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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 - MS Comments

Following the Social Questions Working Party meeting of 16th January 2024, delegations will find attached the contributions received from the EE, FI, FR, HU, IT and LU.

Comments by EE

Comments by the ESTONIAN delegation on proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, document 5133/24 ADD 1

1. General remarks

We thank the PRES for a new compromise text. We find it is going into the right direction by moving closer to the General Approach (GA) adopted in June last year, which we consider more appropriate, although not entirely in our interests.

There are positive elements in the compromise text. However, we continue to have concerns and more work is needed to achieve a legally sound and balanced outcome. In addition to chapter two on employment status, there is also work to be done on other parts for further improvement of the text, particularly on intermediaries (Article 3), information on platform work (Article 18), as well on algorithmic management (Chapter III).

2. Specific remarks on Chapter II Employment status

Article 5 Legal presumption

Art 5 (1). We appreciate that the word “agreed” has been deleted from the chapeau of Article 5 (1). As well, it is a positive step that every criterion is provided as a separate basis in para 1.

However, our main concern remains in the threshold and the content of criteria. According to the GA, 3 out of 7 criteria had to be met for the presumption to be triggered, but according to current text the threshold is 2 out of 5 “indicators". Considering Article 5 as a whole, in practice, it is highly unlikely that at least 2 of the "indicators" aren't always or almost always fulfilled and therefore the legal presumption triggered.

The legal presumption must be proportionate. Meeting the criteria cannot be very easy and a situation where the presumption in principle always applies should be avoided. Our goal has been to see a legal presumption with a threshold of the majority of the criteria. Regarding the PRES’s proposal it would be 3 out of 5.

Still, with a current low threshold 2 out of 5, the content of the criteria and their accuracy is to a large extent decisive. Criterion (b) on supervision is too broad and always applies in case of platforms. Therefore, it should be considered to limit the content of criterion (b), which shrinks the net. In addition, recital 32 needs to be aligned with Article 5 (1).

Furthermore, the fact that the presumption is triggered when certain "indicators" are found and not when concrete criteria is met, is also problematic. Therefore, the risk of wrong-positive results is even greater. Using the term "indicator" implies that any of the points (a) to (e) could be fulfilled even if there is the slightest indication about it. The term used should be “criteria”.

After listening to the explanations in the working group of 16 January, our preference is still to continue to use the term criteria. Although the terms 'criteria' and 'indicators' can be considered synonymous, the understanding of these terms differs in Parliament’s approach. Perhaps the issue could be resolved in the recitals by explaining the reasoning behind the term used, which, of course, first requires a common understanding of the meaning of the term itself.

Art 5 (2). We propose to delete Art 5 (2). The provision gives rise to different interpretations and causes legal unclarity. Article 27 already allows for more favourable provisions. In addition, it is not clear from the text how national indicators should be applied in practice together with EU level indicators and its threshold.

Article 6 Application of the presumption and rebuttal

We thank the PRES for changes made in Article 6. They are a step in the right direction and improve the text. We have one comment on Article 6.

Art 6 (3) point (a). We are unsure about the added value here. It is highly unlikely that relevant authorities do not communicate the triggering of the presumption and the possibility to rebut it (e.g. the court informs both parties about documents received, possibility to make objections etc). We should refrain from over-regulatory paragraphs.

Article 7 Framework of supporting measures

Art 7 (1) point (c). The changes made in Article 7 go into the right direction. However, regarding the point (c), the Directive should not regulate who, how and when must carry out supervision in such a detailed way. This should be left for the Member States to decide and the Directive should not intervene with the independence and discretion of labour inspectorates. Regarding the addition in point (c), the text should give more flexibility and rather refer to, for example, the need to pay more attention to platforms where misclassification has taken place and not firmly obligate for timely controls and inspections.

3. Specific remarks on other issues

Chapter I General provisions

Art 1 (1) – purpose of the directive. The GA clearly indicates that the purpose of the directive is to improve working conditions of platform workers. The compromise text is vague in this respect and simply states that the purpose is to improve working conditions, without specifying whose working conditions. The objective is not to establish working conditions for all persons in platform work, because that would not be in line with TFEU Article 153.1(b). Therefore, it is important for the text to state that it regulates working conditions of platform workers (and not all persons performing platform work).

