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

Delegations will find attached a steering note from the Presidency, in view of the Social Questions Working Party on 21 November.

Presidency Steering note

I. INTRODUCTION

The negotiations with the Parliament enter its decisive phase. While the trilogue on 8 November 2023 allowed for a provisional agreement of 64 rows, there are still a whole number of issues on which it has not yet been possible to find an agreement between the negotiation teams. These open issues will be discussed in the trilogue on 28 November 2023 with the objective to agree on them in a final open-ended trilogue, to be scheduled at the beginning of December, only a limited number of open points, one of which will likely be the legal presumption.

This note serves to gather the views of delegations on the most important open issues, outside the legal presumption, with the objective to identify margins the Presidency has in the further pursuit of the negotiations. It is evident, that progress in the negotiations will only be possible if the Council shows flexibility in a number of the points laid out below.

II. THE MAIN OPEN POINTS

1. The definition of digital labour platform (rows 74 – 77a)

Issue at stake

There are two remaining open points in this definition:

The first (row 77a) is the addition by the Council that the service is to be provided with the involvement of “*the use of automated monitoring or decision-making systems*”. The Presidency considers this an amendment which needs to be kept in any case and it is confident that this will be accepted by the Parliament’s negotiating team (in the following referred to as “EP”).

The second (row 76) is the addition by the EP of “*or it involves the allocation of work through an open call*”. The EP intends to make sure that the Directive covers crowd work (see recital 17c, row 27c), thus a situation where services are not provided in a triangular relationship between 1. the platform, 2. the person performing platform work and 3. the recipient of the service, but where the platform itself is the recipient of the service. In this situation, the platform does not intermediate between the person performing platform work and the recipient of the service but outsourcing work by an open call using automated systems using a digital platform.

Presidency assessment

While the Presidency sees the merit of using the opportunity of this proposal to address crowd work, this has never been discussed in the Council and its preparatory bodies. The Presidency searches the view of the delegations on covering crowd work.

If Member States were to agree to covering crowd work, the Presidency would rather suggest the following wording of row 77a to the EP, which would ensure that crowd work is covered.

“(b) it is provided ***at the request of the digital labour platform or*** at the request of a recipient of the service;”

2. Representatives of persons performing platform work / platform workers

There are many issues related to representatives of persons performing platform work / platform workers, which will be addressed below one by one. All these issues are of particular importance for the EP.

a. Definition of representatives (rows 71a, 81, 81a)

Issue at stake

In the Council, the Commission definition of “representatives” had been deleted as it was not possible to find agreement on a text and a definition was not considered as required. In order to avoid an interpretation, that would oblige Member States to foresee in their legal orders representatives of self-employed, it was clarified in row 71a that *“this Directive shall apply only to the extent that a representation of persons performing platform work is provided for by national law and practices.”*

The EP has provided for definitions in rows 81 and 81a for both representatives of persons performing platform work and representatives of platform workers, which refer equally to national law and practice.

Presidency assessment

The Presidency considers that the EP’s definition could be acceptable as they refer not only to trade unions, but also to other forms of representation. However, as there are not in all Member States mechanisms for recognising trade unions, the word “recognised” needs to be deleted in both rows. Furthermore, the Presidency considers that row 71a should remain in the text in order to avoid any legal uncertainty. Is this view shared by delegations?

b. Information and consultation (row 144)

Issues at stake

The Commission provided that platform workers shall be informed and consulted directly in order to have a consultation also in the supposed frequent cases that there are no representatives within the platform. The Council has kept this text, while the EP has deleted it as it wants to have a pressure on platform to allow for representatives, in particular trade unions, to be present in the enterprise.

Presidency assessment

The extension to other addressees than workers representatives has not been discussed thoroughly in the Council and its preparatory instances. While the Presidency considers that the rights to information and consultation could, as requested by the EP and in line with the Information and Consultation Directive, be limited to representatives only (and thus the text in brackets in row 144 above be deleted), it wonders whether delegations can agree with this limitation.

c. Procedures on behalf or in support of persons performing platform work (rows 164, 165)

Issues at stake

The Council has included in row 164 that an action might be taken “*on behalf or in support of one or several persons performing platform work*” in order to allow for collective action and for class action, under the strict condition that this is foreseen in national law and then deleted row 165. The EP wishes to keep row 165 deleting the requirement of the agreement of the person(s) concerned. Its objective is to provide for an obligation of Member States to provide for class action, even if the modalities are left to national law and practice.

