

ETUC resolution on developments concerning the proposal of the European Commission for a Directive on improving working conditions in platform work in the ordinary legislative procedure

Adopted at the Executive Committee meeting of 22-23 June 2022

ETUC political priorities in the light of latest developments in the European Parliament regarding the report on improving working conditions in platform work.

On May 19th, the European Parliament (EP) presented its first draft report on the proposal for a Directive on improving working conditions in platform work. The rapporteur is MEP Gualmini (S&D).

The report takes on board many demands of ETUC, like (inter alia) a broad definition of digital labour platform and putting forward a general presumption of employment relationship (which therefore should not be activated by a set of criteria). A more detailed analysis of the content of the proposal and the ETUC position is included in the annex of this resolution.

The deadline for amendments was June 9th. Some EPP members along with the Renew Europe and ECR groups have tabled many proposals in a coordinated manner which aim at getting away with the advancements in terms of labour rights brought by the report of MEP Gualmini and even worsen the original proposal of the European Commission (EC).

With the misleading argument that the legal presumption would lead to an automatic classification of all persons performing platform as employees, liberal and conservative MEPs are retrieving the original proposal of the EC of triggering the presumption with a set of criteria. Even worse is that instead of referring to the original EC proposal of meeting two out of five criteria to activate the presumption of employment relationship, these amendments support that a majority of them should be fulfilled. ETUC recalls that this narrative is built on the false argument which equals the presumption of an employment presumption (the fact that the point of departure of the relationship between a digital labour platform and persons performing platform work should be of an employment nature) with the definitive classification of a worker as an employee. Contrary to the confusing narrative used by these MEPs, a presumption of employment relationship will not affect the business model of digital labour platform operating with genuine self-employed workers, upon validation of the relationship by the relevant ad hoc administrative or judicial body.

Another justification provided is that a general presumption would be contrary to the agreement of the Parliament on this topic reached with the previous report on "Fair working conditions, rights and social protection for platform workers - New forms of employment linked to digital development", adopted in the plenary session of September 16th, 2021, and led by MEP Sylvie Brunet. MEPs should be recalled that this report called on the EC "to introduce into its forthcoming proposal a rebuttable presumption of an employment relationship for platform workers, in accordance with national definitions as set out in Member States' respective legislation or collective agreements, combined with the reversal of the burden of proof". The activation of this presumption by a series of criteria was not mentioned in the document.

These MEPs have also tabled amendments opening the possibility for “sweetheart unions” (trade unions operated by the employers) to enter into social dialogue with digital labour platforms, without even acknowledging the employers' responsibility of the latter. Other proposals regarding social dialogue aim at strengthening the capacity of genuine self-employed workers to organise in independent trade unions and to bargain collectively. Whereas the access to this fundamental right to genuine self-employed workers is a long-standing demand of the European trade union movement, and ETUC asserts that the existence in certain member states of provisions for collective bargaining guaranteeing the independence of trade union representatives – such as protections against retaliations – without prejudice on the possibility of re-classification are legitimate, the proposal here intends to evade the employers' obligations of digital labour platforms exerting the prerogatives of employers.

One element which the original Parliamentary report proposed to remove was the suggestion of the Commission included in the recitals that the voluntary decisions by digital labour platforms to develop their own schemes of private protection should not be regarded as determining elements indicating the existence of an employment relationship. ETUC had argued that this behaviour from digital labour platforms provides for the social dependency of their workers and should therefore be an indication of subordination. The amendments of the liberal and conservative MEPs propose that the recital is not only maintained in the Directive but it is also moved to the articles of the Directive.

ETUC condemns this attack to the former objectives of the Directive perpetrated by liberal and conservative MEPs. The European trade union movement should recognise the importance of the current situation and its true origins and intentions. The aggressive lobbying strategy of digital labour platforms is the direct consequence of the strength and determination shown by the labour movement on the representation and protection of their workers. Isolating the forces that are the direct relays of the lobbying of digital labour platforms to destroy labour rights must be a priority for the trade union movement in the upcoming months. In order to achieve this objective, the debate should not be limited to Brussels-based circles but become a societal debate across EU member states and reaching to the workplace. It should be focused on what is the sustainable model for digital labour platforms and the organisation of precarious workers in trade unions for the defense of their interests.