Art 1 (2) – minimum rights. According to the compromise text the Directive lays down minimum rights, but according to GA it does not.
The reference to minimum rights leads to more legal unclarity in the text.
There is no clear understanding what is meant under minimum rights. Despite Article 1 (2) stating that the Directive lays down minimum rights, we believe that chapter II provides no minimum rights in a sense that it does not grant any concrete labour rights (working conditions) to a person, being merely a set of procedural rules.

Art 2 (1) point (8) – definition of automated monitoring systems. Adding "or support" here makes the definition unclear. This could be read as capturing almost any electronic system in use by companies (Word, Excel). Although the definition refers to automatic systems, the explanation itself does not indicate that these systems should be automatic. This needs to be clarified to provide legal certainty. It is difficult to understand what situations it now covers in addition, compared to the previous definition.

Art 2 (2) – definition of platforms regarding reselling goods. According to the GA, the definition of digital labour platforms does not include providers of such services whose main purpose is to resell products or services. According to compromise text, the concept of platforms does not include providers of such services that allow "individuals, who are not professionals" to resell products or services. The definition of digital labour platforms seems to be broader now. The new wording raises various questions regarding the scope of the Directive, e.g. it is not clear why such a distinction is important and what exactly is meant by "professionals". Therefore, we prefer the GA regarding Article 2 (2).

Article 3 – intermediaries. The regulation of intermediaries has become more complex and too detailed. In particular, the second sentence of Article 3 in current text raises legal unclarity because of the complicated wording. In addition, it implies that joint and several liability systems should always be considered. Member States should be given more discretion on how to achieve the aim of the directive in case intermediaries are involved and Member States should be able to decide freely how to regulate liability in case intermediaries are involved. Such flexibility for Member States is important considering differences regarding platform work in Member States. Therefore, the second sentence of this Article should be deleted.

Chapter III Algorithmic management

Art 9 (1) – data protection impact assessment. There are also obligations to assess the impact of automated monitoring and decision-making systems in Articles 11 (1) and 13. How do these assessments differ from one another? It is disproportionate to oblige the platform to carry out three separate assessments (four including the assessment imposed by the AI Act). These assessment obligations must be carefully scrutinized to minimize the administrative burden to EU businesses and increase the uptake of innovative technologies.

Article 10 (1) point (a) – information regarding all types of decisions. Stating that platforms must inform about "all types of decisions" taken or supported by automated decision-making systems is unreasonable. If the aim of such wording is for the platform to inform the person performing platform work of absolutely every type of automatic decisions that algorithms make, then it brings unreasonable administrative burden to platforms.

Art 12 (1) – human review over any decisions. According to the GA, platforms must provide human review over decisions that "significantly affect" the person. However, the obligation in compromise text is to provide human review over any decisions, even if decisions don't significantly affect the person. There is no Council mandate to extend human review to all decisions and we find it disproportionate and too burdensome for platforms. It remains unclear what is the added value of requesting human review, for example for task allocation decisions.

Chapter IV Transparency on platform work

Art 18 – access to relevant information on platform work. Article 18 provides for a regular, automatic obligation to provide information to competent authorities and representatives of persons performing platform work. We find Article 18 (1) point (c) and para 2 problematic.

Regarding Article 18 (1) point (c), we question the necessity and added value of the obligation to provide such large quantity of data regularly after every 6 months. It brings unjustified additional administrative burden to both platforms, who have to process the data regularly and make it automatically available and update it every six months, and competent authorities, who have to manage the large quantities of data.

Therefore, we propose to delete point (c) or to specify that the information in point (c) should only be provided upon request of competent authorities and representatives. Likewise, it would be reasonable that the information on the general terms and conditions set out in point (b) should also be provided upon request of authorities and representatives.

Regarding Article 18 (2), the aim and added value remains unclear, because para 2 essentially repeats Article 18 (1). Paragraph 2 is over-regulatory and unnecessary, raising legal unclarity of the text and should therefore be deleted.

