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From:	General Secretariat of the Council
To:	Delegations
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work - EDPS formal comments

Delegations will find enclosed the EDPS (European Data Protection Supervisor) formal comments on the above directive.



EDPS formal comments on the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work

1. Introduction

- On 10 December 2021, the European Commission adopted the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work ("the Proposal")¹.
- The objectives of the Proposal, according to the Explanatory Memorandum², are the following:
 - to ensure that people working through platforms have – or can obtain – the correct employment status in light of their actual relationship with the platform and gain access to the applicable labour and social protection rights;
 - to ensure fairness, transparency and responsibility in algorithmic management in the platform work context; and
 - to enhance transparency, traceability and awareness of developments in platform work and improve enforcement of the applicable rules for all people working through platforms, including those operating across borders.
- The Proposal is closely interlinked to existing EU law providing rules and principles (rights and safeguards for workers) that are relevant also in the context of digital labour platforms³.
- These comments are provided in reply to the formal request by the Commission of 10 December 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ("the EUDPR")⁴. The EDPS welcomes the fact that it had the opportunity of an early informal consultation on the draft Proposal. We limited our comments below to the provisions of the Proposal that are relevant from a data protection perspective.
- These formal comments do not preclude any future additional comments by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, these formal comments are without prejudice to any future

¹ COM(2021) 762 final.

² Explanatory Memorandum, page 3.

³ See pages 4-6 of the Explanatory Memorandum. See also the Resolution of the European Parliament on "fair working conditions, rights and social protection for platform workers - new forms of employment linked to digital development", available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0385_EN.html.

⁴ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018.



action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of the EUDPR.

2. Comments

2.1 General comments

- The EDPS welcomes the aims of the Proposal, in particular the aim to ensure fairness, transparency and responsibility in algorithmic management in the platform work context. In this regard, the EDPS highlights the relation of complementarity between the right to the protection of personal data and other workers' rights⁵.
- Personal data relating to platform workers are increasingly used in the context of platform work, prompting in many cases a constant and invasive surveillance of the workers concerned. The EDPS therefore welcomes that Article 6 of the Proposal sets out additional rules regarding the transparency and use of automated monitoring and decision-making systems.
- As regards the legal basis of the Proposal, the Explanatory Memorandum indicates that it is based on Article 16 TFEU "*insofar as it addresses the situation of persons performing platform work in relation to the protection of their personal data processed by automated monitoring and decision-making systems*"⁶. The EDPS recalls that, in line with the jurisprudence of the Court of Justice of the EU (CJEU), Article 16 TFEU provides an appropriate legal basis in cases where the protection of personal data is one of the essential aims or components of the rules adopted by the EU legislature⁷.

2.2 Relationship to existing Union legislation on personal data protection

- The EDPS welcomes the intention of the Proposal to build on and extend existing safeguards in respect of processing of personal data by automated decision-making systems laid down in the GDPR, notably Article 22 GDPR⁸.
- Recital 30 of the Proposal affirms that the rights and obligations provided in the GDPR when personal data are being processed shall apply *in addition* to the rights and obligations contained in the Proposal⁹. At the same time, Recital 31 of the Proposal suggests that this does not apply to Articles 13(2)(f), 14(2)(g) and 15(1)(h) of the GDPR, in relation to which Article 6 of the Proposal provides for more specific rules in the context of platform work. Recital 32 of the Proposal nevertheless goes on to state that the obligation of the controller under Articles 13, 14 and 15 of the GDPR

⁵ See also recital (48) of the Proposal.

⁶ Explanatory Memorandum, page 8.

⁷ EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), paragraphs 10-15.

⁸ Explanatory Memorandum, p. 4. See also recitals (29) and (30) of the Proposal.

⁹ Recital (30) of the Proposal.

should continue to apply in the context of platform work. Finally, recital (34) stipulates that Article 6(5) of the Proposal “provides for more specific rules in the context of platform work, including to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data within the meaning of Article 88 GDPR”.

- The EDPS understands that the aim of the Proposal is not to prejudice the application of the GDPR, but rather to particularise specific provisions, notably Articles 13(2)(f), 14(2)(g) and 15(1)(h), as well as Article 88 GDPR. The EDPS understands that the application of the remaining provisions of the GDPR would not be affected by the Proposal. For the sake of completeness, he also recommends explicitly confirming that the Proposal is without prejudice to Directive 2002/58/EC (‘ePrivacy Directive’)¹⁰.

2.3 Limitations on the processing of personal data related to workers

- Article 6(5) of the Proposal provides that digital labour platforms shall not process any personal data concerning platform workers that are not intrinsically connected to and strictly necessary for the performance of the contract between the platform worker and the digital labour platform. Article 6(5) goes on to specify, under letters (a) to (d), certain categories of personal data which shall not be processed by digital labour platforms, namely:
 - (a) any personal data on the emotional or the psychological state of the platform worker;
 - (b) any personal data relating to the health of the platform worker, except in cases referred to in Article 9(2), points (b) to (j) GDPR;
 - (c) any personal data in relation to private conversations, including exchanges with platform workers' representatives; and
 - (d) any personal data in relation to the moment in time when the platform worker is not offering or performing platform work.
- The EDPS understands that Article 6(5) of the Proposal provides a non-exhaustive list of categories of personal data which shall not be processed by the digital labour platforms, without prejudice to Articles 5 and 6 of Regulation (EU) 2016/679¹¹, including the principle of data minimisation. For the avoidance of any doubt, the EDPS recommends clarifying that the Proposal does not create a lawful basis for the processing of personal data by digital labour platforms and that any processing of personal data labour platforms must comply with the principles relating to processing of personal data in the GDPR.

