts of highest instance resulted in the reclassification of employment status[32].

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[27] E.g. the Spanish 'Riders law' requires digital labour platforms in delivery sector to classify their couriers as employees, rather than independent contractors. The law is also introducing the right of information on algorithms.

[28] It can address certain challenges in platform work either through defining the employment status; extending the personal scope of application of national labour and social protection law; regulating the working conditions and social protection for persons in non-standard employment; strengthening the rights and protection of the self-employed and/or introducing a third category status with ad hoc rights and provisions. *Study to gather evidence on the working conditions of platform workers* (CEPS, 2020), Available online.

[29] Member States that have introduced some type of in-between or third category status applicable to platform work: Austria, Germany, Spain, Italy and Slovenia. (ECE review, 2021).

[30] E.g. Belgium, Italy, Malta.

[31] Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Spain and Sweden.

[32] Reclassification to worker status in Germany, Spain and France. The Italian Supreme Court decided to reclassify the relationship from self-employed to 'third status' (it had not been asked to consider classification as regular worker). Other cases have been decided at lower level or are awaiting appeal.

Courts are constantly developing their understanding of platform work. Judges have increasingly come to consider, as key factors in assessing employment status, elements of organisational integration into the platform's business model and the absence of genuine entrepreneurial independence of the people working through platforms, in addition to the more traditional elements of direction and control. Increasingly, the role of algorithms in managing and controlling work performance and the functioning of the platform market has hit the spotlight, leading courts to reclassify the relationship between the platform and the person working through it as an employment relationship.

Nonetheless, case law is far from consolidated. Not everywhere have courts reclassified the employment status of the persons concerned. In some cases, courts have found that the individual's freedom to decide whether and when to work is a reason to reject the claim of an employment relationship. Lower instance tribunals, in subsequent rulings, have not always followed the jurisprudence of the higher instance. The diversity of approaches taken by national courts, both within and between Member States, and the absence of case law in many others, contributes to uncertainty for platforms and people working through them[33].

Legal uncertainty is compounded by the reluctance of platforms to apply rulings consistently. Some platforms have applied court rulings only to the specific plaintiff's situation and have decided not to grant the same advantages to other people working through the same platform[34]. Sometimes they stress that they have made unilateral changes to their business model or terms and conditions since the facts of the particular case arose, so that the current situation is different from the one the court assessed. To prevent possible litigation on employment status and misclassification, some platforms use complex legal set-ups between subsidiary and parent companies, mandatory arbitration clauses, and clauses making disputes subject to the law of another Member State or third country.

3.2. Challenges stemming from the algorithm-based business model

Platform work is by definition driven by algorithms. EU labour law does not tackle algorithmic management challenges. Currently, the internal market *acquis* is developing in this area (see below, in section 3.4), but without focusing specifically on the perspective of people providing services via platforms. People working through platforms lack information and are not consulted on how algorithms are used. There are insufficient means of redress and unclear responsibility with regard to the use of algorithms. Those challenges are magnified by information asymmetries and insufficient dialogue prevalent in platform work.

3.2.1. Lack of information, consultation and redress and unclear responsibilities in the use of algorithmic tools

The digital transformation has enabled technological developments, **such as more powerful automated systems, the use of which is at the core of the platform economy**. The extent of this control could potentially surpass what is possible under human supervision, opening

[33] Section 3.2 of the accompanying analytical document analyses relevant case law in further detail.
[34] See examples and references in the accompanying analytical document.

the door for overarching surveillance of productivity or even private behaviour[35]. AI can create efficiencies by effectively managing a vast pool of data and by proposing user-friendly solutions. It is being used generally for *recruitment, surveillance, management, supervision and control, or termination of work-related contractual relations*.

Lack of transparency and the potential for discrimination are general issues inherent in the nature of the technology enabling algorithmic management, and as such, are dealt with through separate instruments[36]. When applied in the world of work, however, **the application of algorithmic tools results in the distinct challenges below**, which a platform work initiative might still have to address.

Lack of sufficient information, consultation and redress underpins algorithmic management in platform work. Algorithmic management may enable forms of oversight and exercise levels of control that alter the traditional role of managers in workplaces (and human supervision in general) or remove them further from the scene of work[37]. At the same time, people working through platforms may lack information and understanding on how algorithms are applied, are used to reach certain decisions and thus impact their working conditions, and may lack access to redress for such decisions. Algorithmic management might also prevent the effective exercise of the right of workers and their representatives to be informed about working conditions and procedures[38]. **Social dialogue and collective representation might therefore be made more difficult due to the use of algorithms in platform work**.

It is not always clear who is responsible for decisions reached by algorithms. The use of algorithmic management may further obscure the actual management functions performed by platforms and thus allow companies to distance themselves from automated decisions, thereby preventing the attribution of (potential) obligations. This can create a responsibility gap due to the lack of a human 'in the loop' of an algorithmic decision. The proposed AI Act sets new requirements on human oversight and transparency (see Section 3.4).

Human supervision and control of algorithmic decisions may be limited even when it is in place. Algorithms can bring added value in managing efficiently the plethora of data and the matching of supply and demand, thereby creating new business models. However, speeds of data processing can ramp up the pressure to rubber-stamp what automated systems output, due for instance to information asymmetries between the human validator and the system itself[39]. Humans responsible for overseeing algorithms might lack protection against undue repercussions in case they ignore automated decisions affecting workers.

[35] Private behavior is especially at risk when labour platforms require their users to install apps on their private phones, see for example this article.
[36] Most notably the proposed AI Act.
[37] Katherine C. Kellog et al. (2020): *Algorithms at work: the new contested terrain of control*. Academy of Management Annals 2020, Vol. 14, No. 1, 366–410. Available online.
[38] The Directive establishing a general framework for informing and consulting employees requires information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations in companies of a certain size. Available online.
[39] The risk of automation bias is reflected in the proposed AI Act.