Comments by FI

Platform Work Directive: Written comments by FINLAND to PCY document 5133/24 ADD 1

Article 5:

As a rule, we would prefer to keep Articles 5-7 as close to the general approach as possible. However, it might be easier for Finland to accept article 5 if some changes were made to it:

- **The content of the criteria/indicators**: We could support the proposal on indicator b by Italy and France.
- **The use of the term *indicator*:** it could be specified in the text in more detail that a sufficient amount of concrete evidence is needed always.

Article 7.1.c:

FI proposal: (c) *provide for effective controls and inspections conducted by national authorities, in line with national law or practice, and in particular provide for ~~timely~~ controls and inspections**, where appropriate,** on specific digital labour platforms where a misclassification of employment status has been confirmed, while ensuring that such controls and inspections are proportionate and non-discriminatory.*

Justification: we would prefer the word "timely" to be taken out and add "where appropriate". This is because we see that the inspections and controls should be a matter for national discretion. The idea should be that if an authority corrects one misclassification, then the platform itself should remedy the position of those performing in similar circumstances.

FI comments to other parts of the text – outside articles 5-7:

We agree with CZ that the disproportionately stricter regulation of digital platforms compared to other business entities does not appear to be justified.

The extensions made to Chapter III and article 18 create an excessive administrative burden on platforms, in particular as regards the obligation to provide information.

We hope that the Presidency will have time to reflect on these points, despite the time pressure.

Articles 2.8 / 2.9: The use of word '*support*' in connection with automated decision-making and monitoring systems broadens the definition remarkably and makes it difficult to establish exactly which systems should be included.

Article 8:

We have some serious concerns regarding the latest amendments made to the articles on algorithmic management and their relationship to GDPR. We consider some of those articles partly overlapping with the GDPR and possibly also contradictory with it – and we anticipate some problems in the eventual implementation. In many parts of chapter III we think that the general approach is legally more clear.

More specifically:

Article 8.1.d: The sub-paragraph and its purpose are unclear. What kind of problems does it try to solve?

We would suggest:

Primarily, that the sub-paragraph is moved to the recitals. Or alternatively, that the purpose and content of the provision and to what extent does the provision overlap with the GDPR is explained in the recitals. And also, that it is explained in more detail if the provision meets an objective of public interest and is proportionate to the legitimate aim pursued as is required in the GDPR.

Article 8.1.e: We wonder if it is still possible to apply the exceptions in article 9 paragraph 2 of the GDPR? As such this provision seems legally unclear.

We would suggest:

That it is explained in the recitals if it is possible to apply the exceptions in article 9 paragraph 2 of the GDPR regarding the limitation on processing of personal data in art Article 8.1.e and to what extent does the provision overlap with the GDPR. And also, that it is explained in more detail if the provision meets an objective of public interest and is proportionate to the legitimate aim pursued as is required in the GDPR.

Article 8.3.: Appears to be a significant extension and makes the directive more complex, which is not justified.

Article 10.1.a: Too broad and would cause excessive administrative burden.

Articles 10.3 and 10.4: These provisions are vague and appear to be too broad, furthermore they don't seem to be in line with the other parts of that article. It is not clear what information is meant by "*concise information about the systems and their feature*s" and "*comprehensive and detailed information about all relevant systems*". Do these sentences refer to the same information than in para 10.1?

Article 11.1: Consultation is preferred instead of involvement as follows:

> *Member States shall ensure that digital labour platforms oversee and,* ***in consultation with*** ~~*with the involvement of*~~ *workers' representatives, regularly, and in any event every two years, carry out an evaluation of, the impact of individual decisions taken or supported by automated monitoring and decision-making systems used by the digital labour platform, on persons performing platform work, including, where applicable, on their working conditions and equal treatment at work*

Article 12 para 1: The words "*that significantly affects them*" have been removed, granting platform workers the right to seek an explanation for any decision made by an automated monitoring or decision-making system. Without the qualifier "significant," the scope of this right expands remarkably, which does not seem necessary and justified.

