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NOTE

From:	Presidency
To:	Permanent Representatives Committee
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work - Analysis of the final compromise text with a view to agreement

I. INTRODUCTION

The Commission presented its proposal for a Directive on enhancing working conditions in platform work on 9 December 2021. After a first tentative under CZ PCY in December 2022, a general approach (10107/23) was reached under the SE PCY in June 2023. The EP adopted its mandate on 2 February 2023.

The trilogues started on 11 July 2023. Since then, five additional trilogues have taken place, on which the Presidency has systematically reported to Coreper and the Social Questions Working Party. The Presidency went twice[1] for guidance to Coreper. In addition, twelve technical meetings have taken place to prepare these trilogues. A four-column table was shared with delegations the last time on 1 December 2023[2].

1 27.10.2023 (14374/23) and 24.11.2023 (15458/23 + COR1)
2 WK 16241/23

During the trilogue on 12 December 2023, the co-legislators were able to reach a provisional agreement on the whole text after 12 hours of negotiations. The text of this provisional agreement is set out in the Addendum 1 of this note. The four-column table of 13.12.2023, 8h47 is included in Addendum 2. This table does not yet contain agreed text in all rows and the technical teams were charged to continue to work for filling these gaps. In cases, where the texts of the addenda differ, is the text in addendum 1 the relevant one. In this note, references to numbers of articles, paragraphs and recitals are those of the text in Addendum 1 of this note. Numbers in ( ) are references to rows in the four-column table (Addendum 2 of this note).

II. MAIN ITEMS PROVISIONALLY AGREED ON 12 DECEMBER

This note develops the content of the main items of the last trilogue on which a provisional agreement was reached, including also some points on which tentative texts could be agreed on technical level beforehand.

1. Chapter I: General Provisions

a. Definitions, Art. 2

- *Digital Labour platform, Art. 2 paragraph 1, point (1)*

There were several issues related to the definition of digital labour platform. On the Council side, the Presidency insisted that a distinguished feature of digital labour platforms is that the provision of service involves the use of automated monitoring or decision-making systems (77a).

On the Parliament's side, there were several requests. It wanted to ensure that the scope of the Directive was also systematically extended to crowd work (76). While crowd work is included in the definition of digital labour platform as long as it takes place in a triangular relationship, this is not necessarily the case when crowd work servers to the crowd work platform itself. The EP wanted also to exclude traditional taxi dispatch services (27b) and commercial agents (27a) from the scope of the Directive, by introducing additional recitals, which was rejected by the Presidency. After some discussion, the Parliament accepted to take up the Council row 77a in exchange of a recital acknowledging that crowd work might be covered under this Directive in certain and specific situations and addressing traditional forms of service provision (28).

- *Representatives, Art. 2 paragraph 1, points (6) and (7)*

At several instances, the Parliament asked for introducing references to trade unions (e.g. 81, 109, 167). In particular, the EP insisted on having workers' representatives' defined as *"representatives of recognised trade unions in accordance with national law and practice or other persons who are freely elected or who are designated by the workers in an organisation to represent them in accordance with the workers' organisations or representatives provided for by national law or practices, or both;"*.

Given the high political priority the EP gave to this request and given that this would solve all other open issues on mentioning workers' representatives / trade unions throughout the text, the Presidency agreed to reintegrate definitions of platform workers' representatives" and of "representatives of person performing platform work" in the Directive. It also agreed to a mention of trade unions, but it insisted that this could only be done, given different forms of worker representation in the Member States, in an exemplary way using the formula *"workers' representatives, **such as** trade unions…in accordance with national law and practice"* (81). This provision is accompanied by recitals (28b-28d) stemming from the Council Recommendation on social dialogue[3], which acknowledge the current state of play regarding the relationship of the different forms of worker representation in the Member States.

In the definition of the representatives of persons performing platform work (81a), it was clarified that these can only represent persons other than platform workers, insofar as this is foreseen for under national law. This made Article 1(3a) of the Council mandate superfluous (71a).

[3] Doc. 10542/23

- *Terms and conditions, former Art. 2 paragraph 1, points (4b) - deleted*

The Council had introduced the notion of terms and conditions in order to avoid that control and direction is deemed to exist where obligations are imposed by the platforms on the workers as a result of a negotiations process, including collective agreements. To this effect, terms and conditions were mentioned in Article 4(1)[4] accompanied by a definition in row 80b, which only referred to terms and conditions "unilaterally imposed" by the digital labour platform and recitals in rows 34 and 34a. In the latter it was clarified, in addition, that the fact that a platform complies with measures or rules which are required by law or collective agreements, applicable to genuine solo self-employed, is not as such to be understood as fulfilling one or more criteria for triggering the legal presumption.