While the use of automated systems in the work context first gained prominence through its applications in the platform economy, **algorithmic management tools are spreading beyond platforms to traditional workplaces**.

At the same time, the extent to which the challenges potentially raised by the increasing use of IT tools in the workplace, including in the context of platform work, translate into specific regulatory failures should be assessed both from the perspective of EU labour law as well as in the context of the overall internal market acquis (see Section 3.4).

National responses to challenges related to algorithms have been very limited. With the exception of Spain's recent 'Riders Law'[40], no Member State has adopted labour legislation specifically addressing algorithmic-related challenges in platform work. Without prejudice to the internal market acquis (see Section 3.4), existing measures address more generally algorithmic management at the workplace, for example by building on legislation on the protection of personal data or anti-discrimination legislation. Such approaches might not be able to tackle the full array of issues stemming from the use of algorithms in platform work and beyond, for example when it comes to timely and justified human oversight of algorithmic decisions or possibilities for redress for affected people.

3.2.2. Information asymmetries and insufficient dialogue in platform work

Information asymmetries and insufficient dialogue shape working conditions in platform work. They are arguably fundamental to the ability of platforms to exert control over the people working through them, even when classified as self-employed. A general lack of clarity of information and consultation rights can affect the working conditions of people working through platforms. This can make it difficult to maintain an overview of existing rights and obligations due to the unclear or complex contractual terms and conditions of some platforms, particularly in instances where existing regulations, such as the Platforms to Business Regulation, do not apply[41]. Constant monitoring, real-time evaluation and rational control through algorithmic recommendations can further negatively affect the wellbeing of people working through platforms[42].

They can cause an unbalanced power relationship, often a defining feature in platform work[43]. People working through platforms often accept terms and conditions without a clear overview of the corresponding advantages and disadvantages, despite provisions in existing instruments, such as the GDPR[44] and the Platforms to Business Regulation[45]. Moreover,

[40] Royal Decree-Law 9/2021 of 11 May amending the consolidated text of the Workers' Statute, approved by Royal Legislative Decree 2/2015 of 23 October, to guarantee the labour rights of persons engaged in distribution in the field of digital platforms. Available online.

[41] The P2B Regulation only covers self-employed 'business users' engaged in direct transactions with customers.

[42] Katherine C. Kellog et al. (2020). Algorithms at work: the new contested terrain of control. Academic of Management Annals 2020, Vol. 14, No. 1, 366–410 (373). Available online

[43] The issue of unbalanced power relationship is addressed also by GDPR e.g in the context of consent (Article 6 GDPR). Recital 43 GDPR states that "in order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller". See also EDPB Guidelines 05/2020 on consent under Regulation 2016/679, p. 9.

[44] GDPR aims to address information asymmetries by providing in Article 12 that the "*controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible*

social dialogue and collective representation, which would otherwise counterbalance information asymmetries, are not prevalent in platform work.

Platform work modalities limit opportunities for collective representation and organisation. There is often no physical workplace involved, which means that people working through platforms rarely interact with each other. They often might not even know their peers on a given platform, or how to contact them. Moreover, platforms' business models, for instance those relying on a ranking system, may generate competition between people working through them, rather than offering incentives for cooperation. Collective organisation and representation are therefore currently difficult and fragmented[46].

Separate responses to these challenges are emerging. Some collective bargaining agreements in platform work have been concluded, but these are still the exception rather than the rule. Grassroots responses are also taking shape, aiming to set a minimum level of job security, guaranteed working hours, decent payment, health benefits and parental leave or full accident insurance coverage. Section 3.3.2 of the accompanying analytical document examines in further detail existing collective bargaining agreements and grassroots responses.

3.3. Challenges stemming from cross-border platform work

Some of the challenges in platform work performed across borders relate to the unclear employment status in platform work – highlighted above – while others relate to data gaps.

In situations where employment status is uncertain the cross-border character of some platform work may pose challenges as regards determining the law applicable to contractual obligations and the jurisdiction competent for resolving disputes relating to such obligations. The Brussels Ia[47] and Rome I[48] Regulations set out, respectively, rules on the responsible jurisdiction and the applicable law in cross-border disputes. In such disputes between the employer and the worker, special provisions apply, 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.

Unclear employment status could also give rise to questions about social security coverage in cross-border situations. The classification in national law of people working through platforms bears consequences for social security coordination law and the establishment of the competent Member State[49]. For someone working in more than one

and easily accessible form, using clear and plain language". In addition, the controller is obliged to facilitate the exercise of data subject rights under Articles 15 to 22.

[45] The P2B Regulation only covers self-employed 'business users' engaged in direct transactions with customers.

[46] As regards solo self-employed people working through platforms, another obstacle to collective bargaining arises from competition law, which will be addressed through a separate initiative. See more details here.

[47] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1. Available online.

[48] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6. Available online.

[49] Strban et al (2020): *Social security coordination and non-standard forms of employment and self-employment: Interrelation, challenges and prospects*, July 2020. Available online.

Member State, the determination of whether they are employed or in self-employment may be the determining factor about which country's social security system covers them.

National authorities do not have easy access to data on platform work and people working through them, which is especially relevant where platforms operate in several Member States. Data gaps regarding the latest terms and conditions of platforms, and the number and employment status classification of people working through them, affect the ability of relevant national authorities and stakeholders to bring about positive change. It is not always clear where platform work is performed, which can lead to difficulties tracing and addressing cross-border challenges. Insufficient data also has repercussions for taxation, and extending social security coverage to people working through platforms.

