

Regulating platform work: How will this impact migrant workers?

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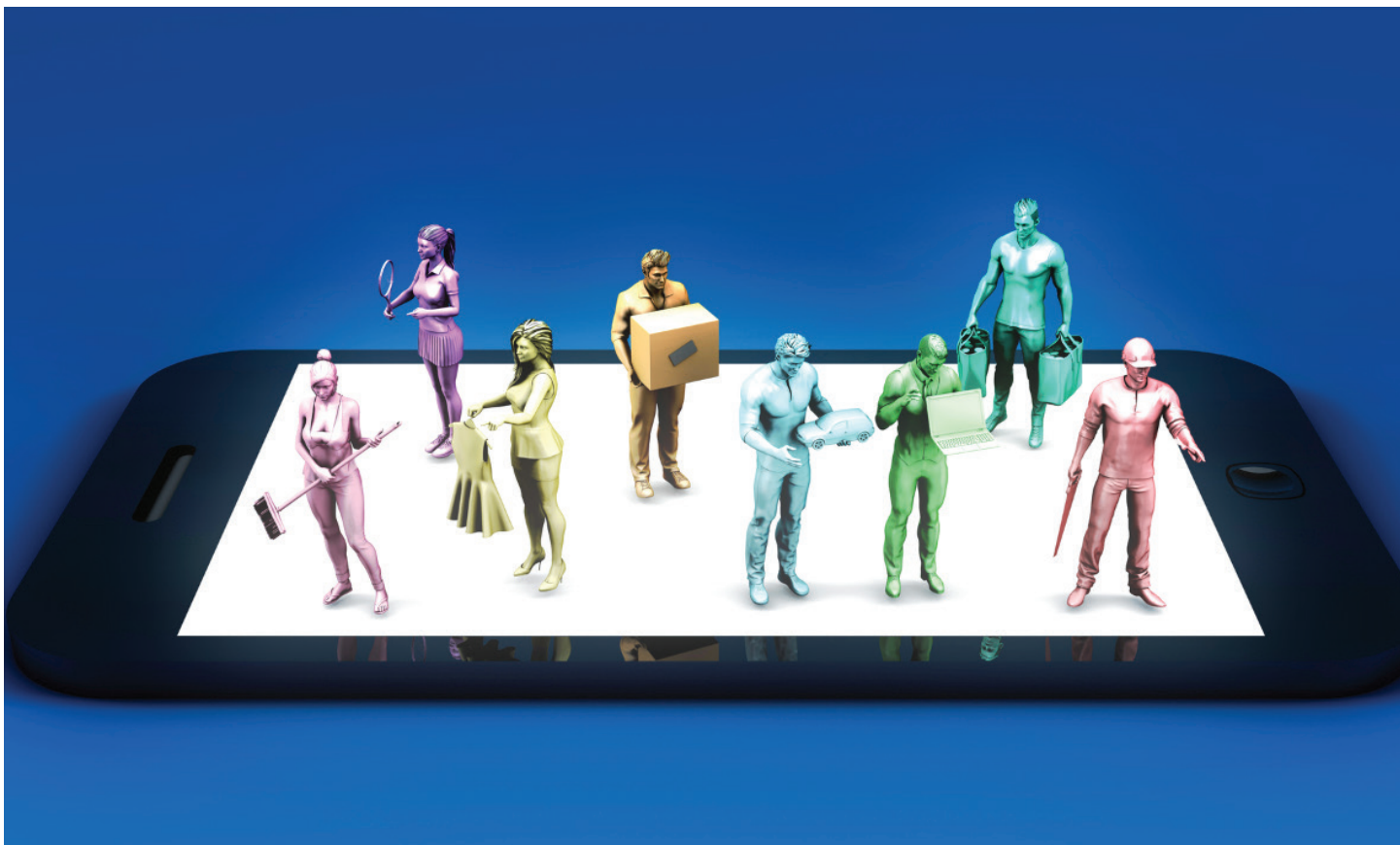


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Executive summary

Platform work has emerged as a key topic in discussions about the future of work in Europe. The conditions of platform workers raise concerns regarding job insecurity and fairness, among other issues. While there has been some focus on the working conditions and employment status of platform workers, more attention needs to be given to their demographics and backgrounds.

