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REPORT

From:	Presidency
To:	Permanent Representatives Committee/Council
No. Cion doc.:	14450/21 - COM(2021) 762 final
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work <i>- Progress report</i>

I. INTRODUCTION

1. On 9 December 2021, the Commission adopted a proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work. That Directive aims to enable correct determination of employment status, ensure fairness, transparency and accountability in algorithmic management in the platform work context and enhance transparency, traceability and awareness of developments in platform work and improve enforcement of the applicable rules for all people working through platforms.

2. The majority of delegations welcomed the proposal in principle, stressing the need for time to assess all of its consequences.

Under the French Presidency, the Working Party on Social Questions met on 17 January, on 8 February, on 3 March, on 4, 5 and 28 April, and on 10 and 24 May 2022. The Working Party finalised the first reading of the text of the proposal, which enabled a first compromise text to be drawn up on the basis of a questionnaire prepared by the Presidency concerning the first two chapters. The progress achieved is summarised in section II below.

For the time being, all delegations are maintaining general scrutiny reservations on the text.

Denmark and the Netherlands are maintaining parliamentary scrutiny reservations.

The European Parliament has not yet adopted its position at first reading.

In accordance with the proposed legal basis of Article 153(2)(b), in conjunction with Article 153(1)(b) and Article 16(2) of the Treaty on the Functioning of the European Union (TFEU), the Council is required to act with the European Parliament in accordance with the ordinary legislative procedure.

On 2 February 2022, the European Data Protection Supervisor delivered formal comments on the proposal in question.

II. THE COUNCIL'S WORK UNDER THE FRENCH PRESIDENCY

The Working Party on Social Questions started examining the proposal under the Slovenian Presidency on 13 December 2021, a few days after its publication. On that occasion, the Commission presented the proposal for a Directive and delegations had an opportunity to submit preliminary comments of a general nature.

A questionnaire on the impact assessment was sent to delegations by the French Presidency on 22 December 2021. 25 Member States responded to that questionnaire. The impact assessment was analysed and discussed in depth at an informal videoconference of the members of the Working Party on Social Questions on 8 February 2022. The Presidency summary of that evaluation is to be found in 9227/1/22 REV 1 ADD 1.

The first reading of the text which took place at the meetings on 17 January, 3 March and 4 April gave rise to numerous questions aimed at ensuring a better understanding the text and the way in which it was to be interpreted, in particular with regard to Articles 4 and 5. At the meeting on 5 April, the Commission provided clarification in particular as regards the legal presumption of employment and its rebuttal.

On 12 April 2022, in the light of the explanations provided by the Commission and the requests for clarification submitted by delegations, the Presidency presented a note from the Presidency in the form of a questionnaire intended to obtain guidance from delegations with a view to drafting an initial compromise text on Chapters I and II, the main purpose being to clarify the text. This step was considered essential in order to allow for a shared understanding of the text and to enable delegations to adopt a position on the most complex points.

The meetings of the Working Party on Social Questions on 28 April and 10 May were devoted to delegations' replies, enabling the Presidency to publish, on 19 May 2022, a compromise text¹ concerning Chapters I and II and the associated recitals, which was discussed at the meeting of the Working Party on 24 May.

¹ ST 8584/22

III. MAIN ISSUES DISCUSSED AT WORKING PARTY LEVEL

Scope and purpose

Since a large number of delegations wanted the text to better reflect the legal basis on which it is based, Article 1 has been restructured so as to present the scope with regard to its dual legal basis.

The Presidency has also sought to shed more light on its objectives and the means of achieving them in paragraph 2 of Article 1. This follows, in particular, numerous requests for clarification concerning the application of the text to employed persons on the one hand (on the basis of Article 153(1)(b) TFEU) and to self-employed persons on the other (on the basis of Article 16 TFEU).

The same attempt to clarify the legal basis was also pursued in the recitals.

Definitions

As the concept of ‘commercial service’ has been the subject of numerous discussions, in particular because of its lack of a definition in EU law, it has been proposed to revert to the concept of ‘service’. Article 2, like recital 18, also specifies the type of platforms excluded from the scope (‘resell goods or services, or those who provide a service that is of a non-profit making nature’), in response to requests to that effect by certain Member States.

Legal presumption

In the absence of a clear and marked position of a majority of delegations as regards the criteria, no significant changes have been made to their number, nature or threshold.

However, the Presidency has proposed to delegations the introduction of an additional concept to refer to the link of subordination which would lead to employment by focusing not only on ‘control of the performance of work’, as in the Commission proposal, but more broadly on ‘restriction of freedom, including through sanctions, to organise one’s work and control its execution’. The concept of restriction of freedom has been removed from criterion (d) and incorporated into the ‘chapeau’ in order to be applied more generally to all the criteria and to better cover certain criteria, in particular (a).

In addition, the word ‘effectively’ in certain criteria has been replaced by ‘*de facto*’ and incorporated into the ‘chapeau’ of paragraph 2, in order to reflect more generally the principle of primacy of facts.

Lastly, in paragraph 3, the new wording aims to make more explicit the margin of manoeuvre accorded to the Member States to apply the presumption of employment outside administrative or judicial proceedings where the employment relationship is at issue and in cases where the contractual relationship is clearly not an employment relationship in accordance with national laws or practices.

Rebuttal of the presumption

The amendments to this article sought to take account of the explanations provided by the Commission and to share a common understanding with all delegations. In terms of substance, the changes took account of more substantial requests for amendments relating to the competence of the Member States, as regards the lack of a suspensive effect.

The issue of the burden of proof and the role of platforms was also further specified in recital 28.

Algorithmic management, transparency of platform work, redress and enforcement

The examination of the articles of Chapters III, IV and V (Articles 6 to 19) focused on the following aspects:

- delegations requested, in particular, clarification of the relationship with other EU texts, including the Platform-to-Business Regulation, the GDPR and the draft Regulation on Artificial Intelligence (AI), and on the application of the provisions of this chapter to platform workers, depending on their status;
- delegations commented on the scope and objective of Article 11 on the declaration of platform work. They also asked for further clarification on the periodicity and arrangements for making certain information available (Article 12);
- delegations asked the Commission about the application of certain articles to self-employed workers (in particular, Articles 10, 13 and 18).

IV. CONCLUSIONS

Tangible progress has been achieved as regards the technical examination of the proposal and the mutual understanding of the operational consequences of the Directive. The first reading of the text in its entirety has been completed. The French Presidency accorded all the time necessary for a discussion of the articles, and gave delegations an opportunity to submit their questions, including in writing ahead of the meetings of the Working Party on Social Questions. On the basis of the explanations provided by the Commission and the comments submitted by the Member States, the French Presidency was able to draw up a first compromise text with the main objective of technical clarification of the text, covering exclusively Chapters I and II and the related recitals and welcomed by delegations as a sound initial basis for negotiations. Further work and technical discussions are necessary before deliberations can begin with a view to agreeing on a general approach.