National approaches vary, with some Member States[50] having taken various legislative and technical steps towards receiving data, directly from platform companies, on individuals' earnings. Initiatives vary in scope and nature (voluntary or mandatory). Such variance can have an impact on the platform economy by increasing the administrative costs for digital labour platforms across Member States[51]. It might also not bring the necessary clarity in cross-border situations on where the work is performed.

3.4. Regulatory gaps at EU level

Existing EU-level legislation does not fully address challenges related to clarification of employment status, algorithm-based business models and cross-border work.

Existing legislative instruments create a minimum floor of labour rights that apply across all Member States. Relevant EU labour and social *acquis* notably includes the following: Directive on transparent and predictable working conditions[52]; Directive on work-life balance for parents and carers[53]; Working Time Directive[54]; Directive on temporary agency work[55]; Directives on part-time work[56] and on fixed-term work[57]; the Occupational Safety and Health (OSH) Framework Directive[58]; and three Directives on anti-discrimination and equal treatment in employment[59].

These legal instruments cover workers; self-employed people, including those working through platforms, fall outside their scope. The Anti-Discrimination and Equal Treatment Directives are an exception to this, as they also cover access to self-employment.

Non-legally binding instruments at EU level cover the self-employed and provide guidance to Member States. While these do not confer directly enforceable rights on

[50] Such as Denmark, Estonia or France.
[51] Vili Lehdonvirta and Daisy Ogembo (2019): *A Digital Single Window for Income Data from Platform Work*. Available online.
[52] Directive (EU) 2019/1152. Available online.
[53] Directive (EU) 2019/1158. Available online.
[54] Directive 2003/88/EC. Available online.
[55] Directive 2008/104/EC. Available online.
[56] Directive 97/81/EC. Available online.
[57] Directive 1999/70/EC. Available online.
[58] Directive 89/391/EEC. Available online.
[59] Directive 2006/54/EC. Available online, Directive 2000/43/EC. Available online, Directive 2000/78/EC. Available online.

individuals, their implementation at national level should result in new rights being granted. The Council Recommendation on improving the protection of the health and safety at work of the self-employed[60] and Council Recommendation on access to social protection for workers and the self-employed[61] both provide guidance to Member States on measures that are particularly relevant for people working through platforms who do not have an employment relationship (or who have a non-standard employment relationship, in the case of the Recommendation on access to social protection).

The case-by-case approach to employment status developed through individual court cases at EU and national level means access to rights is also decided on a case-by-case basis. The EU labour and social *acquis* provides a minimum floor of labour rights and protection to workers, in cases of doubt whether a person is a worker it is not clear whether they can benefit from these rights.

EU labour law does not yet address algorithmic management challenges. Opaqueness and lack of human accountability for algorithms used in the world of work to monitor, manage and control people can obscure employer obligations. Algorithmic management can therefore challenge the enjoyment of rights on transparency, non-discrimination, data protection as well as the right to information, predictability of work, or health and safety at work. However, some of these issues may be addressed by existing and proposed horizontal legislation.

When adopted, the proposal for an AI Act[62] will address risks linked to the use of certain AI systems. The proposed regulation tackles issues related to the development, deployment and use of AI systems. It lists certain AI systems used in employment, worker management and access to self-employment that are to be considered as high risk. It puts forward mandatory requirements that AI systems must comply with, as well as obligations for providers and users of such systems. Among others, the proposal for an AI Act imposes requirements to enable human oversight and extensive documentation on high-risk AI systems, and requires transparency of information to users (e.g. platform companies) of high-risk AI systems. The proposed AI Act foresees specific requirements on documentation, logging and transparency, and will ensure that platforms as users of high-risk AI systems will have access to the necessary information. In addition, the proposed AI Act addresses inherent challenges in the development of AI, such as bias, notably by setting requirements for high-quality datasets, helping to tackle the risk of bias and discrimination[63].

Nonetheless, specificities of employment relations might necessitate further action beyond what is achievable with an internal market instrument. For example, provisions and procedures for improved information could also benefit people in the labour market

[60] Council Recommendation of 18 February 2003 (2003/134/EC). Available online.
[61] Council Recommendation (2019/C 387/01) of 8 November 2019. Available online.
[62] COM(2021) 206 final. Available online.
[63] The recently proposed Digital Services Act (COM/2020/825 final) also sets out information obligations for online intermediaries related to their terms and conditions as regards the use of information provided by the recipients of the service, including algorithmic decision-making and human review, transparency reporting obligations, risk assessment obligations and risk mitigation measures for very large online platforms as regards the dissemination of illegal content and the negative effects for the prohibition of discrimination, as enshrined in the Charter and secondary EU law. Available online.

affected by automated decisions when they are not the users of the system, or be useful to their representatives. Such people could also benefit from the possibility to ask for substantiated grounds for significant decisions or challenge them once they have been taken, and also from the promotion of social dialogue and reinforced collective information and consultation rights. Addressing specificities of employment relations when it comes to algorithmic management might therefore be best tackled through the Treaty social chapter. **Any potential actions in the area of algorithmic management should be without prejudice to the proposed AI Act.**

The EU *acquis* mostly covers self-employed people in their capacity as business actors. Under the General Data Protection Regulation (GDPR)[64], people working through platforms are entitled to specific rights over their personal data irrespective of their employment status. Such rights include the right of access to personal data, the right to rectification, the right to data portability or the right not to be subject to a decision solely based on automated processing. Many people remain unaware of such rights, which could negatively affect their professional development and mobility in the case of data portability rights for example. Some rights are available under the EU internal market *acquis*[65], with the overall goal of ensuring the correct functioning of the EU's internal market. The Platform-to-business regulation provides, among others, the right to terms and conditions written and clear and intelligible language. Importantly, the Regulation only covers genuinely self-employed 'business users' engaged in direct transactions with customers.