¹⁰ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.07.2002.

¹¹ See also recital (34) of the Proposal.

- The EDPS welcomes the additional restrictions provided by Article 6(5) of the Proposal, in particular the prohibition to process any personal data on the emotional or psychological state of the platform worker¹².

2.4 Remedies and enforcement

- Article 19(1) of the Proposal provides that supervisory authority or authorities responsible for monitoring the application of the GDPR shall also be responsible for monitoring the application of Article 6, Article 7(1) and (3) and Articles 8 and 10 of the Proposal.
- The EDPS welcomes the fact that the oversight of provisions concerning the protection of the personal data concerning persons performing platform work are entrusted to independent supervisory authorities, as required by Article 16(2) TFEU and Article 8(3) of the Charter of Fundamental Rights. At the same time, the EDPS notes that certain provisions are also related to workers' rights and may therefore also require consideration of labour law aspects rather than being focussed exclusively on data protection rights.
- This appears to be the case, for example, in relation to Article 8(3) of the Proposal, which refers to workers' rights that stem from the employment context (which concern issues ranging from access to work, minimum pay, occupational safety, health, maximum working time, promotions, contractual status, protection from undue dismissal, *etc.*). It also appears to be the case of Article 6(4) of the Proposal, according to which digital labour platforms shall make information on automated monitoring systems available to platform workers' representatives and to the national labour authorities upon their request¹³.
- The EDPS therefore welcomes the specification in Article 19(2) of the Proposal, providing that data protection authorities and national labour and social protection authorities shall cooperate in the enforcement of the Proposal, within the remit of their respective competences, in particular where questions on the impact of automated monitoring and decision-making systems on working conditions (minimum wage, working time, *etc.*) and rights of persons performing platform work arise. The EDPS also welcomes those authorities are explicitly authorised to exchange relevant information with each other, including information obtained in the context of inspections or investigations, either upon request or at their own initiative.

¹² See in the same vein also the EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), paragraph 35.

¹³ See also Impact Assessment accompanying the Directive, SWD(2021) 396 final/2, specifies, at page 146.

- Such institutionalised, structured and mandatory cooperation on enforcement between the labour and social protection authorities, on the one hand, and the authorities responsible for monitoring the application of the GDPR, on the other hand, is indeed warranted due to the close interface - for some provisions of the Proposal - between labour rights and the aim of enhancing labour conditions¹⁴ and the protection of personal data relating to platform workers.
- Moreover, the EDPS notes that recital (33) of the Proposal specifies that digital labour platforms should not be required to disclose the detailed functioning of their automated monitoring and decision-making systems, including algorithms, or other detailed data that contains commercial secrets or is protected by intellectual property rights. The EDPS considers that this recital, which is not accompanied by a corresponding provision in the operative text of the Proposal, might unduly limit oversight by competent supervisory authorities.
- The EDPS recommends amending recital 33 of the Proposal in the sense that digital labour platforms shall provide access to the competent supervisory authorities for the purpose of monitoring compliance with the Proposal to the detailed functioning of the automated monitoring and decision-making systems, subject to binding confidentiality obligations for aforesaid public competent authorities¹⁵. A substantive provision mirroring the amended recital 33 should be introduced in the Proposal.

2.5 Relationship to the Proposal for an Artificial Intelligence Act

- The EDPS welcomes that the Commission explicitly recognises the interface of the Proposal with the Artificial Intelligence Act¹⁶. In this regard, he wishes to recall the recommendation made in the Joint EDPB-EDPS Opinion¹⁷ to include requirements stemming from EU sectoral legislation among the **requirements for the EU declaration of conformity** of the AI system. In his view, this applies also to the

¹⁴ Reference can be made in this regard to health and safety at work, liability and accident insurance, rights in relation to the calculation of payments, rights concerning maximum continuous working hours (work shifts), protection against dismissal, etc. See Annex 6, page 138, of the Impact Assessment accompanying the Proposal, ("Relevance of the EU's social and labour *acquis*").

¹⁵ Such an approach would be consistent with approach taken in the Proposal for an Artificial Intelligence Act: in order to ensure that commercial secrets are not jeopardised by the access by the competent supervisory authorities, the Proposal for an AI Act provides that when these authorities need to be given access to confidential information or source code to examine compliance with substantial obligations, they are placed under binding confidentiality obligation. See p. 11 of the Explanatory Memorandum accompanying the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts, 21.4.2021 COM(2021) 206 final.

¹⁶ The need for consistency with the Artificial Intelligence Act is referred to at page 7 and 8 of the Explanatory Memorandum.

¹⁷ EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), 18 June 2021, available at: https://edpb.europa.eu/system/files/2021-06/edpb-edps_joint_opinion_ai_regulation_en.pdf

present Proposal and should be addressed by EU legislator in an appropriate manner in the context of negotiations on the proposal for the AI Act.

- In a similar vein, the EDPS, in line with the recommendations made in the Joint EDPB-EDPS Opinion¹⁸, also recommends providing for **ex ante verification** (before the CE marking) of high-risk work management AI systems, including verification of compliance with the Proposal's requirements, by the data protection authority in close cooperation with the competent national labour and social protection authorities.

Brussels, 2 February 2022

(e-signed)
Wojciech Rafał WIEWIÓROWSKI