This was not acceptable to the Parliament. The Presidency therefore proposed deleting the definition of terms and conditions while integrating the element of unilaterality into Article 4(1)[5], and it has been accompanied by a redrafting of the related recitals. This was - as a compromise - acceptable to the Parliament. The Presidency considers that the new text in Article 5(1)[6] and in recital 31[7] allows, as in the general approach, for considering in the application of the legal presumption that control and direction is not exercised by a platform, if it complies solely with legal obligations towards solo self-employed persons.

b. Intermediaries, Art. 3

The Presidency asked the Parliament to come back on the issue of intermediaries, after the provisional agreement in the fifth trilogue had led to concerns of Member States. It was agreed that the Member States shall take measures, in accordance with national law and practice, to establish appropriate responsibility mechanisms, which shall include, where appropriate, joint and several liability systems.

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4 Now 5(1)
5 Now 5(1)
6 Former 4(1)
7 Former 24

2. Chapter II: Employment Status

This chapter was the most difficult to negotiate, given the high sensitivity and the big number of rows still open. It took most of the time in the trilogue.

a. Correct classification of the employment status, Art. 4

The Presidency was able to reject most of the amendments of the Parliament related to this provision. In exchange, all references to the rights platform workers enjoy after it has been established that they are in an employment relationship (86) in the article were removed.

b. Legal Presumption, Art. 5

The discussion on the triggering of the legal presumption was difficult and long. This is understandable, given the different starting points of the co-legislators. While the Council wanted a threshold of 3 out of 7 criteria, the starting position of the EP was that all persons performing platform work shall have access to the presumption, without any further conditions. After the negotiations in the successive trilogues, the Presidency has managed to make Parliament´s position more flexible in a very important way.

The EP, in this sixth trilogue, has presented a proposal with a threshold of 2 out of 6. After the analysis of the new proposal, and in order to end this stalemate, the Presidency offered to the Parliament a threshold of 2 out of 5 indicators (former "criteria"), as per the original Commission proposal and as suggested by several delegations during previous discussion as a middle ground. This was accepted by the Parliament, which requested the inclusion of a clause allowing Member States to add further indicators to the list. This is stated in a new paragraph 2 in Article 5[8], but as a matter of national law. This new provision is in the same spirit as Article 27(4), which recalls Member States' prerogative to introduce more favourable provisions.

[8] Former Article 4

As for the content of the indicators, also here it was agreed to come back closer to the Commission proposals.

- Indicator (a) on remuneration corresponds mostly criterion (a) of the Commission proposal and of the general approach (92).

- Indicator (b) on the supervision of work performance corresponds to criterion (c) of the general approach (94).

- Indicator (c) relates to the distribution of task by the platform. This indicator did not previously exist but has a proximity to criterion (d) of the Commission proposal (95) and to criterion (da) of the general approach (95a).

- Indicator (d) relates to the control of working conditions or the performance of work or of working hours. It has some similarities with to criterion (d) of the Commission proposal and of the general approach (95).

- Indicator (e) relates to the freedom to organise one's work takes up elements of criteria (b) and (d) of the Commission proposal and of the general approach (93 and 95)

- The criterion (db) of the general approach (95b), which is also contained in criterion (d) of the Commission proposal (95), referring to restrictions of the freedom to use subcontractors or substitutes, has not been maintained.

As requested by delegations, the discretionary clause, a key element of the Council´s mandate, was kept in Article 5(3).

c. Application of the presumption and rebuttal, Art. 6

In Article 4a, a number of changes were made in order to address request of the European Parliament.

- *Derogation for social security, tax and criminal proceedings, § 1*

  The first subparagraph of Paragraph 1 was left as such, whereas the second subparagraph was subject to a modification with the objective to have the legal presumption applied in all proceedings where the authorities involved in such proceedings are competent to ascertain the correct employment status of workers (102c), including in social security, tax and criminal proceedings.