Recent instruments partly cover lack of sufficient data on platform work. These include for example the amended Directive on administrative cooperation in tax matters[66]. It introduces an obligation on platforms to report tax-relevant information, including income earned by sellers through their platform. It also provides for the exchange of information between the Member State where reporting took place and Member States where the sellers reside. Importantly, the Directive only concerns reporting, and consequently the exchange of information, on self-employed business users. The proposed Digital Services Act also provides that national authorities can order, on the basis of national or EU laws, intermediaries to provide them information about the recipients of their services so that authorities can assess compliance by such recipients of services with national or EU laws.

3.5. Consequences of identified challenges

The identified challenges present a number of issues for the people working through platforms, for the platforms themselves, for markets and consumers, and for Member States. This section summarises these consequences[67]. It also looks in greater detail to what extent the various challenges affect the different categories of people working through platforms.

For people working through platforms

[64] Regulation (EU) 2016/679. Available online.
[65] See a detailed overview of internal market acquis and its application to platform work in Section 3.5.2 of the accompanying analytical document.
[66] Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L 104, 25.3.2021, p. 1–26. Available online.
[67] See also Section 3.6 of the accompanying SWD 2021) 143

Platform work offers opportunities for flexible work arrangements and additional income. It can help people complement their revenue from other jobs, expand their entrepreneurial activity and combine work with care responsibilities or studies. Platform work also provides opportunities for people who otherwise would have difficulties accessing the labour market, for example migrants[68].

Nevertheless, it often results in precarious working conditions and inadequate access to social protection. Despite a classification as self-employed, people often lack the autonomy and ability to shape their own working conditions traditionally associated with a self-employed status. Rights and protections normally available under labour law in cases of subordination are also unavailable to them as self-employed. Limited social protection coverage could exacerbate occupational safety and health challenges.

Automated decision-making in platform work could exacerbate these challenges. Algorithms can offer opportunities to detect biases. However, algorithmic and data bias can also reinforce inequalities or negatively affect the welfare of people working through platforms. Algorithmically powered work evaluation and appraisal could also prevent people who work through platforms from making full use of otherwise existing rights. The proposed AI Act addresses inherent challenges in the development, deployment and use of AI, including by setting requirements for high-quality datasets. People working through platforms may also often be unaware of their rights under EU and national law, for example their rights on personal data under the GDPR.

Legal action is currently the usual route for clarifying the employment status. For individuals who wish to challenge their categorisation, this brings high associated costs.

For digital labour platforms

Digital labour platforms currently face a regulatory patchwork. They have to comply with the EU's social and labour *acquis* and with national labour regulations where national law classifies the people working through platforms as workers. Platforms have to also comply with existing rules for contracting self-employed people where the people working through platforms are categorised as self-employed.

Internal market *acquis* does not fully address the uncertainty created by this regulatory fragmentation. The heterogeneity of personal and material scopes of the platform-relevant internal market *acquis*, which does not focus per se on labour law matters, means companies still face regulatory uncertainty and compliance costs. This can create different incentives and disincentives when choosing in which Member States to operate or focus growth efforts and investment. This contributes to an uneven regulatory playing field with negative spillover effects, including a possible race-to-the-bottom competition between platforms.

For markets and consumers

Existing regulatory fragmentation can be a serious challenge to the scaling-up of platform SMEs and start-ups. The lack of EU regulation addressing working conditions in platform work has repercussions on the functioning of markets and on consumers who purchase services through digital labour platforms. It can entrench the market position of

[68] ILO (2021), particularly Section 4.1.4.

incumbents, who are able to acquire a dominant or semi-dominant role in their sector of activity.

Market concentration is particularly strong in the digital economy, thanks to economies of scale and scope, data-driven 'network effects' and the control by platforms over data[69]. These create high barriers to entry for new and growing platforms as against well-established ones[70]. Incumbent digital labour platforms also gain market power by entering 'adjacent markets' (i.e. markets that share some but not all features of a company's market of origin) and leveraging their initial pool of data to acquire even more data, leading to growth and market entrenchment[71]. The Commission's proposed Digital Markets Act (DMA) aims at making online markets fairer and more easily contestable. However, the DMA will only cover so-called "gatekeeper" platforms, with many digital labour platforms arguably falling outside its scope.

Lack of regulation can also negatively affect the competitiveness of traditional business models in sectors with platform activity. For example, digital labour platforms are often able to avoid sector-specific obligations by insisting that they are providing information society services. However, this can create an uneven playing field between traditional businesses and platforms competing for customers in a given economic sector. The Court of Justice of the European Union has, on several occasions, pronounced on the legal qualification of digital labour platforms. In a preliminary ruling addressing Uber, for instance, the Court held that the service provided by the platform must be classified as a service in the field of transport and therefore the provider must comply with sectoral rules in that area[72]. Given the potential for unfair competition vis-à-vis non-platform companies operating in the same sector, some Member States have banned altogether the provision of certain services, such as ride-hailing, through platforms[73].

Consumers might also be facing issues. Such problems can arise from the informal production of services and the insufficient transparency of liability rules and resolution or redress mechanisms. Given the uncertainty surrounding the employment status of people working through platforms, it is also difficult for consumers to establish who is responsible if the quality of a service is not up to standard or if a good is not delivered in the shape or form promised by the seller[74].