Presidency assessment

The Presidency would like to know whether Member States would be willing to accept an obligation introduce the right to class action for persons performing platform work in their national legal orders or whether they wish to keep the possibility of class action to the discretion of Member States (rows 164 and 165).

d. Communication and reporting channels for persons performing platform work (rows 166 – 167a)

Issues at stake

Here there are three different issues for the EP. The EP wishes to include in row 167 the possibility for trade unions (first issue) to use the communication channel to contact (proactively, second issue) persons performing platform work. As a third issue, the EP calls for a reporting channel, distinct from the one under row 167 “*to safeguard persons performing platform work from violence, including gender-based violence and harassment*”.

Presidency assessment

On the first issue, the Presidency wishes to hear from delegations, whether the mention of trade unions is acceptable to them.

On the second issue, the Presidency is of the view that it can be recognised that these channels can be used by workers representatives to proactively contact workers for the purpose of defending their rights. It would therefore be appropriate to add “to be contacted” as in the Commission text.

On the third issue, it is the Presidency’s view that there is a particular risk of harassment and violence, including gender-based violence, in digital labour platforms as the usual mechanisms of on-site enterprises for reporting are not available. While the Presidency does not intend to take the EP amendment in row 167a as such on board, but it would like to know whether delegations could in principle accept the idea of a dedicated communication channel.

3. Intermediaries (rows 80a, 83a-83b, 159d- 159h)

Issues at stake

While the EP can accept the Council text of a new Article 2a (rows 83a-83b), it insists on introducing a liability system whereby the digital labour platform and the intermediary, or any subcontractor in a subcontracting chain, shall be held jointly and severally liable.

Presidency assessment

The Council has chosen for good reasons not to add any concrete rule on liability at Union level. Indeed, the cases of subcontracting and the legal frameworks in the Member States are too different for a one-size fits-all solution.

Subcontracting cannot as such be seen as problematic. It might also be used in a responsible way. In these cases, the digital labour platform as contractor needs to have the possibility to liberate itself from its responsibilities, for example by proving that he has undertaken due diligence obligations (see Article 12 (5) of the Posting Enforcement Directive 2014/67/EU).

The Presidency could imagine to develop Article 2a (row 83b) by adding elements inspired by the Council recital 18a (row 28d), at the end of Article 2a, as follows: “... , *including, where appropriate, mechanisms of joint and several liability across subcontracting chains and effective access to redress*”.

The Presidency wishes to hear delegations’ views on this proposal.

4. Prohibition of the use of personal data (rows 107a to 107l)

The EP has accepted to delete its rows 123a to 127e in favour of an integration of many of its amendments in a modified form in the new Article 5a, which has been added by the Council (rows 107a to 107l). This provision was subject to an attempt to reach a package deal in the third trilogue, which however was not achieved. The main open issues on this provision are a) the scope of the provision and b) a prohibition of processing to predict the exercise of fundamental rights.

a. The scope of the provision (rows 81c, 107a, 107b)

Issues at stake

Article 5a provides for specific prohibitions on processing of personal data. The Council chose to apply this provision only to automated monitoring and decision-making systems as defined in rows 81b and 81c. The EP, to the contrary, considers that this provision shall apply to every processing of personal data by the digital labour platform. It is of the view that limiting its scope would open doors for circumvention by platforms.

Presidency assessment

Article 5a does not foresee any lawful ground for processing of personal data concerning the types and purposes listed therein in rows 107c to 107k. The Presidency considers that it is a matter of proportionality to keep the scope of Article 5a limited as in the Council position, which sought to cater for a balanced approach. In addition, the scope of Article 5a can be seen as sufficiently broad as it does not only refer to automated decision-making systems (row 81c) but also to automated monitoring systems as defined in row 81b. As the extension of the scope of this article to all systems taking automated decisions affecting persons performing platform work in addition to the automated monitoring systems is a very important point for the EP, the Presidency would like to hear the delegations' views on such an extension.

b. Prohibition of processing to predict the exercise of fundamental rights (row 107f)

Issues at stake

The EP wishes to protect the exercise of fundamental rights, by prohibiting the processing of *“personal data to predict the exercise of fundamental rights and freedoms enshrined in the EU Charter, in particular social and employment rights, such as the right of association, the right of collective bargaining and action or the right to information and consultation”* (see row 107f). Neither the Commission nor the Council texts contain provisions on this issue.

Presidency assessment

The Presidency considers that processing of data for predicting the exercise of fundamental rights is not allowed under the GDPR, if it serves the purpose of then restricting the exercise of these right as all processing needs to serve a legitimate purpose (Article 5 (1)(b) GDPR).

The Presidency is however willing to find a compromise with the EP, if the prohibition is clearly limited. It therefore suggests the following text, on which it searches the views of Member States:

“process personal data to predict the exercise of the right of association, the right of collective bargaining and action or the right to information and consultation, as defined in the EU Charter;”

5. Declaration of platform work (rows 152, 152a)

Issues at stake

Article 11 is about the declaration of platform work performed by workers to the competent authorities of the Member States, where the work is performed. The EP is willing to take over the Council's text but want to extend the scope by adding an obligation to inform also about "*work performed by persons performing platform work, and their employment status*".