The combined strategy deployed by the liberal and conservative forces of “supporting” collective bargaining for solo self-employed with the attacks against the presumption of employment makes it evident that their intention to promote collective bargaining is a way to circumvent minimum floor of rights for persons performing platform work. The power imbalance and the legitimization of “sweetheart” unions will further make impossible any improvement of rights while safeguarding platforms from potential reclassifications of bogus self-employed workers as employees. To be able to bargain collectively, independent trade unions need a level playing field where the circumvention of labour law is prohibited.

Unless rectification following the ETUC position, the uncertain outcome of the presumption mechanism linked to the blocking effects of the criteria and the rebuttal will make the Directive an empty shell to address the issue of workers' status.

As also presented in further detail in the annex, the work of the European Council on this file has been limited to an in-depth reading of the Commission's proposal at the meetings of the Social Questions Working Party. The French Presidency has presented a proposal of general approach for chapters 1 (on general provisions) and 2 (on the employment

status) which does not modify substantially the Directive and certainly does not improve any of the shortcomings identified. ETUC is concerned that Member States may not want to take a clear political stand at the level of EPSCO meetings and further work of the SQWP in favour of improving the proposal of the EC which would therefore result into a weak (when not negative) mandate of the European Council in the tripartite negotiations.

Upcoming ETUC actions

ETUC will continue to develop initiatives to isolate and denounce the lobbying of the platforms. ETUC and its affiliates will engage to convince MEPs from Renew Europe and EPP that our proposals are coherent and legally feasible to guarantee the sustainable development of platform work from a worker's rights-based approach.

ETUC will develop a petition initiative in September to call for clear defence of recognition of employees when subordinate and of protection of genuine self-employed from subordination of platforms.

Initiatives to gain momentum in support of our demands ahead of the vote of the Parliamentary report in the EMP Committee and in plenary session and around EPSCO Council meeting will also be developed.

ETUC demands to improve the report of the EP are focused on making explicit the operation of the presumption of employment relationship and the possibility for digital labour platforms to rebut such presumption. ETUC foresees the application of the presumption of employment relationship for persons performing platform work in two different stages. The first refers to a transitory period for the implementation of the Directive, which would start after the adoption of the legislation by the EU governing bodies and span across the time foreseen for the transposition of the Directive. The second one covers the application of the Directive for new platforms being created in member states, coming to the EU from abroad, or moving from one European country to another. Whereas the two procedures are slightly different, both have the objective of granting workers their correct status. This is achieved through the validation, by the relevant authority, that platforms rebutting the presumption can operate with self-employed, if it is deemed that the relationship is of a self-employment nature. If the decision of said authority is that there is an employment relationship, digital labour platforms shall be employers and their workers employees.

ETUC is also working to guarantee that many advances brought by the draft EP report led by MEP Gualmini, which have only been incorporated in the recitals by the rapporteur, are included in the articles of the Directive. This is, for example, the case for the use of non-exhaustive criteria to guide the possibility of rebuttal of the employment presumption and the provisions included to guarantee the access of undocumented third-country nationals to redress mechanisms without fear of retaliation or deportation, which requires the need to establish a division between the work of labour legislation enforcement and courts, and migration control mechanisms.

As further developed in the annex, the EC is explaining to the co-legislators that the enforcement procedure for the activation of the employment presumption enacted in its proposal for a Directive published in December should be either initiated by the person doing platform work or by an authority. Besides, the positive result of a decision on the presumption of employment relationship would only benefit the individual claimants. ETUC and its affiliates will engage in the discussion with the co-legislators to oppose this counter-productive understanding of a presumption of employment relationship which is being promoted by the EC in its exchanges with the co-legislators.

ETUC and its affiliated organisation will address EU Member States to advocate for an ambitious position at the level of the European Council which improves the EC proposal for a Directive in line with the ETUC political priorities.

From September 29 to October 1 ETUC will organise in Vienna in collaboration with OEGB a trade union action event that aims at bringing together trade union representatives and organisations across Europe that are active on the topic of digital labour platform. There is a need for exchange of experiences and strategies between Confederations & Federations active on organising and collective bargaining, active in legal or campaign strategies on new trade union topics as the negotiation of the algorithm, employment status or collective bargaining of self-employed workers in platform companies. Engagement of ETUC affiliates will be key to make this event fit their needs and a success in term of participation. ETUC will develop a concept note where the affiliates ownership of the initiative will be a key objective.