For Member States

Challenges faced by Member States include defining the status of workers and companies in the platform economy, enabling social dialogue, responding to different protection needs

[69] Song, P. et al. (2018), *The Ecosystem of Software Platform: A Study of Asymmetric Cross-Side Network Effects and Platform Governance*, MIS Quarterly (42:1), pp. 121–142. Available online.
[70] Parker, G. et al. (2017), *Platform Ecosystems: How Developers Invert the Firm*, MIS Quarterly (41:1), pp. 255–266. Available online.
[71] R. Picker (2018), *Platforms and Adjacent Market Competition: a Look at Recent History*, in *Digital Platforms and Concentration*, University of Chicago Booth School of Business. Available online.
[72] C-434/15, *Asociación Profesional Elite Taxi (Uber Spain)*. Available here.
[73] European Centre of Excellence (ECE) in the field of labour law, employment and labour market policies. Thematic review 2021 on platform work (forthcoming).
[74] Eurofound's repository on the platform economy: consumer protection. Available online.

for the diverse types of platforms and for a variety of work arrangements (part-time, hybrid income, etc.), and mitigating the risks of undeclared work, social dumping and gatekeeping by platform companies. The misclassification of employment status of some people working through platforms and the prevalence of undeclared work also negatively affect public finances, including the financing base of social protection systems. If left unaddressed, the potential "platformisation" or additional sectors could also present challenges for the sustainability of public finances.

Enforcement of existing legislation is an issue. National labour inspectorates face challenges in inspecting platform work as it becomes increasingly more difficult and complex. The lack of clear rules on data reporting for digital labour platforms exacerbates enforcement difficulties for Member State governments and courts. It can also have negative implications for future policymaking initiatives.

In addition, the **cross-border** nature of some platform work may also create enforcement difficulties for Member States. For instance, it can create difficulties in determining the law applicable to the contractual obligations between the platform and the person working through it, and in determining which courts have jurisdiction over disputes relating to such obligations. Furthermore, the unclear employment status of people working through platforms can also give rise to questions about their social security coverage in cross-border situations. The classification of these people in national law bears consequences for social security coordination law[75].

4. Need for EU action

Member States take different regulatory approaches to platform work challenges. The legal protection and rights available to people working through platforms depend on their employment status classification, so their position in the labour market differs from one Member State to another. National courts have repeatedly reclassified - as workers - people working through platforms where they are formally categorised by the platforms as self-employed, but this trend is built on individual cases and is not developing consistently throughout the EU. National approaches to the question of algorithmic management in platform work and in the workplace more broadly are scarce and diverging.

One third of EU-based platform work is estimated to be performed across borders[76], for instance with the platform operation or the client - or both - being established in another country than that of the person offering work through the platform. This adds further complexity to already complicated contractual relationships, in particular where the terms and conditions of platforms make legal disputes subject to the law and/or jurisdiction of the country where the platform is established or of yet another country[77].

Given the transnational character of platform work, and in the absence of EU minimum standards, platforms operate in different Member States under different jurisdictions – with

[75] Strban et al (2020), *Social security coordination and non-standard forms of employment and self-employment: Interrelation, challenges and prospects*, July 2020. Available online.
[76] Ad hoc calculations based on JRC (2018).
[77] *Study to gather evidence on the working conditions of platform workers* (CEPS, 2020), p. 102-103. Available online.

case law developing in potentially different directions. When working through a platform established in a Member State other than the one where the work is performed, people may encounter difficulties to ascertain their employment status and to enjoy the protection afforded to workers under the Brussels Ia and Rome I Regulations.

Due to the flexibility and enhanced mobility of the platform economy, whose primary means of production are algorithms, data and the cloud, and which is not tied to any fixed premises, **Member States on their own will face difficulty in maintaining a level playing field among themselves.** Without coordination or common rules it will also be challenging for them to address unfair competition between platforms and traditional businesses arising from the avoidance of labour market rules.

EU action is therefore desirable to ensure basic labour standards and rights to people working through platforms. Existing EU labour law does not address algorithmic management challenges. Only an EU initiative can ensure common minimum standards in platform work that apply throughout the EU. Such action can create synergies with recognised good practices in Member States and build a momentum for improved social convergence.

In line with the proportionality and subsidiarity principles, EU action would not exceed what is necessary to achieve its objectives and would respect the competences of Member States and social partners with respect to working conditions. Such action would not unduly increase the possible administrative burden for platforms, and it would, in particular, take into account the impact on SMEs and start-ups.

5. Possible directions of EU action

5.1. Proposed objectives of an EU initiative

In light of the challenges identified above, the overall objectives of the initiative would be to ensure that **people working through platforms have decent working conditions,** while supporting **the sustainable growth of digital labour platforms in the EU**.

Decent working conditions in platform work are important to ensure the well-being and dignity of people working through platforms. They can contribute to improved health and safety, fairer income, and more predictable working opportunities. Decent working conditions can also mitigate the weak bargaining power of some people in platform work vis-à-vis the platform. Improving working conditions is an essential goal of the EU treaties and a key objective of the European Pillar of Social Rights and its Action Plan.

Digital labour platforms play a key role in the digital transition of the European economy. Many of them are innovative and fast-growing start-ups and small and medium-sized businesses that contribute to job creation, promote the development of digital skills and enhance the EU's competitiveness. Digital labour platforms are currently facing different regulatory frameworks, which increases their cost of doing business and contributes to significant legal uncertainty for their future development and growth. Creating optimal conditions for the sustainable growth of the platform economy, while preserving a level playing field with traditional businesses, is therefore key to attaining the EU Treaty objectives of achieving balanced economic growth, a highly competitive social market economy and promoting scientific and technological advance.