This Discussion Paper analyses the potential impact of the proposal for a Directive on the working conditions and rights of platform migrant workers. The Directive presents a much-anticipated opportunity to guarantee that workers in the platform economy have proper access to labour rights and social benefits. However, having a more stringent regulatory framework does not necessarily translate into stronger and greater social protection for the most vulnerable individuals.

Migrant platform workers are vulnerable to double exploitation. First, as platform workers, they cannot enjoy the protections that employment law provides. Second, they can be subject to exploitation due to their migration and residence status, especially those who are undocumented.

In this context, the positive impact of the proposed Directive will likely be limited by differences in bargaining power between migrant workers and platforms and by the well-founded fears of retaliation that some non-EU platform workers might face. Therefore, strengthening protections will require targeted improvements to the proposed framework and further actions to remove structural barriers faced by migrant workers when accessing the labour market.

Introduction

Platform work has become one of the cornerstones of the debate on the future of work in Europe.¹ It has been high on the EU policy and legislative agenda since 2016. The European Commission and the European Parliament (EP) have issued several communications and resolutions pointing to the need to clarify uncertainties about the status, rights and working conditions of those participating in the platform economy.

The overall aim of these efforts is to improve the social protection system for non-standard forms of work, especially for individuals who are in a precarious situation. The conditions of platform work raise concerns in terms of job insecurity and fairness primarily due to unclear employment status. Platform workers are generally considered self-employed. Being classified as self-employed leads to the inapplicability of labour and social protections, such as minimum wages, collective bargaining, and unemployment and sickness benefits.

To address these concerns, in 2021 the European Commission issued a Directive on improving working conditions for platform workers (hereafter ‘the proposed Directive’).² Following European Commission President Ursula Von Der Leyen’s call to “look at ways of improving the labour conditions of platform workers”, the proposed Directive offers a long-awaited opportunity to guarantee that all workers in the platform economy enjoy labour rights and social benefits, including non-EU migrant workers (hereafter ‘migrant workers’).³

Despite a lack of accurate statistical data, migrant workers appear overrepresented in the platform economy.⁴ The flexibility of platform work and low administrative requirements make it possible for many migrant workers to earn a living. But Eurostat data also suggests that migrant workers tend to be employed in temporary and precarious jobs.⁵

Faced with high entry barriers to the traditional labour market, platform work remains a crucial source of income for many non-EU nationals. At the same

time, the absence of viable alternatives makes them vulnerable to precariousness and double exploitation. In other words, not only are non-EU workers who work through platforms excluded from protection standards otherwise provided by employment law, they are also vulnerable to exploitation due to their migration and residence status, especially if they are undocumented, making them more inclined to accept precarious working conditions.

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While efforts to improve the working conditions of platform workers are welcome, the proposed Directive overlooks the specific situation of migrant workers. Its positive impact will likely be limited by differences in bargaining power between migrant workers and platforms, and by the well-founded fears of retaliation that some non-EU platform workers might face.

As the EU debate on platform work advances, this Discussion Paper examines the systemic vulnerabilities and needs of migrant workers, also suggesting targeted measures to address existing shortcomings and strengthen safeguards. The Paper covers non-EU nationals in an overarching way, irrespective of their residence status, although it focuses on the challenges that undocumented migrant workers face.

1. Migrant workers in the platform economy: An overlooked demographic

Although migrant workers are a diverse group, they frequently encounter challenges in accessing suitable employment in conventional labour markets. As reported by the International Labour Organisation (ILO), practical difficulties include language barriers, lack of recognition of foreign qualifications and skills mismatch, scarce information about job opportunities in the host countries, as well as discriminatory practices.⁶ In addition,

challenging economic and social circumstances, such as lack of adequate housing, access to safety nets or health issues, might exacerbate these problems.⁷

