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

Executive Summary:

- UNI Europa calls on the Commission to propose an ambitious directive based on Article 153(2) TFEU to put platform workers on equal footing as traditional workers.
- The proposal should provide a rebuttable presumption of employment relationship with a shift of the burden of proof that should be borne by the platform company and not the workers.
- Platform companies must abide to their labour, social protection, and fiscal obligations as employers, including the sectorial agreements negotiated in collective bargaining by social partners.
- Furthermore, the proposal should also address the occupational health and safety of workers in platform companies in line with the European Health and Safety legal framework and enable them to exercise their rights and must respect national traditions and practices and the autonomy of social partners.
- The Commission should use this opportunity to promote collective bargaining and increase the coverage of collective bargaining.

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

UNI Europa agrees with the overall objective of the European Commission to ensure decent working conditions for people working in platform companies. The Commission should use this opportunity to promote collective bargaining and increase the coverage of collective bargaining. UNI Europa also welcomes the references to the European Pillar of Social Rights, which should be the compass of European policy and legislative action in the social and employment fields.

UNI Europa strongly objects to any notion of platform work as a separate form of work which necessitates separate rules regarding employment or social security. The protection of workers in platform companies is a matter of enforcement and equal treatment. Dedicated rules are necessary to facilitate the identification of platform companies as employers and the enforcement of their obligations of employers. Workers in platform companies should have the same employment rights and protection as any other worker.
For the purposes of this consultation, UNI Europa addresses digital labour platforms as defined in the ETUC reply. Labour platforms are online platforms that allow for individuals, organisations or companies to get in touch with other individuals who provide services in exchange for remuneration. Labour platforms are in fact companies that can be classified as employers, (temporary work) agencies or intermediaries. Many of them make it their business to avoid such a classification and, by that, the applicability of regular employment law. UNI Europa would like to emphasise that workers in platforms should have access to decent salaries and working conditions, which should be regulated in the first place through collective bargaining and then through national legislation.

UNI Europa highlights the need to recognise platform companies as employers, where the employment relationship presumption applies. Platform companies should be liable for their legal obligations in matters related to labour, income tax, financing of social protection, responsibility for health and safety, due diligence and corporate social responsibility. Any move towards the classification of workers in platform companies as employees without tackling the employers’ liability would become a lame exercise that could risk creating bogus intermediaries between the workers and the platform company. The presumption of the employment relationship is necessary to ensure the right of workers to bargain collectively with their employers.

Young people and migrant workers are indeed over-represented among workers in platform companies. However, this category of workers is over-represented in the low-wage sector. While some platform jobs may indeed offer employment with fewer hurdles, which is beneficial for workers who have difficulty entering the labour market, these workers deserve no less labour market protection than other workers. All workers employed through platforms should enjoy decent working standards and equal treatment independently of their nationality, residence or migration status.

The proposal of the European Commission to guarantee that people working in platform companies have – or can obtain – the correct legal employment status considering their relationship with the platform companies and gain access to associated labour and social protection rights is welcomed by UNI Europa.

Labour law and/or social dialogue has traditionally been able to regulate heterogeneous forms and patterns of work (from part-time work to home working, to agency work) on the basis of common regulatory principles, common legal institutions, and a broadly universally applicable set of rights.

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

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

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

UNI Europa states that a possible EU initiative would be designed in full respect of the autonomy of social partners. With regards to the personal scope of both workers and employers (platform companies), UNI Europa demands to broaden the scope of the
proposal to cover all workers, including non-standard workers, as defined by the ILO, not least those working in platform companies, as well as digital platforms operating in the EU. Non-binding instruments have, so far, delivered little to no protection for workers in platform companies. Besides, there is a risk that this may lead to a fragmented approach across the EU. The solutions to the challenges identified by the European Commission in the previous section will only be brought to practice if these are regulated by legislation. This said, considering an ambitious legislative proposal as the basis of the action, UNI Europa believes that additional non-binding instruments may provide added value.

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

UNI Europa agrees with the statement of the European Commission that any initiative on platform work should respect national concepts regarding employment status, including the definition of worker (in opposition to a European definition of worker), yet considering the general principles of the EU legislation and case law established by the Court of Justice of the European Union.

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

2.1 Addressing misclassification in employment status

UNI Europa, like the ETUC, claims that the employment status, whether a worker is an employee with an employment contract or a self-employed person offering services, is decisive in the access to other rights within EU Member States. We therefore agree with the analysis of the Commission about the gateway effect of the status towards many existing rights and protections, both at Member State and EU level. UNI Europa supports the call by the ETUC to develop more concrete criteria to consider for the establishment of a potential rebuttable presumption of an employment relationship, in addition to the proposed criterion in the consultation document. More concrete criteria will, however, be needed to guarantee a broad coverage for the potential regulation.