Article 18.2: is unclear in relation to articles 17 and art. 18.1. Would 18.2 mean an obligation to provide information on their own initiative directly to competent national authorities? We would like to suggest the removal of article 18.2 or the following amendment:

> *Member States shall ensure that digital labour platforms make information on work performed by persons performing platform work and their employment status* ***available*** *to competent national authorities.*

Article 21: The reference to directive 2002/58/EC is not mentioned any more, as it was in the general approach. We would appreciate bringing it back into the text (as follows):

> *Member States shall take the necessary measures to ensure that digital labour platforms create the possibility for persons performing platform work to contact and communicate privately and securely with each other, and to contact or be contacted by representatives of persons performing platform work, through the digital labour platforms' digital infrastructure or similarly effective means, while complying with the obligations under Regulation (EU) 2016/679* ***and Directive 2002/58/EC*** *Member States shall require digital labour platforms to refrain from accessing or monitoring those contacts and communications.*

Recitals:

29) The new reference to ECJ case law is not totally clear now**;** the text can be interpreted so that the term indicator is used in the ECJ case law, and if this is not what is meant by the text, it should be modified to that end.

40) Processing of personal data based on consent: appears to be in conflict with the GDPR.

Comments by FR

Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work

FR comments on Presidency proposal examined at the SWQP meeting on 16 January 2024 (document ST 5133 2024 ADD 1)

Additions to the text are in **yellow**, and proposals of deletion in ~~blue~~.

Article 3 (Intermediaries):

Member States shall take appropriate measures to ensure that, when a digital labour platform makes use of intermediaries, persons performing platform work who have a contractual relationship with an intermediary enjoy the same level of protection afforded under this Directive as those who have a direct contractual relationship with a digital labour platform. To that effect, Member States shall take measures, in accordance with national law and practice, to establish appropriate ~~responsibility~~ mechanisms, which shall include, where appropriate, joint and several liability systems.

Justification: The French authorities are not in favour of the wording of the second sentence of Article 3, solely insofar as it concerns the application of a joint and several liability mechanism to the obligations arising from Chapter II on the legal presumption (Article 6). Joint and several liability mechanism could not ensure the useful effect of the Directive, insofar as the person performing platform work would not be able to rely on the presumption against the platform in the context of the contract concluded with the intermediary. The purpose of joint and several liability is to allow a creditor to turn to either of the debtors to claim all of his debt. Where there is no contractual relationship between the platform and the person performing platform work, this mechanism will not allow the worker to benefit from the provisions of the Directive in the specific case where he or she invokes the presumption. The French authorities propose to delete the word "responsibility" in order to leave MS some flexibility in the use of appropriate mechanisms, without the need to resort solely to joint and several liability mechanisms, which will not always be the most appropriate to the person performing platform work's situation, and the obligation under the directive that he or she is invoking.

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Recital 25:

(25) In some cases, persons performing platform work do not have a direct contractual relationship with the digital labour platform, but are in a relationship with an intermediary through which they perform platform work. This way of organising platform work often results in a vast array of different and complex multi-party relationships, including subcontracting chains, as well as in blurred responsibilities between the digital labour platform and the intermediaries. Persons performing platform work through intermediaries are exposed to the same risks related to the misclassification of their employment status and the use of automated monitoring or decision-making systems as persons performing platform work directly for the digital labour platform. Member States should therefore lay down appropriate measures in order to ensure that, under this Directive, they enjoy the same level of protection as persons performing platform work who have a direct contractual relationship with the digital labour platform. Member States should lay down appropriate ~~responsibility~~ mechanisms, including, where appropriate, through joint and several liability systems.

Article 5 (Legal presumption):

1. The contractual relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship when any two of the following indicators of control and direction are found, by virtue of **[…]** unilaterally determined terms and conditions or in practice:

   (a) the digital labour platform determines **upper limits for** the level of remuneration **[…]**;

   (b) the digital labour platform supervises the performance of work **[…] and requires the person performing platform work to comply with specific binding rules**;

   (c) the digital labour platform **restricts the freedom to organize one's work by limiting the discretion to accept or to refuse** tasks;

   (d) the digital labour platform **restricts the freedom to organize one's work by limiting** the discretion to choose one's working hours or periods of absence;

   (e) the digital labour platform restricts the freedom to organise one's work~~;~~ **by limiting the discretion to use subcontractors or substitutes to perform the work […]**.