In order to reach the general objectives stated above, the specific objectives of the EU initiative would be as follows:

- **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.** Addressing misclassification in platform work enables people who qualify for worker status to claim key labour and social rights, and for them to be enforced where necessary. Access to such rights would mean more predictable earnings, improved occupational safety and health, clear rules on annual and family-related leave, better social protection, and clearer avenues for redress, to name but a few. Genuinely self-employed people will be able to fully benefit from the autonomy and freedom associated with their status and also have access to certain forms of social protection, in line with national rules. Clarifying employment status in platform work is therefore key to achieving better working conditions and broader access to social protection.
- **Ensure fairness, transparency and accountability in algorithmic management.** People working through platforms may lack information and understanding on how algorithms are applied, are used to reach certain decisions and thus impact their working conditions, and may lack access to redress for such decisions. The use of algorithmic management may further obscure the actual management functions performed by platforms and thus make it challenging to determine the attribution of obligations where they might otherwise be due. Building on the GDPR and the proposed AI Act, setting up procedures to improve the understanding of how such systems work and their implications for the people involved can open up avenues for prevention of and redress for unfair or discriminatory outcomes. It would therefore contribute to better working conditions in platform work.
- **Enhance knowledge of developments in platform work and provide clarity on applicable rules for all people working through platforms operating across borders.** Data gaps affect the ability of relevant national authorities and stakeholders to bring about positive change for platforms and the people working through them. Enhancing knowledge on the extent of platform work, providing clarity on applicable rules and supporting the traceability of cross-border work provided through platforms would contribute to the enforcement of existing rules. It would, therefore, improve working conditions in platform work and contribute to the sustainable growth of digital labour platforms in the EU.

5.2. Avenues for EU action

A possible EU initiative would be designed in full respect of national competence, the diversity of labour market traditions in Member States, and the autonomy of social partners. This section presents possible options for an EU initiative on platform work, providing an overview of the measures under consideration for addressing the problems and meeting the objectives outlined above. All options should be complementary to existing (or proposed) EU legislation, which is not focused *per se* on platform work but partly covers the challenges set out above *vis-à-vis* digital labour platforms.

Several options could be envisaged for the personal scope of the EU initiative. Depending on their design and objective, the measures could target all people working through digital labour platforms, regardless of employment status, or be limited to workers

(including those people with a misclassified employment status). **An EU initiative could cover all digital labour platforms active in the EU, or focus on certain types of platform work or certain types of platform business models.**

These measures can form part of a package of binding and non-binding instruments. They address different challenges in platform work and can be combined in various ways since they are not mutually exclusive.

Any initiative on platform work should respect national concepts of employment status. In their responses to the first-phase consultation, social partners agree that they do not wish to open a discussion on an EU concept of 'worker'. Member States have different approaches to the delimitation between worker and self-employed status. For example, some have introduced an intermediate category for dependent or 'employee-like' self-employed who can access some social protection benefits on conditions similar to those for workers. Any EU-level initiative on platform work should thus rely on definitions of the employment relationship as laid down by national law, collective agreements or practice, while taking into account the case law of the Court of Justice of the EU. For this reason also there is no intention to create a 'third' employment status at EU level, while respecting the choice made by some Member States to introduce it in their national legislation.

5.2.1. Addressing misclassification in employment status

Facilitating the correct classification would address many of the identified challenges related to access to decent working conditions and social protection. The establishment of an employment relationship remains a gateway to many existing rights and protections, both at Member State and EU level. Only people who are classified as workers have access to the full set of labour rights, such as on working time, paid annual leave, maternity, paternity and parental leave, and occupational safety and health. Workers have easier access to social protection, although gaps remain for non-standard workers. For example, when it comes to coverage by insurance for accidents at work and occupational diseases, 10 Member States have no accidents at work scheme for the self-employed, and in a further six Member States self-employed only have access to voluntary or partial schemes[78]. Workers are also better protected in cross-border situations than the self-employed, in the case of disputes on jurisdiction or applicable law (see Section 3.3).

The initiative could include tools to help platforms and people working through platforms to correctly establish the classification of employment status in line with national definitions, taking into account the imbalance of power between the platforms and the people working through them.

- One option would be a **rebuttable presumption of an employment relationship** to the effect that the underlying contract between the platform and the person working through it is deemed an employment relationship. To counter that presumption, platforms would have to establish in a legal procedure before a court that the person is in fact self-employed. Such legal presumption could have the advantage of providing a clear rule and strengthen the work of labour authorities or social security institutions

[78] Avlijas (2020): Social Situation Monitor - *Comparing Social Protection Schemes for the Self-employed across EU-27*. Available online.

to reclassify them as workers. In order to ensure that genuine self-employed remain so, the scope of application of such a rebuttable presumption could be narrowed by accompanying it by a number of criteria that would need to be met in order to trigger the presumption, or by limiting it to situations where the work relationship has certain stability.

