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From:	Presidency
To:	Permanent Representatives Committee
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Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work - <i>Preparation for the trilogue</i>

Introduction

Following the lack of qualified majority in favour of the provisional agreement¹ reached in the trilogue of 12 and 13 December 2023 at the Coreper meeting on 22 December, the Belgian Presidency has taken up the file with the objective to conclude it in the very limited time remaining before the end of the legislative cycle.

To that end, the Presidency asked delegations for feedback concerning their major concerns on the provisional agreement. On 10 January 2024, it presented a revised version of the provisional agreement (5133/24 + ADD1) taking into account the major concerns highlighted by the delegations. This text was discussed at the Social Question Working Party meeting of 16 January 2024 with a view to understand the delegations' positions in more depth.

¹ Provisional Agreement 16187/23 ADD1

In order to have a reasonable assurance that a possible new provisional agreement which might result from the next trilogue meeting scheduled on 30 January 2024 would find the required qualified majority, the Presidency's intention is to ask the Committee of Permanent Representatives to approve a revised mandate for the continuation of the negotiations with the EP.

The proposal for a revised mandate is to be found in the Addendum to this Note.

Main elements of the revised mandate compared to the provisional agreement

Given the very limited time available for concluding the negotiations, the Presidency is of the view that it is necessary to build on the work of the Spanish Presidency and to take the provisional agreement of 13 December 2023 as a basis for any further work². This Note sets out, Chapter by Chapter, the reasons for the main changes which the Presidency made to the provisional agreement. In its work, the Presidency respected the general approach³ as the baseline behind which it did not step back. It strived as well to keep many elements of the provisional agreement in order to make an agreement with the European Parliament possible.

Chapter I: General provisions

The Presidency decided neither to touch Article 1 nor the definitions in Article 2. It is of the view that Article 1, together with Recital 17, still well identifies the scope of the Directive with its double purpose of improving working conditions and the protection of personal data in platform work, in line with its legal bases. The definitions are fit for purpose and were established in difficult and long-lasting negotiations with the European Parliament. This concerns in particular the definitions of automated monitoring systems and automated decision-making systems⁴. These definitions are linked to Chapter III which was agreed with the Parliament already in November and which the Presidency does not intend to reopen.

² See document 16187/23 for a description of the provisional agreement

³ General Approach 10107/23

⁴ Article 2 paragraph 1 numbers (8) and (9)

The Presidency addressed the concerns of some delegations that Article 3, second subparagraph, would focus on responsibility mechanisms only, even if other measures would allow for ensuring the same level of protection of persons performing platform work when the platform uses an intermediary in accordance with Article 3, first subparagraph. For this reason, the Presidency deleted “responsibility” in the second subparagraph.

Chapter II: Employment Status

Most comments of the delegations concerned Chapter II and the related recitals. The Presidency took these into account as far as this was possible without losing the delicate balance found in the general approach. At the same time, it kept the perspective that some concessions are required in order to ensure a deal with the European Parliament. The main changes are explained below as well as why certain suggestions of Member States were not taken on board.

Article 5 paragraph 1: Indicators vs. criteria

The Presidency decided to keep the term “indicator” as the using of this term instead of “criterion” does not bear any concrete significance on the effects of the legal presumption. This decision is underpinned by the fact that the Employment Relationship Recommendation R 198 from 2006 of the International Labour Organisation also uses the term “indicator”.

Article 5 paragraph 1: Number, threshold and choice of indicators

In the provisional agreement, the negotiation teams of the co-legislators agreed to reintroduce a threshold of two out of five criteria/indicators for triggering the legal presumption as per the Commission proposal. Given the big symbolic importance of this ratio, the Presidency decided not to go back to a ratio of three out of seven but to reformulate the indicators instead in a way that the effect is still similar to the general approach. Indeed, the general approach was constructed in a way that in addition to two relatively broad criteria, namely (b) on rules on appearance and conduct plus (c) on supervising the performance of work, at least the criterion on remuneration or one of the four criteria identified by the Court of Justice in the *Yodel-Order*⁵ needed to be fulfilled for triggering the presumption. The Presidency therefore constructed the indicators in a way that it would still be required to fulfill, in addition to one relatively broad indicator (namely (b) on supervising the performance of work), the criterion on remuneration or one of three criteria out of those identified in the *Yodel-Order* in order to trigger the presumption. Recital 32 was streamlined and adapted to the revised operative text.

Article 5 paragraph 1 and recital 31: Chapeau

While not reinstating a definition of terms and conditions, the Presidency decided to return closer to the language of the general approach with regard to the terms and conditions in the chapeau of Article 5 paragraph 1 by deleting the word “agreed” and by adapting Recital 31. Notably, it has been clarified that collective agreements, applicable to genuine solo self-employed persons, are part of those legal obligations, with which the digital labour platforms might need to comply and which are therefore not as such to be understood as fulfilling one or more indicators of control and direction for triggering the legal presumption.

⁵ C-692/19 of 22 April 2020

Article 5 paragraph 1 (b): Supervision of performance of work

The Presidency has carefully listened to the delegations who regretted that with the merger of the former seven criteria (as per general approach) into five criteria, the original criterion (b) of the general approach referring to the digital labour platform requiring the person performing platform work to respect specific rules with regard to appearance or conduct towards the recipient of service or the performance of work had disappeared. Considering its objective to keep the global ratio as established in the general approach, the Presidency decided not to take this up as additional element in the indicator (b). The Presidency considers that, if both elements were linked by a coordinating conjunction “and” as requested by some Member States, it would have led to a considerable restriction, as both elements would need to be fulfilled. On the contrary, if connected by a conjunction “or”, it would have further opened up this already broad indicator. In both cases, the balance of the provision would have been distorted.

