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NOTE

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>Analysis of the final compromise text with a view to agreement</i>

I. INTRODUCTION

The Commission presented its proposal for a Directive on improving working conditions in platform work on 9 December 2021. Building on the work of the Slovenian and French Presidencies and after a first tentative under Czech Presidency in December 2022, a general approach (doc. 10107/23) was reached by the Council under the Swedish Presidency on 7 June 2023.

The European Parliament voted to start inter-institutional negotiations on 2 February 2023.

II. STATE OF PLAY

The proposal was subject to eight trilogues, the first having taken place on 11 July 2023. At the seventh trilogue on 12/13 December 2023 the co-legislators managed to reach a provisional agreement of the text¹. However, this proposal did not find the necessary support at the Coreper meeting on 22 December 2023.

The Belgian Presidency resumed the negotiations on the file with the aim of reaching an agreement still under this legislature. It obtained a revised mandate in the Coreper meeting on 26 January 2024² that it managed to be largely based on the provisional agreement reached in December.

At the 7th trilogue on 30 January, the Parliament informed the Presidency that an agreement could not be found on this basis and suggested moving forward on the basis of another approach on the legal presumption in Chapter II of the proposal. The new approach would entail the definition of common objectives for the introduction of a legal presumption whose modalities are to be defined at national level instead of setting out of common criteria and detailed prescriptions on how Member States should implement the legal presumption as initially proposed by the Commission. A mandate was given to the technical level to elaborate a text following four commonly defined principles.

The members of the technical teams of the co-legislators reached an agreement on a joint exploratory text on 2 February 2024. This text was examined in the Working Party on 5 February and, on 6 February, it was submitted, taking Member States's concerns into account, in an adjusted form to Coreper with the request to grant a second revised mandate under the Belgian presidency³.

¹ Doc. 16187/23 + ADD 1 and ADD 2.

² Doc. 5816/24 + COR1

³ Doc. 6002/24.

Although in the Coreper meeting of 7 February no sufficient support for this proposal was found, partly due to the lack of time for delegations to examine the text, the Presidency was authorised by the Committee to continue negotiations with the Parliament and concluded that it would address the concerns raised by Member States in the 8th Trilogue scheduled for 8 February, namely to:

- Bring more clarity on what Member States need to take into account when they determine the elements indicating control and direction triggering the legal presumption;
- Accommodate the wish to take into account the individual relationship between the person performing platform work and the platform when establishing the legal presumption;
- Clarify that the legal presumption is a procedural tool to facilitate the correct determination of the employment status;
- Make clearer that competent national authorities decide the appropriate action to take in case they consider a person is wrongly classified and when and how controls and inspections are to be carried out.

Based on these principles, the Presidency established a presidency negotiation position in the form of a consolidated text as a basis for the discussions in the 8th Trilogue on 8 February 2024. Following difficult negotiations, the co-legislators agreed on a provisional compromise text. The main elements of this provisional agreement are clarified below in Chapter III of this Note.

III. MAIN ISSUES PROVISIONALLY AGREED ON 8 February 2024

The text of the provisional agreement of 8 February is laid out in Addendum 1 to this Note. The explanations below make reference to this addendum. Addendum 1 does not yet contain change markings. They will be added later.

Chapter I General Provisions

The Presidency obtained that the whole Chapter I, and notably Article 3 on intermediaries remained unchanged as in the Council's revised mandate of 26 January.

Chapter II Employment status

Article 5 paragraphs 1 and 2 providing for the obligation to establish an effective rebuttable legal presumption stayed as set out in the second revised mandate ⁴. It was impossible to obtain any concession from the European Parliament in these two paragraphs. However, following the call of delegations for more clarity on the meaning of these provisions, additional explanations have been proposed and maintained in Recital 31. Notably, it is now expressed that it is for the Member States to set out the modalities of the legal presumption. This reflects the content of Article 5, paragraph 1, and confirms that the Member States maintain discretion at national level for the triggering of the legal presumption. It also englobes that Member States can define when sufficient facts indicating control and direction are found to trigger the legal presumption.

However, Member States remain obliged to ensure a result, meaning that the legal presumption is *effective* in a way that constitutes a procedural facilitation to the benefit of persons performing platform work. The term *effective* was concretised referring to the requirements for obtaining a decision on the correct employment status. The national rules on the definition of employment relationship for the final decision in a proceeding for ascertaining the employment status remain untouched by Recital 31.

The final decision on the correct employment status remains a matter of national law, as defined therein, in collective agreements or practice in force in the Member States, with consideration to the case-law of the Court of Justice.

The rules on a rebuttal have been limited to the sole indication that in case the digital labour platform rebuts the legal presumption, the burden of proof that the contractual relationship in question is not an employment relationship, as defined in the Member States, is on the platform. In particular, the obligation contained to assist the claimant has been deleted. The Directive is now silent on other modalities of the rebuttal, including the consequences of its absence. Those modalities are left to the Member states.

⁴ Doc. 6002/24

The rule that the legal presumption shall apply in all relevant administrative or judicial proceedings where the correct determination of the employment status of the person performing platform work is at stake has been kept alongside the carve out for proceedings concerning tax, criminal and social security matters (Article 5(3)). The necessity that, despite this carve-out, the application of the presumption shall be guaranteed in the proceedings falling under the scope of this Directive has been reiterated by the addition of a wording in Recital 32 whereby *it is crucial that the presumption is effectively applied in all Member States, pursuant to this Directive*.

In Article 5(5), the discretion of competent national authorities was upheld as to the choice of the measure to be taken, where the authority considers that a person performing platform work might be wrongly classified. The competent national authorities might therefore initiate appropriate actions *or* proceedings.

Similarly, according to Article 6(1)(c) on supporting measures, it is up to Member States' authorities to decide to carry out, *where appropriate*, controls and inspections. This corresponds to the revised mandate of 26 January and provides for a large discretion of competent national authorities. The Presidency could therefore agree that this provision applies to all cases where the existence of an employment status of a person performing platform work has been ascertained by a competent national authority.

Chapter III Algorithmic management

The Chapter remained as in the revised mandate of 26 January.

Chapter IV Transparency in platform work

The Chapter remained as in the revised mandate of 26 January.

Chapter V Remedies and enforcement

Compared to the revised mandate of 26 January, this Chapter was subject to the addition of a new paragraph 3 in Article 24. This provision foresees the collaboration of the competent national authorities, with the support of the European Commission, through the exchange of relevant information and best practices on the implementation of the legal presumption.

All other provisions remained untouched, notably Article 24 (5) on penalties.

Chapter VI Final provisions

Compared to the revised mandate of 26 January, this Chapter was subject to three minor changes, an exemplary reference to the existing prerogatives of representatives in the non-regression clause (Article 26 (1)), the deletion of the text referring to indicators which was not fitting anymore in Article 26(2) and an explicit reference in the review clause to the review of the effectiveness of the legal presumption (Article 30).

IV. CONCLUSION

The Presidency considers that the provisional agreement clarified in this Note and set out in its Annex I, represents the best possible compromise between the co-legislators, respects the spirit of the general approach as updated by the revised mandate of 26 January and takes into account the guidance provided by the Committee on 7 February. The Presidency would like to call on the delegations to show additional flexibility and to agree on the current compromise text build on the intensive work of previous Presidencies, taking into account the risk of missing the chance to adopt under this legislative term this key piece of legislation that would considerably improve the working conditions of persons performing platform work.

The Committee of Permanent Representatives is invited to:

- agree on the text of the final compromise, as set out in Addendum 1 to this Note, and to
- 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.