Presidency assessment

The Presidency considers that Article 11 shall remain limited to platform workers as its purpose is to allow competent national authorities to ensure that platform workers enjoy the rights workers have, but it is open to further work on the obligation to inform about persons performing platform work under Article 12 (row 155). The Presidency wishes to hear the views of Member States to this orientation.

6. Scope of access to evidence (row 169)

Issues at stake

Article 16 (1) sets out an obligation for Member States to ensure that courts or authorities are able to order the digital labour platform to disclose any relevant evidence which lies in their control. The scope of this provision was in the Commission proposal "*a claim regarding correct determination of the employment status of persons performing platform work*". This idea was kept in the Council's general approach but transformed into a reference to "*the proceedings referred to in Article 4a*". The EP however wants to extend this possibility for courts and authorities to "*proceedings concerning the provisions of this directive*".

Presidency assessment

The Presidency considers that Article 16 is a provision which deals with the conditions which are required to allow persons performing platform work to enforce effectively rights which are based on this Directive. As the algorithmic management is a distinctive feature of the platforms, which makes proof of facts in a proceeding difficult without the disclosure of relevant evidence by the platform, the Presidency has some sympathy for the EP request. The Presidency therefore wishes to know whether delegations share its view.

7. Supervision and penalties (rows 184a – 184e)

Issues at stake

The EP sets out in rows 184a – 184e a number of very detailed provisions on the severity of penalties, including the exclusion from public benefits and public procurement.

Presidency assessment

The Presidency considers the EP amendments as overly prescriptive, but it also sees that it might be useful to concretise the notions of penalties being “*effective, proportionate and dissuasive*” (row 184 at the end). The Presidency wishes to hear the delegations’ views, whether they are willing to accept one or several of the elements, with which the EP tries to concretise this notion.

8. Article 20a (row 189c)

Issue at stake

This clause has been introduced by the Council. It has a double purpose: 1. to allows Member States to “... , *by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of persons performing platform work's personal data under Articles 6, 7 and 8 of this Directive*”, 2. The possibility to deviate by collective agreements from Articles 8a, 9, 11, 12.

The EP is quite critical about this clause as it considers that this could be used by platforms in collusion with yellow trade unions to erode the respective provisions of the Directive.

Presidency assessment

The Presidency has some understanding for the concerns brought forward by the EP given the diversity of social dialogue systems in Member States. The Presidency therefore addresses the question to Member States, whether they could consider deleting this provision or – as an alternative – limit it to certain types of collective agreements.

9. Obligation to carry out an inspection once a reclassification took place (rows 101a, 102p)

Issues at stake

The EP wanted to have set out in the operative part an obligation to carry out an inspection “*every time a person performing platform work is newly recognised as platform worker, within one month of such recognition, in order to verify the status of the other persons performing platform work for the same digital labour platform;*” (row 101a).

After negotiations, which led to a less prescriptive text in the operative part (row 102p), the EP still insists to set this obligation clearly out in a recital.

Presidency assessment

In line with Member States’ positions voiced earlier, the Presidency is of the view that the discretion of enforcement authorities needs to be safeguarded and that there is no place in the Directive for any text which puts concrete and time bound obligations to conduct inspections on them. The Presidency, however, considers that the successful reclassification of a person performing platform work is an indication that other persons performing platform work working for the same digital labour platform might be wrongly classified and that it is important that this indication is taken into account when competent national authorities decide on carrying out inspections. Would delegations be able to accept stating this in a recital?

10. Prohibition that automated decision-taking systems take certain types of decision (row 120a, 135d)

Issues at stake

The EP wishes to prohibit that a number of decisions are taken by automated decision-making systems (row 120a).

Presidency assessment

The Presidency has carefully listened to delegations in the SQWP of 14 September and therefore taken a restrictive position. It considers it however politically very problematic and difficult to defend that machines are allowed to decide on a dismissal / the termination of a contract. The Presidency therefore considers the text set out below (row 135d) as a balanced compromise, on which it searches the views of delegations:

“Any decision to restrict, suspend or terminate the contractual relationship or the platform worker’s account, or any decision of equivalent detriment, shall be taken by a human being and not solely by automated decision-making systems.”

III. CONCLUSION

The Presidency would be grateful if delegations could provide their views on the points above in the meeting of the Social Questions Working Party of 21 and 22 November 2023. Any written contribution on these issues is equally very welcome in order to allow the Presidency to shape its negotiation strategy in good knowledge of Member States’ positions.