ETUC will continue to develop its strategy in close coordination with the ETUFs and with regular consultation with, and feedback to, our ETUC ad-hoc group on non-standard work and platform work.

Annex: latest developments at Institutional and ETUC level

The EC's explanation of the presumption of employment relationship

During the European Parliament's preparatory work on the first draft report and also at the discussions held at the level of the European Council in the Social Questions Working Party, the EC has held meetings to explain to the co-legislators its proposal published in December. ETUC is concerned by the approach undertaken by the EC to explain the rebuttable presumption of employment relationship, which goes against the objectives initially pursued by the Directive.

The EC explained that the enforcement procedure for the activation of the employment presumption should be initiated by the person doing platform work or by an authority. The explanations provided by the EC do not correspond to a presumption of employment relationship, but to a mechanism to provide for a shift in the burden of proof.

Any policy option that sets the trigger of the presumption on an individual action to challenge his or her self-employment status against the employer is not a presumption of employment relationship. In the most favourable case, it can be interpreted as a facilitation or an easing of the burden of proof, yet such policy option can also entail no change in relation with the current situation (where workers face a long litigation process to have their employee status recognised and where the ruling of the courts only apply to the individual claimants).

The EC has put a lot of hope on the self-assessment by workers themselves of the characteristics of their working relationship and subordination towards the digital labour platform. Workers through digital labour platforms may not be in the capacity to evidence that they have been penalised by not having been granted jobs, since they simply did not receive requests through the application. Also, it should be borne in mind that the capacity of some workers to make a judgment around labour relationships and subordination, which entail – among others – some familiarity with legal concepts, may be limited. Besides, the assessment of these conditions may vary among workers, and digital labour platforms may apply several standards in the subordination of different workers.

The expectation that individual workers will start proceedings against their digital labour platform to challenge their self-employment status does not consider the vulnerability of workers through digital labour platforms and the structural bargaining inequality between workers and employers. This situation makes it unlikely that these workers will feel encouraged to undertake any legal action.

With regards to the activation of the presumption of employment relationship by enforcement authorities, this option already exists. Furthermore, enforcement authorities currently bring cases in favour of the reclassification of bogus self-employed workers as employees basing their litigation strategy on national definition of workers, and not the made-up criteria of the proposal for a Directive. The EC's proposal, therefore, renders things more complicated for the labour inspectorates and other enforcement actors to classify bogus self-employed workers of digital labour platforms as workers.

What is more important, the EC's understanding that the result of the presumption of employment will only apply to the individual claimant and not to all workers of the digital labour platform (or those performing similar functions) does not add any advantage in the Directive in comparison with the current situation. Again, ETUC defends a general

presumption where digital labour platforms have to trigger the rebuttal if they want to be allowed to work with genuine self-employed.

Parliamentary developments

Following the ordinary legislative procedure after the publication of the proposal for a Directive on improving working conditions in platform by the EC, the European Parliament (EP) has presented its first draft report, led by MEP Gualmini (S&D), on May 19th.

The EP's draft report on improving the working conditions in platform work is a step in the right direction to tackle many of the shortcomings identified by ETUC in the proposal of the EC. The report should however be improved further to provide for an effective legislation that protects the rights of workers through digital labour platforms.

The report defends a general presumption of an employment relationship: the criteria is no longer presented as requisite to trigger the presumption of employment relationship. The criteria proposed by the EP aims at guiding the operation of the rebuttal, as requested by ETUC, and it is a non-exhaustive list to indicate that a digital labour platform supervises or exerts some control over the performance of work. Furthermore, the rapporteur has taken on board the need to relate the rebuttal with the transparency of the algorithm, which is also an ETUC demand.

However, in the EP's report the process of the presumption and the rebuttal remains vague. In this respect there is a risk that the process, as envisaged by the EC, may actually be the way it is interpreted.

A new article 15, on the promotion of collective bargaining in platform work has been put forward, with provisions aiming at – inter alia – facilitating the communication by trade unions with workers and fighting against retaliation and discriminatory practices based on trade union activities.

The report has improved the proposal of the EC regarding the rights appertaining to algorithm management. It includes references to the protection of workers and the obligations for employers, in the light of the use of automated and semi-automated systems, among other improvements. Also, the ETUC demand to extend these rights to all workers (and not only to those through digital labour platforms) has been taken on board.