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

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

UNI Europa agrees that the following points are necessary and mutually inclusive to correctly establish the classification of employment status in line with national definitions:
- 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. Accordingly, the presumption of an employment relationship would set the status of employee as the point of departure for the labour and contractual relation between the platform companies and their workers.
- this must be coupled with the burden of proof being borne by the platforms.

Only in combination of these two solution elements above, would the EU Action serve to fulfil the strategic objective of the ensuring decent working conditions for people working through platforms. The reason for this combination solution being the only genuine and serious approach is due to the challenges posed by the imbalance of power between the platforms and the people working through them.

- UNI Europa opposes the introduction of administrative procedures seeking to establish the employment status of people working through platforms. It would only assist workers that have the resources and determination to seek judicial or administrative redress against their contractual misclassification at the hands of their — invariably better resources — platform employers. Workers employed by platform companies are often some of the most precarious and vulnerable workers in the labour market, and their ability to access judicial and administrative dispute resolution processes is effectively hampered by a combination of factors, including ethnicity, low pay, job insecurity, and lack of union representation (often due to their employers' hostility towards unions). Thus, this option would counter the overall objective of the EU action.

- UNI Europa opposes the introduction of a certification of work-related contracts, whereas this measure is presented as a less burdensome procedure than undertaking legal action, still it would have a chilling effect on vulnerable workers. Such system would add unnecessary complexity to the system, which could be easily solved with the implementation of a rebuttable presumption of employment relationship.

Regarding the criteria to determine the employment status, UNI Europa supports the ETUC's position:

The criteria to determine the employment status should be regarded as the legal compass to guide the court in cases where companies rebut the employment relationship. UNI Europa supports criteria based on ECJ decisions for the status of self-employment, these being:

- To use subcontractors or substitutes to perform the service, which he has undertaken to provide;
- To accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
- To provide his services to any third party, including direct competitors of the putative employer; and
- To fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer.

UNI Europa also looks with interest to the criteria introduced by the California Assembly Bill 5, yet unfortunately, the lobbying of many platform companies for exemptions, resulted in the virtual exclusion from the scope of this law for workers in platforms companies. The
criteria, which represented a very holistic approach to employment status presumption, basically stated that for the following criteria should be met for genuine self-employed workers:

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

2.2 Introducing new rights related to algorithmic management

UNI Europa agrees with the proposals of providing improved information to workers affected by algorithmic management and the need to reinforce information and consultation rights on algorithmic management systems, ensuring full involvement of social partners.

The democratic control and transparency of the operation of the algorithm of intermediate work applications (including rating of workers) and platforms, the right to disconnect, and the protection of the data of workers should be discussed through information, consultation and participation of workers in full compliance with principles of non-discrimination. In determining and implementing the respective rules regarding algorithmic management, collective bargaining and the social partners should play a key role.

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

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

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

The monitoring of workers is regulated by national laws that often predate GDPR and do not cover modern and intrusive people analytics. Digital tools have brought this to a new level which we can define as algorithmic worker surveillance: advanced analytics (biometrics, machine learning, semantic analysis, sentiment analysis, Emotion Sensing Technology, etc.) can measure biology, behaviours and emotions. Algorithmic surveillance does not passively scan but ‘scrapes’ the personal lives of workers, actively builds an image and then makes decisions. UNI Europa demands that algorithmic worker surveillance is prohibited.
Workers and their trade union representatives should also be able to understand the role of data and the algorithm management in their workplace and its impact on the organisation of their work; they should be critically aware about the role and impact of working with AI systems and have full access to the relevant data. To this end, a legal obligation for companies to set up the necessary processes is required. The introduction of AI technologies at the workplace should involve trade unions and workers’ representatives through collective bargaining among at company and sector level before introducing those technologies, as highlighted in UNI Europa’s position paper on Artificial Intelligence.

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

For UNI Europa, it is unacceptable that workers in platform companies, who often perform dangerous and precarious work and are the least protected, fall outside the scope of the EU OSH regulation and therefore have no legal protection. Therefore, the Commission proposal must address the occupational health and safety of workers in platform companies in line with the European Health and Safety legal framework and enable them to exercise their rights, including a right to disconnect in line with implementation of the European Social Partners Framework Agreement on Digitalization.

2.3 Tackling cross-border challenges

UNI Europa agrees with the statement that: “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.”

On point 1: The initiative to consider either a register of, or transparency obligations for, platforms. This option is welcome, but it is not sufficient on its own.