Crucially, on top of practical difficulties, legal barriers structurally hinder integration into the job market because of the lack of the right to work (e.g. asylum seekers in the first few months after applying for

international protection), restrictions on the type and working hours that can be performed (e.g. students), or lack of permit to stay.⁸ As a result, many migrant workers, particularly those without work authorisation or who lack a permit to stay, are forced to accept poor working conditions and often remain in exploitative situations.⁹

Against this background, it does not surprise that migrant workers represent a considerable share of the platforms' workforce.¹⁰ According to the latest COLLEEM survey, which includes information on the country of birth, 13.3% of the people surveyed were born abroad (either in a different member state or outside the European Union) and were doing platform work as a main occupation.¹¹

Due to the uncertainty around the number of undocumented workers, it remains difficult to come up with accurate estimations of the total number of platform workers who are not EU-nationals or were born abroad. That said, existing estimates confirm the labour market segmentation: although platforms are also relevant for 'white collar' jobs, their business core remains that of on-location services (e.g., food delivery, transportation, and domestic labour), which heavily relies on the migrant workforce.¹²

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The flexibility of platform work, therefore, makes it an easily accessible and attractive source of income for migrant workers with limited access to the conventional labour market. These, for example, include undocumented migrants who either register an account in their own name or use someone else's.¹³

This flexibility, however, also exposes them to greater risks. The precarity of platform work is disadvantageous for all workers. But it is especially severe for migrant workers, who may be more likely to end up in a vulnerable situation due to, among others, a lack of access to other sources of income or formal employment opportunities.¹⁴ Illustrating this, undocumented migrants who use someone else's account are usually obliged to pay a fixed sum or a percentage of their income to the owner, further exposing them to exploitation.¹⁵

1.1. MIGRANT WORKERS IN EUROPE: WHAT SAFEGUARDS AGAINST EXPLOITATION?

While the EU has only recently started looking at the specific changes to the labour market brought about by platform work, the Union has taken some initiatives

to fight against exploitative practices against non-EU nationals. More specifically, the 2009 Employment Sanctions Directive (ESD) has tried to counter the exploitation of undocumented migrant workers.¹⁶

The ESD prohibits the hiring of non-EU nationals who do not possess a valid permit to stay. Furthermore, a protective framework has been put in place against abuses. Undocumented workers who are under the supervision of an employer can seek to retrieve any outstanding payments and lodge complaints against their employers. The ESD also envisages the possibility for national authorities to grant temporary residence permits to workers subjected to particularly exploitative working conditions. This is intended to provide an incentive for them to utilise the complaint mechanism.

In addition, in 2014, the Court of Justice of the European Union (CJEU) held in the [Tümer](#) that employment law also applies to non-EU nationals who do not have a regular residence permit. The ruling clarified that their residence status should not hinder the enjoyment of labour and social rights.

The EU legal framework thus contains a common layer of protection for all workers, including those who are undocumented, when there is an employment relationship. Yet, platform workers fall outside the scope of this protective framework, being considered self-employed instead.

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1.2. THE COMMISSION'S PROPOSAL: A WINDOW OF OPPORTUNITY

The proposed Directive on platform work represents a window of opportunity to improve the conditions of all workers, including non-EU nationals who work via platforms. More specifically, the proposed Directive seeks to bring legal clarity to the employment classification of platform workers, responding to growing pressure to address the issue at the EU level. Connected to this, it also tries to prevent national authorities from pursuing different policy approaches in a context where [court rulings](#) in some member states have extended the right of platform workers to social benefits.

The Commission's proposal aims to introduce harmonised standards by presenting a list of five

criteria to determine whether platforms are, in reality, functioning as employers, regardless of their formal contractual relationships. If two out of the five criteria of subordination are fulfilled, the worker is presumed to be an employee, and the platform is required to classify and treat them as such.¹⁷ Furthermore, the Directive requires member states to introduce complaint mechanisms for platform workers who are incorrectly classified. To ensure the procedure's effectiveness, the EU states should protect workers from any retaliatory actions following the lodging of a complaint. They should also guarantee enforcement of the legal presumption of employment through strengthening controls and field inspections and allowing platform workers to be represented and supported by organisations promoting workers' rights.