- *Integration of the provisions on the initiation of proceedings, paragraph 2*

  The Presidency made a compromise proposal to the EP on 8 November 2023[9] where it has introduced a new Article before Article 5[10]. This Article was dedicated to the initiation of proceedings by different stakeholders. At the demand of the Parliament, these provisions have been integrated in a modified format into Article 4a. The first provision replaces the former Article 4a(2) of the Council general approach as it ensures that competent national authorities have a discretion to decide which action to take in order to apply the legal presumption in case they consider that a person might be wrongly classified. In addition, a new obligation has been introduced for competent national authorities which it shall help and therefore assist the claimants with a view to apply the presumption in accordance with Article 4.

[9] WK 16226/23

[10] Former 4, this refers to a new Article 3a

- *Rebuttal, paragraph 3*

  The Presidency has achieved that Article 6(3)[11] could remain very close to the same provision in its non-paper of 8 November 2023[12]. Indeed, the Parliament wanted condition a successful rebuttal by the relationship not being an employment relationship as referred to in the applicable law, collective agreements or practice in force in the Member State in question, with consideration to the case-law of the Court of Justice, and by that the person performing platform work being free from control and direction, taking into consideration Article 5[13]. This double condition was not acceptable to the Presidency that managed to agree on the deletion of the latter condition.

  In this way, it is important to highlight that the decision on reclassification as an employment relationship will always be adopted according to the applicable law, collective agreements or practice in force in the Member State in question, with consideration to the case-law of the Court of Justice

- Absence of rebuttal / unsuccessful rebuttal, § 4

  The Parliament has insisted that the rules of Chapter II would not be complete, if there was not any provision on the consequences of the absence of a rebuttal or un unsuccessful rebuttal. As the legal presumption would indeed lose most of its power without a rule on the non/ unsuccessful rebuttal, it was difficult to object such an addition. The Presidency could however achieve that decisions need to be taken in accordance with national procedural law.

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11 Former 4a(3)
12 WK 16226/23
13 Former 4

- *Information of competent national authorities about reclassification decisions, § 5*

  Given the different national systems of employment relationships in different strands of law and given the different ways national administrations are organised, it is essential for an effective exercise of rights of reclassified workers that all competent national authorities, independent of their strand, are informed about that decision. This has now been stipulated in paragraph 5 and, in addition, these competent national authorities need to take the necessary decisions in order to apply all the effects deriving from the reclassification decision, in line with national law and practice.

- *Suspensive* effect, § 7

  It could be agreed with the Parliament that all references to the suspensive effect of appeals against reclassification decisions were deleted form the text.

d. Supporting measures, Art. 7

The entire pre-agreed text on the supporting measures could be provisionally agreed. The Presidency ensured that the provisions do not set out concrete and time bound obligation as concerns activities and resources of national enforcement authorities and notably labour inspectorates. Overall, the obligations for enforcement authorities were strengthened, including to proactively identify, target and pursue digital labour platforms which do not comply with rules on correct determination of the employment status (102o), and, as appropriate, by establishing targets for such controls and inspections (38e).

A new paragraph 2 was added to this provision, which obliges enforcement authorities to take appropriate actions towards a digital labour platform where this digital labour platform has been identified as an employer following a reclassification proceeding, in order to apply the presumption to verify the correct determination of the employment status of the other persons performing platform work in the same digital labour platform.

3. Chapter V: Remedies and enforcement:

a. Class action, Article 20

The Parliament had the intention to foresee that representatives of persons performing platform work shall also have the right to act on behalf or in support of several persons performing platform work, without those persons´ approval (165). The Presidency could obtain from the Parliament that the whole Article was taken over from the general approach and therefore class action would only be possible in those Member States where this is foreseen in the national law.

b. Channel for reporting on violence, Art. 21

The Parliament wanted to introduce an obligation for platforms to establish, in addition to the communication channel for the persons working for it and their representatives (167), a dedicated channel for reporting on harassment, including gender-based violence and harassment (167a). The Presidency did not accept this provision as such, as this would have been problematic under the legal bases of this directive, but it took it up as an obligation for occupational safety and health in Article 13(5).

c. Penalties, Art. 25 (3)

The Parliament had very strong views on the penalties which Member States would be obliged to foresee in order to effectively enforce the provisions of the Directive other than those related to the infringement of data protection provisions (regulated in Art. 25 (1)). In its original amendment, Member States had to foresee financial penalties, which shall increase in amount according to the number of affected employees.