On point 2: The initiative to require that platforms report certain data such as task duration, pay per task, assignment of the task to the workers, contacts between the workers and the platform, etc. to improve the enforcement of applicable rules. This option raises two issues: What are the applicable rules and where should they be enforced? Determining the applicable social legislation in cross-border situations should starts from a worker-centred approach, building on the premise that the platforms are the employer – as the following references clarify the place of activity of the worker or of residence in case the worker performs his job in more than one country:

- As affirmed by Article 8 of the Rome I Regulation, an individual employment contract shall be governed by the law of the country in which or from which the employee habitually carries out his work. Any derogation from this principle must not have the result of depriving the worker of protection otherwise afforded to him.
- Likewise, as a general rule, Article 11(3)(a) of the 883/2004 Regulation on the Coordination of Social Security Systems states that a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation
of that Member State. In other words, it should primacy facie not be relevant where the platform is established, but where the worker habitually works. Also, in cases where the worker physically pursues activities in two or more Member States, he should primarily be subject to the legislation of the Member State of residence (Article 13(1)(a)), whereas the Member State of the registered office of the employer is only of secondary relevance (Article 13(1)(b)).

- This goes hand in hand with the conclusion of the Court of Justice in cases such as C-434/15 Elle Taxi v Uber, where the Member State of destination was held competent to enforce its applicable rules on the physical service offered by Uber.

While the Member State of the worker has the primary competence to verify compliance with applicable social legislation, transparency and reporting obligations of the Platform, this would also require enforcement in the Member State of establishment.

When it comes to inspections, it must be possible to inspect at the premises of the Platform in both the Member States of establishment and destination, regardless of where the directions given to the workers are coming from.

Lastly, the need to ensure effective enforcement of applicable rules also necessitates further strengthening of collective bargaining at sectoral level as well as cooperation and information exchange between competent authorities in the Member State of establishment (of the platform) and the Member State of destination (where the worker is habitually active and/or where from where the service is carried out).

On point 3: on the Commission supporting the portability of social security rights and addressing the challenges in the identification of people working through platforms across borders through the European Social Security Pass.

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

Consequently, the Commission’s pilot for a European Social Security Pass (point 3) seem relevant in situations characterised by a genuine cross-border dimension, where the worker physically crosses borders. However, it is important that the European Social Security Number or Pass is not limited only to the portability of rights, but also serves to equip enforcers with concrete tools to ensure identification and verification of workers and their rights and entitlements through real-time access to, and exchange of, data.

2.4 Strengthening enforcement, collective representation and social dialogue

UNI Europa agrees with the statement of the European Commission that the enforcement of rules and collective action are key, given the imbalance of power between platforms and people working through them.

The reference to the “absence of any support from trade unions or other organisations” should however be commented upon. Trade union across the European Union are engaged
in organising and representing workers in platform companies. Platform companies however oppose to the organisation of their workers as this would put in jeopardy their business model. This resistance from platforms ranges from outright hostility, or more indirectly, to the setting up of alternative representation arrangements controlled by them to compete with trade unions.

The EU should indeed encourage Member States and social partners to stimulate social dialogue in platform work and to support capacity building in this context. This is yet one more argument in favour of the liability of platform companies as employers. Currently, platform companies deny their employers' responsibilities to circumvent the social and fiscal obligations, which have been outlined earlier. They present themselves as a mere virtual marketplace which connects offer and demand of two or more undertakings. For platform companies to be engaged in social dialogue and collective bargaining with trade unions, they should acknowledge their role as employers and get organised with the other employers' organisations around their respective industrial sector. In accordance with the law and practice of Member States and national labour market models, only organised, recognised, representative and independent trade unions can legitimately bargain collectively on behalf of employees, self-employed and other non-standards workers.

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

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

UNI Europa rejects the option of a policy recommendation with voluntary instruments like code of conducts, charters or labels, which are in no way suitable to improve the working conditions of platform workers, in the long run.

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

UNI Europa calls on the Commission to propose an ambitious Directive based on Article 153(2) TFEU. The core aim of the Directive should be to put platform workers on equal footing as traditional workers and thereby ensure their right to freedom of association, including collective bargaining; thus strengthening the enforcement of existing rules. The Directive would need to define binding minimum standards and requirements for workers. Amongst others, the Directive has to codify the criteria for a rebuttable presumption of employment relationship and the shift of burden of proof to the platform companies instead of workers. The clear classification as a worker ensures that all social and employment regulations are applicable. The Directive must respect the national traditions and practices.
UNI Europa believes that it would be appropriate to set standards for the protection of self-employed persons employed by platform companies on the basis of Article 153(2), in the context of an instrument aimed at setting minimum standards regarding the working conditions of employees (and employees misclassified as 'bogus self-employed') working in platform companies. UNI Europa therefore believes that Article 153(2) should serve as the main legal basis for an instrument setting minimum standards primarily for employees working in platform companies and incidentally for self-employed working through platform companies. The main or predominant aim of the instrument would be to protect employees working in platform companies, and the protection of self-employed persons working through platform companies would be incidental to that predominant or main aim (as well as being necessary to its attainment; Judgment of 6 May 2014, Commission v Parliament and Council, C-43/12, EU:C:2014:298, paragraph 29, and judgment of 14 June 2016, Parliament v Council, C-263/14, EU:C:2016:435, paragraph 43, and case law referred to therein).

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

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

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