

Ceemet's views on the proposal for a Directive on platform work

On 9 December 2021, the European Commission published its proposal for a Directive on improving working conditions in platform work. While Ceemet agrees to the objective to ensure that people working in a platform receive the correct employment status in line with national legislation, we consider that it is not for the EU level to regulate this issue. It should rather be left to the national level as Member States are better suited to take action in this respect.

Ceemet's key messages

- Ceemet considers that the EU is not the best level to establish criteria to determine whether a person performing platform work is legally presumed to be in an employment relationship. We are of the opinion that the Member States are best placed to take measures in this respect, fully in line with their national legislation and practices. EU action in this regard may undermine and collide with national frameworks already in place and it gravely oversteps the EU's competences in this respect.
- The definition of a 'digital labour platform' is too broad and may have extensive, unintended consequences such as the requalification of genuine self-employed people in employees. Also companies that are no labour platforms as such risk to fall under the scope of the Directive due to this wording. Such a wide definition may have severe consequences for important business models that offer flexibility and expert knowledge for the MET industry in Europe.
- When a person performing platform work is correctly classified as an employee according to national law and practices, the applicable EU and national labour and social law will automatically apply to that person. Therefore, Ceemet does not see the need to add the rights deriving from chapter III and IV to persons that are considered employees as they are already protected by the applicable labour legislation. Furthermore, applying these rules to self-employed people is incompatible with several national systems as in many Member States, provisions related to self-employment are regulated by the general contract law.
- In chapter V, the Commission goes far beyond its competences as matters regarding national legal proceedings fall under the prerogative of the Member States. This should be left to the national level to be regulated in line with their national legislation and practices.

General remarks

Ceemet agrees to the Commission's objective which is, amongst others, to ensure that individuals working through platforms have the correct employment status in the light of their actual employment relationship. Where there are issues with the misclassification of the

employment status, they should be dealt with at the appropriate level and by using the appropriate and most effective tools.

While there are indeed several examples of court cases within the Member States on the qualification of the people performing platform work, the outcome of such cases is rather divergent. The outcome is linked to differences in national labour, social and tax regulations which exist throughout the EU. Moreover, it depends on the specific circumstances and the sectors concerned as well as the highly individual circumstances of the persons performing platform work.

We also note that Member States are already taking several legislative initiatives to provide rights to people working for digital labour platforms. For example, in Italy legislation has been in force since 2019 to improve the labour and social rights of individuals providing their services through a platform, regardless of their employment status. On the other hand, in Germany there are general rules deriving both from labour law and social legislation to determine the employment status of an individual. These provisions are also applicable in the platform economy and can be used to classify individuals performing platform work either as self-employed or employee. Meanwhile in the Netherlands, they are looking into the option of a legal presumption of employment status for people working through a platform. These, and many other initiatives within the entire European Union, illustrate that Member States are actively looking for, and finding, legislative solutions which are in line with their national legislation and practices.

In addition to legislative action, national social partners are taking initiatives to safeguard rights for persons working for digital platforms. In Sweden, collective agreements for bike couriers have been reached. Employers' organisations and employee's organisations are further discussing collective agreements that takes into consideration both the need for flexibility of platform companies and fair labour conditions for persons working for digital platforms.

The initiatives on national level, by both the legislator and the social partners, confirm that the EU level is not the correct level to deal with the topic of qualifying an employment relationship. Member States are better suited to take measures in this respect, fully in line with their system. EU action in this regard may undermine and collide with national frameworks already in place.

The main problem that the Commission intends to tackle is the correct classification of persons working through a platform. If a person is classified as an employee by application of Member States' existing legislation and collective agreements, that person will automatically be entitled to the protection and rights laid down by applicable EU and national labour and social security legislation. We therefore do not see the need to add additional rights in this Directive, as is the case in the provisions foreseen by chapter III and IV, for people classified as employees working for a digital labour platform as they are already protected by the applicable labour legislation.

Furthermore, applying the rules of chapter III and IV to self-employed people is incompatible with several national systems as in many Member States provisions related to self-employment are regulated by the general contract law.

Due to these additional rights and consequently the additional administrative burden and costs for companies, the proposal risks to create an uneven playing field between EU based

companies with different business models. This practice could jeopardize the further development of digitalisation of companies in Europe.

The proposal may also have unintended consequences for traditional consultancy firms or consultancy brokers using digital platforms to allocate consultancy resources. Individuals engaged through these firms are not always considered employees. As they often are highly skilled and offered very generous working conditions, they do not have a personal interest to be re-classified as employees. Therefore, it must be safeguarded that any legislation does not interfere with these important business models that offer flexibility and expert knowledge for the MET industry in Europe.