The Presidency rejected the request for the compulsory financial penalties. It only agreed that these are mentioned in a "may"-clause, when it comes to significant penalties following a digital labour platform's refusal to comply with a legal ruling determining the employment status of persons performing platform work.

4. Chapter VI: Final provision: More specific rules, Article 29

The Council introduced in its general approach a new Article 20a which had the purpose to allow for more specific rules, by law and collective agreement, for the data protection related provisions and by collective agreements, for articles 8a, 9, 11 and 12[14], as long as the same overall level of protection of platform workers was respected. The Parliament requested to strike this provision out, as it was of the view that this could lead to a circumvention of the obligations laid out in the Directive. Finally, the Presidency could persuade the Parliament to accept that this provision stayed in, but in a modified form. The reference to Article 11[15] was deleted and specific rules to Article 12 are only possible under the condition that the implementation of the specific article is entrusted to social partners according to Article 30(4).

III. OTHER MAIN RULES AGREED EARLIER

The Presidency has already earlier reported on the compromise texts provisionally agreed during previous trilogues. As from 1 December 2023, when the four-column table was transmitted to delegations, delegations have already had the opportunity to analyse the draft agreement on these points. This concerns particularly Chapter III on algorithmic management.

Article 8 lays out absolute prohibitions for processing certain types of personal data or for certain purposes by means of automated systems supporting or taking decisions that affect persons performing platform work in any manner. These prohibitions provide for a higher level of protection compared to the General Data Protection Regulation (EU) 2016/679 (GDPR).

Article 9 extends the obligation of a data protection impact assessment contained in the GDPR and provides for a compulsory consultation of data subject's representatives.

Article 10 provides for transparency of automated monitoring or decision-making systems by formulating additional rights of persons performing platform work and their representatives, as from the start of a recruitment procedure. In addition, it complements the right to data portability of the GDPR.

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14 Now Articles 13, 14, 17 and 18

15 Now 17

Article 11 provides for human oversight of automated systems, including an evaluation of the systems and an obligation to take the necessary steps, if there is a high risk of discrimination at work identified or in case that individual decisions taken or supported by automated monitoring and decision-making systems have infringed the rights of a person performing platform work. As it stands now, this Article aims at providing that decisions on the termination of a work relationship and those of equivalent detriment have to be taken by a human being.

Article 12 provides for human review of decisions or supported by automated monitoring and decision-making systems, including a right to individual information, access to a contact person and compensation for the damage sustained, if applicable.

Article 13 provides for specific provisions related to the safety and health of platform worker in relation to the specific risks of automated monitoring and decision-making systems.

Article 14 provides for information and consultation of representatives of persons performing platform work in relation to modifications of automated monitoring and decision-making systems.

Chapter IV contains information obligations for digital labour platforms in order to ease the work of national enforcement authorities.

Chapter V on remedies and enforcement contains, in addition to the provisions mentioned under Point II. above and among others, the right to redress of persons performing platform work, the possibility for representatives to act on behalf of one or several persons performing platform work as well as the obligation for platforms to disclose in proceedings any relevant evidence which lies in their control.

Chapter VI contains, among others, an obligation of Member States to promote collective bargaining in platform work, inspired by Article 13 of the Pay Transparency Directive (EU) 2023/970.

IV. CONCLUSION

The Presidency considers that the compromises set out above, found in difficult and long negotiations, still respect the spirit of the general approach of the Council and takes into account the guidance provided by the Committee. This Directive will, once entered into force, change the business models in platform work to the benefit of those service providers, which are more respectful to their workforce. This Directive does not only provide for effective instruments to fight bogus self-employment in platform work, but it also sets, for the first time, balanced limits to the use of automated monitoring and decision-making systems at the workplace (Chapter III), including the obligation that the most severe decisions, i. e. those of the termination of a work relationship, are taken by a human being (135d).

The Committee of Permanent Representatives is invited to:

- agree on the text of the final compromise, as set out in the Addendum to this Note, and
- mandate the Presidency to send a letter to the President of the EMPL Committee of the European Parliament confirming that, should the European Parliament adopt its position at first reading, in accordance with Article 294(3) of TFEU, in the exact same form as set out in the compromise text set out in the Addendum to this document (subject to finalisation by the lawyer-linguists of the two institutions), the Council would, in accordance with Article 294(4) of TFEU, approve the position of the European Parliament and the act shall be adopted in the wording which corresponds to that European Parliament.