- Another option would be a **shift in the burden of proof** or lowering the standard of proof required for people engaged in platform work or for their representatives in legal proceedings. The person working through the platform would not automatically be considered to be in an employment relationship, but would have to establish very few basic facts from which it can be presumed that an employment relationship exists (prima facie evidence), in which case it would be for the platform operator to prove that the person is in fact self-employed. The prima facie evidence could, for instance, consist in the fact that the level of remuneration is determined by the platform, the fact that the platform controls or restricts communication between the person and the customer, or that it requires the worker to respect specific rules with regard to appearance, conduct towards the customer, or performance of the work. Since people working through platforms often do not have full access to information on how the work is organised, and therefore might be in a difficult position to prove all elements of an employment relationship, this option would help them challenge more easily their contractual status if they wished to do so. It would, however, still require individuals to start court proceedings, with the associated costs and risks.
- An **administrative procedure** to examine the employment status of people working through platforms could spare them the cost and risk involved in legal proceedings and thus lower the burden of reclassification action. It could be open to both parties of the contractual relationship, and possibly other actors, for example worker representatives, and would result in an administrative ruling[79]. Decisions would have precedent value for similar cases, without being legally binding (except for the administration itself). Such administrative procedures would have the advantage of being less costly and lengthy than court proceedings, and thereby more easily accessible for individuals. They are, however, still open to a challenge in court. If one of the parties refuses to comply with the administrative ruling, subsequent litigation might still be necessary.
- Another out-of-court option would be the **certification of work-related contracts**, carried out at the request of either party, by labour authorities or by independent bodies. This means that persons engaged in platform work could, on their own or represented by worker representatives, have their employment status ascertained by an impartial institution. The same possibility would be open to platforms. The certification would produce the presumption of a correct classification of the employment relationship (as either worker, self-employed or a third status, in line with national law) for labour, social protection and tax authorities, which only a court could reverse[80]. While the certification has a signalling effect and does not entail high

[79] This possibility exists in Belgium since 2006 through the Administrative Commission for the regulation of the employment relationship established by the federal government as part of the social security service.
[80] Such a certification procedure of work-related contracts was introduced in Italy in 2003.

costs or risks, it cannot be directly enforced. In case of non-compliance by the platform, a misclassification claim would need to be introduced before a court.

These different tools would pursue the same objective, but would produce different effects and different degrees of efficacy, not only in terms of legal certainty and speed of procedures, in balancing the asymmetry of bargaining power between the worker and the platform but also in terms of level playing field within the internal market. Different options **could also be combined** in different ways**.** Depending on the level of stringency of the tool envisaged, they could apply either to **all digital labour platforms or only to specific categories.** For instance, an administrative or certification procedure for all digital labour platforms could be combined with a rule on the burden of proof for legal procedures. It would also be possible to combine a rebuttable presumption for those sectors where misclassification is more prevalent, such as platforms intermediating certain forms of on-location platform work, with a rule on the burden of proof for all other digital labour platforms.

Criteria or indicators to clarify the employment status and assist in the correct classification could further reinforce these procedural tools. They could narrow down the scope of a legal presumption or define what kind of evidence could be sufficient to shift the burden of proof. Such criteria or indicators should be specific to platform work and not interfere with national definitions of general labour law. They could be **either binding or indicative, exhaustive or non-exhaustive.** They can also promote a level playing field across the single market not only between platforms but also between platforms and other businesses.

5.2.2. Introducing new rights related to algorithmic management

Algorithmic management presents distinct challenges in platform work, and is also becoming more prevalent beyond the platform economy. It is a new phenomenon not yet fully tackled in labour law at EU and national level. The Commission's initiative could therefore propose new rights in this area, building upon and in full consistency with existing instruments (labour law, GDPR, P2B) and proposed ones (AI Act, DSA). These could include:

- improved information for the people affected by algorithmic management and their representatives on the way algorithms manage work;
- establishing internal procedures to guarantee timely and justified human oversight, control and accountability of decisions with significant implications for affected people;
- ensuring appropriate channels for redress (e.g. by setting up internal procedures or mediation structures within companies);
- reinforcing information and consultation rights on algorithmic management systems, ensuring full involvement of social partners;
- ensuring the right to privacy while off duty[81], as well as the effective application of other relevant GDPR principles and requirements in the workplace;
- promoting ratings portability, in particular by increasing the effective use of the right to data portability; and

[81] Platforms often tap into the service provider's smartphone gyroscope to detect driving patterns – sudden braking, acceleration, etc.

- excluding automatic termination of work-related contractual relationships or practices with equivalent effect.

An EU initiative introducing new rights and reinforcing the implementation of the existing rights could be specific to platform work and apply to workers only or be extended to the self-employed. It could also look at the world of work in general. If tailored to algorithmic management challenges in platform work, the initiative could pave the way for a broader approach to the use of artificial intelligence in the labour market in the near future.

5.2.3. Tackling cross-border challenges

National authorities face challenges when it comes to cross-border platform work. With platform companies often operating in several Member States and offering services across borders, verification of compliance with existing laws and their enforcement may be challenging for national administrations, in particular those responsible for labour inspection, social security and taxation.

- The initiative could consider either **a register of, or transparency obligations for, platforms,** which could provide key information such as the active terms and conditions, the number of people working through them and their employment status.
- To facilitate the tasks of authorities, **platforms could be required to report certain data** regarding transactions they facilitate (i.e. task duration, pay per task, assignment of the task to the workers, contacts between the workers and the platform, etc.) Member States could ensure access to the reported information for relevant national authorities for the purposes of enforcing rights and obligations and to build statistical information on the digital labour market, needed for informed policies. Information could also be exchanged between Member States when the provision of services has taken place in a Member State other than that of the platform company's (potential) place of registration.
- To support the **portability of social security rights** and address challenges in the **identification of people working through platforms** across borders or in two or more Member States for social security coordination purposes, the relevance of platform work could be taken into account in the pilot under the **European Social Security Pass**, which was announced in the European Pillar of Social Rights Action Plan.

The initiative should keep any new reporting obligations to a minimum in order not to create excessive administrative burdens on platform companies, in particular small and medium-sized businesses, or national administrations. Indeed, there are already several reporting and data sharing obligations for online platforms under the internal market *acquis* and taxation legislation.

People working through platforms in a cross-border context also need accurate information on rules and obligations. The initiative could provide **interpretation or guidance** regarding the application of existing EU legislation to people working through platforms, including for instance rules on applicable law and jurisdiction or social security coordination.