Remarks specific to the articles of the draft proposal

Article 2 – Definitions

The definition of 'digital labour platform' is rather unclear and risks to be interpreted in a very wide manner. Indeed, it should be noted that a digital labour platform is not the same or even similar to digital work but it could however be easily confused by this definition. Consequently, companies or natural persons providing their services via a website or an app, such as delivery services or transportation companies, could be considered a digital labour platform. As a result, these companies will need to comply with all the obligations deriving from this Directive and bear the costs of the administrative burden which goes along with it. The proposal risks to create an uneven playing field between EU based companies with different business models. This practice could jeopardize the further development of digitalisation of companies in Europe.

Also platforms that offer the possibility for people working as independent contractors, such as e.g. software developers or graphic designers, to provide their services through these platforms in order to acquire new clients, risk to fall under this definition. Read in conjunction with the articles falling under chapter 2, this may lead to genuine self-employed people being requalified as an employee.

Ceemet therefore proposes to amend the definition of digital labour platform and narrow it down. It is of vital importance to avoid situations that are not meant to be covered by this provision, as they are not a digital labour platform or platform work, fall under this definition. This is especially important as regards traditional consultancy firms or consultancy brokers using digital platforms to allocate consultancy resources.

Chapter 2 – Employment status

- **Article 3**

Ceemet acknowledges that Member States shall have mechanism in place to correctly classify the relationship between a digital labour platform and the person working through the platform on national level. The contract between a person performing the work and the digital labour platforms should be classified and judged based on a case-by-case basis on their de facto and real business activities. Such a classification must be based on the applicable national legislation, collective agreements and practices. A European approach would jeopardize legal traditions and trust.

EU Member States have national legislation in place which ensures that employees, and in some cases also other categories of persons performing paid work, benefit from social security protection and working conditions. Furthermore, Member States already have systems in place to reclassify bogus self-employed persons as employees. Therefore, there is no need for any EU legislation on this matter.

Finally, we note that Member States are bound to respect the case law of the Court of Justice and in any case need to take this into account in their interpretation of the notion of an employee. The reference to the case law in article 3 can therefore in no way be understood as if the EU is creating an EU definition of an employee.

- **Article 4**

Ceemet strongly disagrees with the Commission's proposal to introduce specific criteria at EU level that could trigger a presumption of employment. Article 4 of the proposed Directive is very far-reaching by presuming that the contractual relationship between a digital labour platform and a person performing platform work is qualified as an employment relationship if two out of the five proposed criteria are fulfilled.

Ceemet notes that this proposal contradicts the Commission's statement from the social partners consultation that the 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 and respect national concepts of employment status. The Commission is doing the exact opposite by imposing criteria on Member States that they have to take into account in order to qualify the professional activities of a person as either self-employment or employment.

Determining whether someone is considered to be an employee or a self-employed person, including deciding whether or not there is a presumption of an employment relationship, should remain a decision of the Member States and an agreement between the social partners in case of collective agreements. National concepts in this respect are developed over a long period of time, taking into account the specificities of the national level and ongoing developments in labour markets. As these developments differ from one Member State to another, one uniform EU approach would have practical implications and would interfere with the well-functioning of the national markets.

The proposal as it stands leaves no room for the national situation and developments. For example, the proposal only gives the option to qualify a person as either a self-employed or an employee, while in some Member States, the option of a third status other than a self-employed or an employee is or has been a topic of discussion. In other Member States specific regulations regarding digital platforms and provisions regarding presumption of employment relationship does not exist and is thus unfamiliar to the national employment law system. In France, there is no presumption of salaried status. On the contrary, the French Labour Code establishes the principle of a (simple) presumption of non-salaried status, notably to the benefit of natural persons registered in the Trade and Companies Register, the Commercial Agents Register and persons benefiting from the status of "auto-entrepreneur". With this rigid article, the option for the Member States, which are better placed than the EU level to respond to new forms of work and hence better placed keep up with developments in the labour market, is strongly restricted.

Furthermore, we are very concerned about the provision that competent national authorities enforcing relevant legislation shall be able to rely on the presumption. This could have significant consequences on the enforcement of other legal frameworks, such as national tax legislation, where EU explicitly lacks competence according to the treaties.

The proposal also contradicts what was agreed in the discussions between the Member States and the European Parliament in the Directive on transparent and predictable working conditions. At that time, it was made clear that there was no support for the EU to establish a definition of employee nor of an employment relationship or establish criteria in this respect.