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Furthermore, the proposal put forth by the Commission tackles the issue of new data-driven technologies (algorithms) commonly used by digital platforms to allocate, organise, and evaluate work assignments. It sets transparency obligations for platforms and seeks to improve algorithmic management.¹⁸ Connected to this, it bans the automatic termination of contractual relationships based on algorithmic-driven decision-making.¹⁹

2. Strengths and weaknesses of the Commission's proposal

While the Commission's proposal contains some positive suggestions, it currently falls short in accurately addressing the challenges and risks that non-EU nationals face when working through platforms, particularly those who have a precarious legal status or are undocumented.

Following the Commission's proposal, the text of the Directive is currently undergoing a divisive negotiation process. The main point of contention between member states and political groups in the EP regards the presumption of employment. While some policymakers aim to increase the number of criteria needed to trigger

The Directive has the potential to resolve various persistent issues related to the challenges faced by platform workers. It aligns with the principles enshrined in the Action Plan of the European Pillar of Social Rights (EPSR), which was adopted to define a new ambitious EU social policy agenda. According to Principle 5 of the EPSR, all workers are entitled to fair and equal treatment in terms of their working conditions, access to social protection and training, regardless of the nature or length of their employment relationship.

Accordingly, as per the changes proposed by the Directive and mandated by the EPSR, the employment status should be based on the actual relationship between platform workers and digital platforms. The recognition of an employment relationship would give all platform workers, including non-EU nationals and undocumented migrant workers - following the [Tümer](#) ruling - access to the complete set of labour and social rights granted to any other employee. Furthermore, increased transparency on algorithmic management has the potential of substantially improving platform workers' labour conditions, with benefits for those who are at greater risk of discrimination and have little technological knowledge.

Yet, while looking good on paper, the potential benefits of the new protective framework may be limited by the specific conditions and legal uncertainties faced by migrant workers. Its provisions may therefore be less effective in practice, widening existing protection gaps.

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reclassification, others are pushing to introduce an automatic presumption of employment.

Disagreements between the main EP groups did not prevent the Parliament from reaching a negotiating position.²⁰ In February 2023, the EP accordingly approved its mandate for interinstitutional negotiations, or 'trilogues', and the Council is expected to reach a general approach in June.

The ongoing negotiation of the proposal offers an opportunity to bring into focus the existing benefits and shortcomings of the Directive, and flag potential

margins for improvement. The following analysis will first examine the added value of the original Commission's proposal, focussing in particular on:

- i) Re-classification of employment status.
- ii) Promoting third parties' engagement to ensure the full implementation of rights on paper.
- iii) The benefits brought forward by enhanced transparency on algorithm management.

It will then examine the remaining weaknesses, also looking at the changes sought by the EP to address them, considering in particular:

- iv) Power asymmetries faced by migrant platform workers.
- v) The risk of retaliation.
- vi) The danger that platforms engage in sub-contracting.

2.1. FIRST STEPS TOWARDS EXTENDING PROTECTIONS TO MIGRANT PLATFORM WORKERS

The Commission has primarily focused on extending employment protections to platform workers who are subordinate rather than self-employed, with the aim of improving working conditions in the platform economy. The most promising aspect of its proposal is that it seeks to bring legal clarity on who should be considered an employee, regardless of their specific contractual relation with the platform. This grants potential access to labour and social protection rights to misclassified workers – especially important for non-EU nationals, including those undocumented, due to the practical challenges and legal uncertainties they face.

The most promising aspect of its proposal is that it seeks to bring legal clarity on who should be considered an employee, regardless of their specific contractual relation with the platform.

The Commission's original proposal also aims at guaranteeing effective enforcement of the rights and changes it introduces, including its main innovation, the re-classification provisions. For this reason, it facilitates the lodging of complaint mechanisms when the presumption of employment is not correctly applied by the platform. To this aim, it also enables organisations representing workers to use administrative and judicial procedures to support workers in having their rights

recognised, putting further pressure on platforms to set safe communication and reporting channels in place.