5.2.4. Strengthening enforcement, collective representation and social dialogue

Enforcement of rules and collective action are key, given the imbalance of power between platforms and people working through them. This is particularly true for workers who often face obstacles or risks to claim their rights in the absence of any support from trade unions or other organisations. It is also true for certain self-employed who are sometimes in a weak position to defend their rights and interests.

The initiative could introduce measures to ensure compliance with the new material and procedural rights and obligations in platform work that the initiative will establish. Such rules should be in line with national traditions and could take inspiration from other instruments in labour and equal treatment law. They could cover access to effective and impartial dispute resolution, procedures on behalf of or in support of workers (e.g. by trade unions), the right to compensation, protection against adverse treatment or consequences for claiming rights, access to evidence, and penalties. Another avenue to be considered is the promotion at national level of ombudspersons responsible for resolving disputes between platforms and people working through platforms.

Social partners have an important role to play in the management of platform work. To support the representation of people working through platforms, and the platforms themselves in Member State social dialogue practices, the EU could also encourage Member States and social partners to stimulate social dialogue in platform work and to support capacity building in this context. Trade unions also face difficulties in identifying and contacting people working through platforms due to the absence of a common place of work. Communication channels embedded in the digital infrastructure of platforms, allowing worker representatives to provide people working through the platforms with information, could strengthen their ability to effectively defend their rights.

Removing obstacles to collective bargaining might be necessary. Under competition law, self-employed people are considered as 'undertakings' and any agreement between them risks being prohibited as anticompetitive under Article 101 TFEU. A forthcoming separate EU initiative aims to ensure that EU competition law does not stand in the way of collective bargaining for self-employed who need it (while other aspects of competition law would remain applicable to self-employed and platforms)[82].

Finally, clarity on rules and a broader data basis can contribute to better enforcement and compliance. The initiative could encourage Member States to provide advice and guidance to people on rights and obligations resulting from their platform activity in relation to tax and social security matters. Data collection and exchange of best practices on platform work and algorithmic management could also be a way forward.

5.3. Relevant EU instruments

The initiative on working conditions in platform work could take the form of a directive, a Council recommendation, or a combination of the two. A policy communication could possibly introduce any non-legislative elements of the initiative.

Directive

[82] See more details here.

A directive would provide certainty about the mandatory requirements to be applied by Member States. To this end, it could contain a set of minimum standards and procedural obligations with which to comply.

Article 153(2) TFEU provides for the possibility of adopting a directive in the area of working conditions involving minimum requirements for implementation by Member States[83]. This legal basis would enable the EU to set minimum standards regarding the working conditions of people working through platforms, where they are in an employment relationship and thus considered as workers (including false self-employed people), in line with national traditions and practices.

A directive addressing the situation of genuine self-employed people working through platforms as business actors could be based on an internal market legal basis. Possible provisions in the TFEU include Article 53(1) – which empowers the EU to issue directives coordinating national provisions concerning the uptake and pursuit of activities as self-employed persons – or Article 114 allowing for the approximation of laws with regard to the establishment and functioning of the internal market.

Article 352 TFEU allows the EU to act in order to attain one of its Treaty objectives in the absence of a more specific legal basis. This legal basis could be used for a directive on the working conditions of self-employed people engaged in platform work. This legal basis would require unanimity in the Council.

Council recommendation

A recommendation could provide for policy guidance and a common policy framework at EU level, while not setting specific mandatory requirements. Envisaged tools for monitoring implementation of such a non-binding instrument might include the use of benchmarking under the European Semester, the exchange of good practices, and joint work with Member States and social partners on the development of appropriate monitoring tools.

Non-legislative measures

The initiative could entail non-legislative measures at EU level that would contribute to the objectives set out above. For example, the Commission could facilitate a dialogue with platform operators aimed at developing principles for good quality platform work by way of a code of conduct or a charter, possibly accompanied by a voluntary label. Such a self-regulatory tool could cover social benefits and training on digital labour platforms and complementary aspects in relation to working conditions and algorithmic management.

As possible EU legislative action can only set minimum standards in the labour and social affairs field and cannot ensure full harmonisation in the internal market, further action could be taken to improve coordination and avoid fragmentation, such as organising exchanges of experience and mutual learning among Member States on the issue of clarifying the employment status of people working through platforms.

[83] Art 153(2)(b) TFEU also states that '*Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings*.'

Other possible measures include: guidance regarding the application of existing legislation in cross-border platform work, including for labour inspectorates; promoting social dialogue and other social partner initiatives; and/or further monitoring and data collection by setting up an EU-level observatory on platform work and algorithmic management. Such actions could be promoted by means of funding, organisation of meetings and other forms of support.

6. Next steps

In accordance with Article 154(3) TFEU, the Commission must consult management and labour on the content of the envisaged initiative. This initiative could address the challenges related to working conditions in platform work. For this second phase of the consultation, the Commission would welcome the views of social partners on the questions set out below.

EU action could also be pursued to address platform work challenges for the self-employed, for which the procedure of Article 154(3) TFEU might not as such be applicable. It is therefore on a voluntary basis that the Commission invites social partners to share their views on the questions below also as regards the self-employed.

1. What are your views on the specific objectives of possible EU action set out in Section 5.1?
2. What are your views on the possible avenues for EU action set out in Section 5.2 of this document?
3. What are your views on the possible legal instruments presented in Section 5.3?
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?

The Commission will take into account the results of this consultation for its further work on an EU initiative to improve the working conditions in platform work. In particular, if the social partners decide, as provided for under Article 154(4) TFEU, to negotiate between themselves on these matters, the Commission will suspend its work.