Moreover, Ceemet is of the opinion that the proposed criteria are not nuanced enough and can be interpreted in a manner that is too broad. This could have the unintended consequence of genuine self-employed persons being unwillingly requalified as employees. For most users, platform work is merely a flexible and supplementary source of income. It should be considered that flexibility and the absence of binding commitments or obligations toward an employer are main motivational drivers to register on a digital labour platform in the first place. The broadly described criteria laid down in this article could easily lead to a presumed employment relationship that none of the involved actors would be interested in.

With its current proposal, the European Commission would introduce EU-wide criteria to presume an employment relationship while an employee status at national levels would go along with highly divergent rights, social entitlements and duties in every single Member State. This would by no means result in a level playing field.

For all of the reasons mentioned above, Ceemet considers that the EU cannot introduce the legal presumption in article 4 and that it should be left to the national level to decide on the best tools to help platforms and people working through platforms to correctly classify the employment status, fully in line with national systems and industrial relations systems.

- **Article 5**

Ceemet notes that article 5 gives digital labour platforms the possibility to rebut the legal presumption of employment in legal or administrative procedures. This would however mean that digital labour platforms and persons performing platform work that do not agree with the legal presumption of employment will need to challenge this presumption in costly and lengthy legal procedures before a court. This will strongly disadvantage companies with digital business models compared to non-digitized processes and put them in a competitive disadvantage.

Needless to say that this proposal will create a lot of administrative burden on companies and start-ups, implies high costs and will hinder job creation. Moreover, this will create legal uncertainty for employees, self-employed and companies and risks distorting competition between companies.

Moreover, we underline that the criteria to rebut the presumption on national level, and thus in principle before a national court, might be divergent from the criteria laid down in article 4. It will therefore be a very confusing practice that EU-wide criteria trigger a legal presumption while this presumption must be rebutted based on national criteria that can be very different from the EU criteria.

Finally, we underline that this option will hamper the flexibility and autonomy that the majority of people working for a digital labour platform are looking for.

Chapter V – Remedies and enforcement

In the articles falling under chapter V, the Commission proposes to regulate matters on national legal proceedings at EU level by means of very prescriptive and detailed articles. This gravely oversteps its competences and does not respect national competences regarding judicial systems.

Moreover, this chapter establishes material rules and procedures for persons performing platform work, regardless of the contractual designation of their relationship with the digital labour platform. The notion ‘persons performing platform work’ may include both employees and self-employed persons. As regards the self-employed persons, this practice is incompatible with several national systems, such as in Sweden, where self-employment is

regulated by general contract law. Therefore, Ceemet believes that provisions on remedies and enforcement should be left to the Member States so they can be regulated in line with their national legislation and practices.

Furthermore, we note that **article 14** gives the power to representatives of persons performing platform work, and other legal entities which have a legitimate interest in defending the rights of persons performing platform work, to engage in any judicial or administrative burden to enforce any of the rights or obligations arising from this Directive. The notion of legitimate interest leaves room for interpretation and may enable an extremely wide range of entities to intervene in this matter. We fear that enabling external actors to engage in judicial and administrative procedures on behalf of persons performing platform work could lead to abusive litigation and disproportionately high claims. Therefore, while Ceemet agrees that it is of key importance that individuals have all the means to start judicial procedures, we are cautious about the fact that this power is given to a wide range of organisations. It should be left to the national level to decide who can take judicial steps, in accordance with existing national judicial systems.

Article 15 stipulates that digital labour platforms are to create the possibility for persons performing platform work to be contacted by representatives of persons performing platform work. As mentioned above, Ceemet notes that the scope of the Directive is very wide and the definition of digital labour platform is too broad and therefore many companies risk to fall under the scope, whether or not they may actually enable platform work. Therefore, a wide range of companies will now be obliged to build a communication infrastructure that allows representatives to contact the persons working for or with these companies. Furthermore, this article raises several concerns as regards the protection of the privacy of the individuals as they will now be allowed to be contacted by representatives. This notion poses practical concerns from the side of the company as to which representatives, trade unions or associations they should grant rights to access the individual.

Finally, **articles 17** and **18** are applicable for persons performing platform work, regardless of whether these persons are presumed or classified to be in an employment relationship, entailing that also non-employees are granted protection against adverse treatment or consequences and protection from dismissal. In many countries non-employment relationships are solely governed by general contract law. It would be unfamiliar for many Member States and far-reaching to implement provisions similar to employment law provisions also in contract law.

About Ceemet

- Ceemet represents the metal, engineering and technology-based industry employers in Europe.
- Member organisations represent 200,000 companies in Europe, providing over 17 million direct and 35 million indirect jobs.
- Ceemet is a recognised European social partner at the industrial sector level, promoting global competitiveness for European industry through consultation and social dialogue.