This additional measure could prove especially consequential, as trade unions and other third parties have played a crucial role in ending misclassification practices and, more generally, imbalances between platforms and workers who try to challenge their (self-) employment status. It could also bring systemic benefits to workers in the platform economy. As of today, most of the national platform-related cases have not been brought to court by individual workers alone but thanks to unions' efforts.²¹ Guaranteeing effective support by third parties is even more critical when it comes to non-EU nationals because language barriers or lack of knowledge of their rights can severely hinder their ability to benefit from existing protections.

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Regarding algorithm management, the Commission's proposal could contribute to improving platform workers' working conditions. The lack of autonomy and surveillance introduced by opaque algorithm management in the platform economy impacts the well-being of all workers. It can lead to psychosocial stress and a heightened risk of accidents (e.g. in case of bonuses for faster deliveries), income unpredictability (e.g. when shifts are allocated at short notice), as well as discriminatory practices (e.g. not distinguishing between legitimate and non-legitimate reasons for being unable to work, such as sickness, or discriminatory wage-setting based on dynamic pricing),²² which can lead to unfair termination.²³

Since low-skilled platform workers and those with a precarious income are particularly affected by the risks posed by algorithm management, requiring platforms to disclose the criteria behind their functioning, as the Commission's proposal foresaw, is essential to promote dignified labour standards.²⁴ The Directive's proposed changes would be particularly significant for migrant workers with limited technological knowledge, with the (few) studies on the topic highlighting that the current algorithmic design furthers the exploitation of migrant labour.²⁵ The EP's compromise text further improves the Commission's original proposal, highlighting the importance of tackling unfair treatment and insecurity that opaque algorithmic management generates (Recital 30a).

2.2. IMPROVING CONDITIONS IN PRACTICE: THE REMAINING CHALLENGES

The Commission's proposal establishes that all platform workers who are self-employed on paper but whose working conditions fulfil more than two criteria should be reclassified. While the use of well-defined criteria to determine the employment relationship increases legal certainty, this could incentivise some platforms to draft the terms and conditions for those seeking work through them in such a way as to avoid fulfilling more than one criteria.²⁶

According to the Commission's proposal, if such a situation arises, it would be the responsibility of the individual worker to initiate administrative or judicial proceedings to activate the presumption. This expectation fails to acknowledge the unbalanced bargaining power between workers and employers. As highlighted above, migrant workers often face language barriers or limited knowledge of their rights, reducing the prospect of taking direct action against platforms. Non-EU nationals who are undocumented might have even greater fears of retaliation from employers. Retaliation could lead to loss of income, or the initiation of a return procedure, potentially leading to their deportation. This would make them even more reticent to initiate proceedings against platforms under the proposed Directive.²⁷

Non-EU nationals who are undocumented might have even greater fears of retaliation from employers. Retaliation could lead to loss of income. This would make them even more reticent to initiate proceedings against platforms

The EP's position could potentially address these shortcomings. The EP's compromise text enshrines a general presumption of employment without the need to fulfil pre-established criteria. This, however, would not automatically translate into a reclassification of platform workers. Digital platforms could rebut the presumption before a decision on reclassification is taken in administrative or judicial proceedings, with the criteria used at this stage instead. This general presumption would ensure that workers do not have to initiate the action. At the same time, the possibility of using the criteria in the rebuttal phase would ensure legal certainty for both platforms and workers alike. Overall, the flexibility provided by platforms to those who are genuinely self-employed would be preserved.

Yet, the EP's proposed changes leave some questions unanswered, particularly when guaranteeing adequate protection to migrant workers who seek to be re-

classified as employees or have their rights enforced and undocumented workers reporting exploitative conditions.

The EP introduced two recitals in its compromise text which are relevant in these respects. The first one broadly encourages Member states to ensure effective protection for platform workers, particularly regarding the most vulnerable, citing migrants explicitly (recital 23). The second (recital 42) specifically targets undocumented migrants, specifying the applicability of the ESD to platform work. It also highlights the necessity to implement measures to ensure undocumented migrants have access to justice without retaliation or fear of deportation.

The amendments proposed by the EP represent a positive step towards the recognition of the role of migrants in platform work but also the predicaments they face. However, the amendments do not have binding legal force.