The report of the EP also refers to the vulnerable situation of undocumented third-country nationals, by proposing they are granted access to redress mechanisms without fear of retaliation and deportation.

As reported in the body of this resolution, a group of MEPs are relaying the arguments brought forward by the platforms against the Directive, during the EP discussion they will try to reintroduce the criteria by saying that their deletion would mean automatic re-qualification of genuine self-employed. This assertion is of course false as re-qualification can happen or not happen with or without criteria. Criteria to limit the triggering of the presumption only add an extra-burden to prove that workers are employees.

The calendar of the EP on this dossier is the following (we also include for information the dates of previous stages of the procedure):

- 19th May, presentation of the report to the Committee of Employment and Social Affairs of the European Parliament.

- 8th June, deadline for amendments
- October, the report will be voted in the EMPL Committee (to be confirmed)
- November: the report will be voted in the EP plenary (to be confirmed)

The Committee on Transport and Tourism will deliver an opinion to the report led by the EMP Committee, whose rapporteur is MEP Vind (S&D). The report was discussed at the TRAN Committee meeting of June 16 and the deadline for amendments was June 24.

Council

The Social Questions Working Party of the European Council has, in January 2022, started holding meetings to analyse the proposal of the EC.

Based on the observations of the different permanent representatives, on May 19th the French Presidency of the European Union has presented a first draft compromise proposal for Chapters I and II.

The Ministers for Employment and Social Affairs of the Member States will, on June 16th, take stock of the Council's progress of work on the directive regarding digital platform workers.

ETUC deems that the text does not propose any significant improvement of the draft Directive presented by the EC.

With regards to the definition of digital labour platform, amendments have been proposed to exclude some platforms from the scope of the Directive (those reselling goods or services, and those providing non-profit services). However, the cumulative definition included in the original proposal of the EC prevails. Since all conditions must be met for a digital labour platform to be so defined, it reduces the scope of the definition and can therefore still result in many digital labour platforms falling outside of the scope of the Directive.

When it comes to the presumption of an employment relationship, the proposal maintains the criteria with slight modifications regarding the restriction of freedom, which render the text more difficult. Furthermore, it proposes a problematic provision under paragraph 3 of this article¹, which is based on the argument of providing leeway for Member States on the application of the presumption of employment relationship. The new formulation may leave room for non-compliance by those Member States opposing the objectives of the Directive.

ETUC has held meetings with the representatives of the French Presidency of the European Union, the upcoming Czech Presidency, and the social attaches of the Italian and Spanish governments, to convey its political priorities. A meeting with the representatives of the Swedish government is foreseen for late June.

The Czech Presidency aims to conclude the discussions by the December 2022 EPSCO meeting. ETUC and its affiliates need to strengthen the contacts and discussions with

¹ **In addition, competent authorities verifying compliance with or enforcing relevant legislation may also rely on that presumption in assessing whether a contractual relationship should be considered an employment relationship, unless it is manifest that the presumption would be rebutted on the basis of the law, collective agreements or practice in force in the Member State in question, with consideration to the case-law of the Court of Justice.**

national governments to ensure the mandate from the Council can improve the current draft Directive.

Previous ETUC events

On May 19th ETUC organised a working breakfast with MEPs to discuss the developments regarding the proposal of the Directive on improving working conditions in platform work. ETUC presented its position illustrated by concrete examples and real-life scenarios that could arise if we the European co-legislators do not strengthen the text proposed by the EC. On this occasion, and aiming at facilitating the advocacy work, ETUC published: a document providing the rationale for the amendments proposed; and a leaflet laying down the assessment of the Directive and the main demands to effectively improve the working conditions in platform work.

On June 14th ETUC organised, together with the Friedrich-Ebert-Stiftung - Competence Centre on the Future of Work and the Foundation for European Progressive Studies (FEPS), a seminar named "Work ahead: labour in the platform economy". The event gathered stakeholders around a table to discuss the legislative process to improve the conditions of workers in digital labour platforms and the employment aspects of the AI Act. It also aimed at looking ahead and identifying potential new elements for a progressive agenda to address challenges appertaining to non-standard work and the impact of digitalisation in the European labour market.