The Presidency has however addressed the concerns by enhancing the clarity of the indicator of supervision of performance of work, namely by specifying that it should be a *close supervision by electronical means* and by introducing additional explanations in Recital 32.

Article 5 paragraph 1 (e): Limitation of the discretion to use subcontractors or substitutes

The Presidency has taken note of the demand to replace “limiting” by “excluding”. Given that this would considerably restrict this indicator and given that an identical wording was part of the general approach, the Presidency decided not to modify it.

Article 5 paragraph 2: Possibility of Member States to add further indicators

As the provision is of particular importance for the European Parliament, the Presidency has decided to leave Article 5 paragraph 2 in the text. However, a reference to this option has been added in Article 27 paragraph 2 concerning the non-regression clause to clarify the meaning of this provision.

Article 6 paragraph 1: derogation for certain types of proceedings

Following the very strong demands of the delegations, the derogation for tax, criminal and social security proceedings was reinserted as per general approach.

Article 6 paragraph 2: respect of prerogatives of national authorities

In order to address better and more explicitly the fact that competent national authorities of the Member States are of very different nature and are vested with different powers for launching proceedings for ascertaining the correct employment status of persons themselves or in front of other authorities, a reference to the prerogatives conferred to that competent national authority in accordance with national law and practice has been further specified. This avoids any doubt that the text could oblige Member States to change the powers conferred to their competent national authorities. In addition, the references to the legal presumption and to Article 5 have been removed as the assessment of the appropriateness of actions remains with the Member States. In this context Article 6 paragraph 2 second subparagraph first sentence on the obligation to inform other national authorities has also been deleted.

Article 6 paragraph 2 second subparagraph last sentence: support for claimants

The Presidency understood from comments of some Member States that this provision does not fit with their national judicial systems. Therefore, the Presidency removed the obligation for competent national authorities to assist claimants.

Article 6 paragraph 3: right to rebuttal

The Presidency has reverted to the text of the general approach as regards the chapeau of this provision, taking into account that the text of the chapeau of the provisional agreement was redundant in the light of the provisions under the following letters (b) and (c).

Article 6 paragraph 3 (a): obligation to inform

Some delegations indicated that this provision would be superfluous. The Presidency decided to keep this provision as it is the result of a difficult compromise with the European Parliament.

Article 6 paragraph 4: consequences of absence or unsuccessful rebuttal

At the request of many delegations, the Presidency has deleted this provision. Building on Article 6 paragraph 3 (b), the consequences of an unsuccessful rebuttal by the digital labour platform are described in Recital 35.

Article 6 paragraph 5: Information about final decisions on a reclassification

The delegations brought to the attention of the Presidency that final decisions were usually taken by judicial authorities which often do not have the task and procedures to inform other authorities about the outcome of proceedings. Indeed, it is to be expected that the beneficiaries (and their representatives) inform other authorities in any case in order to fully benefit from the new status.

Article 7 paragraph 1 (c) and paragraph 2: Inspections in case of confirmed misclassification

The delegations have criticised Article 7 as overly prescriptive as regards the work of enforcement authorities and they raised in particular that paragraph 2 would infringe the discretionary powers to labour inspectorates, asking for its deletion. Given that this point is very important to the European Parliament and considering that a change to another employment status confirmed by a final decision, is anyway to be taken into account by enforcement authorities when they take their discretionary decision on subsequent controls and inspections, this idea has been integrated in Article 7 paragraph 1 (c) and in Recital 38.

Chapter IV: Transparency on platform work

Article 18 paragraph 1 (c) and paragraph 3: Information on the activity of person performing platform work

Member States have raised the concern that the newly inserted provision of Article 18 paragraph 1 (c) would not only put a heavy workload on the digital labour platforms but also create an overflow of information for the competent national authorities. This provision obliges the digital labour platforms to provide, at least each six months, to the competent national authorities of each Member States, in which persons are performing platform work through the digital labour platform concerned, information on the average duration of activity, the average weekly number of hours worked per person and the average income of person performing platform work. The Presidency therefore modified paragraph 3 in the sense that the information mentioned under letter (c) only needs to be provided upon request.

Chapter V: Remedies and enforcement

Article 25 paragraph 5: Significant penalties

The Presidency has heard the delegations' comments that the obligation to provide for significant penalties in case of infringements related to digital labour platforms' refusal to comply with a legal ruling determining the employment status of persons performing platform work would be overly prescriptive and that paragraph 4 of the same Article already provides for penalties, which shall be *effective, dissuasive and proportionate to the nature, gravity and duration of the undertaking's infringement and to the number of affected workers*. The Presidency therefore proposes deleting the words "significantly" and the reference to the turnover of the digital labour platform in Article 25 paragraph 5.

Conclusion

The Presidency considers that the revised text of the provisional agreement as set out in the Addendum 1 to this Note presents a well-balanced approach for resuming and closing in due time the negotiations with the European Parliament. It underlines that it is of utmost importance that this Directive enters into force as soon as possible, as it makes - beyond the politically strongly disputed provisions on the rebuttable legal presumption in Chapter II – a considerable progress on the Union labour law *acquis* concerning in particular, but not limited to, the regulation of the use of automated monitoring and decision-making systems at the workplace (Chapter III).

The Committee of Permanent Representatives is invited to:

- examine the Presidency's compromise suggestions as set out in the Addendum 1 to this Note; and
- agree on a revised Presidency negotiation mandate for the upcoming informal trilogue.