The amendments proposed by the EP represent a positive step towards the recognition of the role of migrants in platform work but also the predicaments they face. The applicability of the ESD to undocumented platform workers would represent an especially welcome safety net against protection from exploitation. However, the amendments are placed in the recitals. As such, they do not have binding legal force. While symbolically important, they would not obligate member states to introduce additional and ad hoc protective measures.

This could disincentivise some migrant platform workers from seeking reclassification or having their rights under the Directive enforced through complaint mechanisms. The lack of targeted measures could also deter undocumented workers from reporting exploitative conditions by platforms to labour inspectorates. Connected to this, the enhanced role of labour inspectors in facilitating the enforcement of labour rights is a positive element of the proposed Directive. However, it could be counterproductive for undocumented workers if inspections lead to their referral to immigration authorities. Some would likely choose not to report cases of abuse or exploitation during inspections.

In this respect, valuable lessons can be learned from implementing the ESD. Complaint and reporting mechanisms tend not to be used in the absence of legally binding measures ensuring that undocumented migrants are not referred to the immigration authorities – known as 'firewalls' – or are granted a residence permit.²⁸ In this light, undocumented platform workers are unlikely to make use of the complaint mechanisms

and seek to have their rights enforced under the proposed Directive. This could render a potentially beneficial protective framework ineffective for an especially vulnerable part of the platforms' workforce.

Subcontracting practices in member states suggest that when stricter regulations apply, some platforms start looking for ways to bypass them.

The third main limitation of the Commission's proposed approach to the presumption of employment lies in the absence of measures to ensure that platforms do not circumvent their obligations through subcontracting chains. Indeed, while addressing misclassification is an important step forward, this alone will not suffice to close down all protective gaps connected to platform work.²⁹ Subcontracting practices in member states suggest that when stricter regulations apply, some platforms start looking for ways to bypass them.³⁰ For example, recent developments at the national level show that, after being required to reclassify their workers as

employees, some delivery platforms started relying on subcontracting agencies, which act as intermediaries between the platforms and the workers.

Should the possibility of circumventing the rules by subcontracting not be tackled, the Directive's reclassification provisions could have a limited impact, thus failing to address the risks of exploitation that all platform workers face. Migrant workers, particularly those who are undocumented, face the concrete risk of being subjected to (lawful and unlawful) forms of labour intermediations, as also shown, for example, by recent criminal cases in Italy.³¹

The proposed compromise text by the EP makes explicit reference to sub-contracting, calling on member states to implement measures to provide for joint and several liability of sub-contracting chains (recital 42). This means that when a platform uses subcontractors, both the platform and the intermediary agency could be held liable to pay outstanding wages, social security contributions or penalties. However, in this case, the relevant EP amendment is also placed in a recital. With recent developments at the national level pointing to the substantial risk that subcontracting chains create critical gaps in the protective framework, the lack of corresponding binding measures could undermine the Directive's objectives and leave migrant platform workers especially exposed to exploitative practices.

3. The way forward: Close down protection gaps

The proposal for a Directive on improving working conditions for platform workers represents a long-awaited opportunity to regulate non-standard forms of work and a step forward for individuals who are in a precarious situation. Yet, a tighter regulatory framework does not automatically translate into stronger and greater social protections for the most vulnerable.

Strengthening and extending protections for non-EU platform workers, therefore, requires targeted improvements to the proposed legislative framework and further actions beyond it, especially for undocumented migrants.

The potential impact of the Directive on migrant workers will likely be limited by differences in bargaining power between workers and platforms and by the well-founded fears of retaliation that some non-EU platform workers face. At the same time, some

digital platforms may circumvent the stricter rules by strategically using remaining loopholes. Strengthening and extending protections for non-EU platform workers, therefore, requires targeted improvements to the proposed legislative framework and further actions beyond it, especially for undocumented migrants.

On this account, to further improve the EU's actions in this area, the attention of policy makers should focus on three objectives: preserving or enhancing the positive elements in the original Commission's proposal, ensuring that some of the key amendments put forward by the EP are given full effect in the future, and closing down other gaps in the broader EU policy framework. To this end, the following ways forward should be pursued:

- ▶ **Strike the right balance between retaining flexibility for genuine self-employed platform workers and enhancing protection through reclassification.** To guarantee access to social protections and rights, it is crucial that platform workers who are misclassified can see their status effectively changed. In this context, the EP approach—which is based on a general presumption of employment without criteria, but allows platforms to rebut it—represents a good solution to achieve this objective. Since the presumption does not require individual workers to take action, it prevents power

imbalances and fear of retaliation from discouraging migrant workers from claiming their rights. At the same time, by not imposing an automatic reclassification, it does not undermine the flexibility enjoyed by genuine self-employees, facilitating access to a valuable source of income for some.

► **Guarantee transparency and ensure non-discrimination in algorithmic management.**

Improving working conditions in the platform economy requires that all workers receive accurate information on how their work is allocated and evaluated, especially with respect to the criteria employed by algorithms to assess their productivity and related retribution, as well as dismissal.³² Transparency in algorithmic management would prevent vulnerable workers from being at further risk of discrimination and exploitation due to a lack of knowledge of how algorithms function.

► **Introduce effective measures against the risk of subcontracting and ensure the liability of subcontracting chains.** To preserve and improve the working conditions of platform workers in practice, it is crucial to ensure that platforms do not circumvent their obligations on reclassification through subcontracting practices. This requires putting in place measures for enhanced liability, such as mandatory joint and several liability in sub-contracting. Platforms should likewise conduct due diligence and monitor the full chain of sub-contractors, to ensure that wages are paid, and social security and other social obligations are respected.³⁵

► **Facilitate the involvement of civil society organisations (CSOs) with specific expertise on migrants' rights as well as trade unions involved in defending the rights of platform workers to enhance the enforcement of rights and protections.** Receiving support from third parties is essential to guarantee proper enforcement of labour rights.³⁴ In this context, it is of paramount importance that CSOs and trade unions will be in a position to effectively provide support, information,

and representation, especially in the cases of irregular employment or workers without a residence permit. To this end, adequate financial support should also be provided.

► **Put in place binding measures to establish 'firewalls' for platform migrant workers who lodge complaints and in the context of inspections by the labour authorities.**

Effective enforcement of labour rights requires ensuring that all migrant workers can report violations and access complaint mechanisms without fearing retaliation from their employers or deportation. This can be achieved through effective measures prohibiting data exchange between labour inspectorates, courts and immigration enforcement authorities.³⁵ The granting of work and residence permits to migrant platform workers who come forward to report abuses or have workers' rights protected should also be facilitated.

► **Promote better access to the labour market for migrant workers and consider regularisation channels for undocumented migrants as the most effective way to prevent or fight exploitation.**

The dependence of non-EU nationals on platform work to make a living derives from the structural barriers they face to enter the traditional labour market. While providing an income, platform work also exacerbates labour market segmentation, increasing job insecurity and representing declining job quality.³⁶ This is especially true for those who have little choice but to accept poor and, in some cases, exploitative working conditions. Access to regular and decent work should be simplified for migrant workers. To facilitate a faster integration into the labour market, certain measures can be taken, such as eliminating legal barriers to work for asylum seekers, emphasising the development of skills, and implementing more straightforward procedures for recognising foreign qualifications. When it comes to undocumented workers, policy-makers should consider implementing regularisation programmes, which would be especially effective in promoting dignified jobs and reducing exploitation.³⁷

Conclusion

Without targeted measures and safeguards to address the specific vulnerabilities faced by non-EU nationals in the platform economy, regulatory efforts under the proposed Directive will not necessarily translate into greater protections. In order to improve the conditions of all workers in the platform economy, including those in a precarious situation, policy-makers at the EU and national level should design more ambitious measures at the intersection of labour and migration policy to ensure that unbalances in bargaining powers and fear of negative consequences do not stand in the way of enjoying dignified working conditions.³⁸

However, a fundamental rethinking of labour and migration policies more broadly needs to take place to remove structural barriers faced by migrant workers in accessing the EU labour market. Facilitating access to quality employment remains key to promoting job security and fair working conditions for all workers.

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