2. Member States may add further indicators to this list as a matter of national law.

3. The rules laid down in this Article and in Article 6 shall not affect the discretion of courts and competent authorities to ascertain the existence of an employment relationship, as defined by the law, collective agreements or practice in force in the Member State in question, with consideration of the case-law of the Court of Justice, regardless of the number of indicators found.

Justification: French authorities support IT's proposed amendment on the indicator (b) and propose to correct a typo in the indicator (e).

Recital 32:

(32) Indicators that a digital labour platform controls the performance of work and that a person performing platform work is likely to be in an employment relationship should be included in the Directive in order to make the legal presumption operational and facilitate the enforcement of workers' rights. Those indicators should be inspired by Union and national case-law. The indicators should include concrete elements showing that the digital labour platform determines the **upper limit of the** level of remuneration **[…]**; supervises the performance of work, ~~**including by requiring the person performing platform work to respect specific rules with regard to appearance or conduct towards the recipient of the service and […]** by tracking or thoroughly verifying the quality of the results of the work of persons performing platform work **by electronic means**; determines or controls the distribution or allocation of tasks;~~ **[…]** or restricts **the freedom to organise one's work by limiting the discretion to accept or to refuse tasks,** the discretion to choose one's working hours or periods of absence**, or the discretion to use subcontractors or substitutes to perform the work**~~; restricts the freedom to organise one's work~~ **[…]**. ~~When one indicator is composed by several elements to be assessed, the fulfilment of any of those elements should be considered to be sufficient to deem the indicator fulfilled~~. The digital labour platform might exert direction and control as defined by those indicators not only by direct means, but also by applying sanctions or other forms of adverse treatment or pressure.

~~The indicators should also comprise concrete elements showing that the digital labour platform~~ Closely supervising the performance of work, also by tracking, by requiring the person performing platform work to respect specific rules with regard to appearance or conduct towards the recipient of the service or thoroughly verifying

the quality of the results of the work of persons performing platform work~~. This~~ includes assessing or regularly taking stock of the work performance or work progress which can also be performed by electronic means, such as camera surveillance, ~~location tracking,~~ counting keystrokes or taking screenshots or using other functions in computers or smartphones. Supervision does not include, on the contrary, the use of electronic tools**, including location-tracking,** for matching the person performing platform work and the recipient of the service **and aiming at ensuring the minimum quality standard of the service**. **At the same time, the criteria should not cover situations where the persons performing platform work are genuine self-employed. ~~Genuine self-employed persons are themselves responsible vis-à-vis their customers for how they perform their work and the quality of their outputs~~. The freedom to, notably, choose working hours or periods of absence, to refuse tasks, to use subcontractors or substitutes or not to be limited in working for any third party is to be considered one of the characteristics of genuine self-employment. Restricting such freedom can take different forms, considering that the platform economy model is constantly evolving.** Nothing in this Directive should prevent Member States, as a matter of national law, to add further indicators to the list of indicators provided by this Directive. Those additional indicators**, such as a restriction of the possibility to build a client base or to perform work for any third party,** could be inspired by Union and national case-law as well as by the ILO Employment Relationship Recommendation 198 (2006).

Justification: Regarding the proposed changes to Article 5, French authorities propose to adjust the recital 32 accordingly.

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New Recital 33a:

(33a) When acting on their own initiative, if a competent national authority considers that a person performing platform work might be wrongly classified, it shall take appropriate action in line with the prerogatives conferred on it by national law or practice, such as applying the legal presumption, conducting targetted controls or inspections, requesting relevant information from the digital labour platform, the persons performing platform work or their representatives, or engaging in co-operation with all other relevant competent national authorities to assess the situation in more detail.

Justification: The provision of the first sentence of article 6 paragraph 2 is a major source of legal uncertainty as the « competent national authorities » mentionned in this sentence are not defined and there is no precision on the « appropriate action » which they must take, and which must aim to « ascertain the correct employment status of [the person performing platform work] ». It is necessary to clarify in the directive that this provision does not lead to an extension of the prerogatives of the concerned authorities. In particular, it should be made clear that as regards administrative authorities that do not have the power to reclassify a worker, such action cannot consist in applying the presumption. Neither should this provision confer the possibility of engaging a reclassification claim to entities that are not entitled by national law or practice to engage such claims. We therefore propose to clarify this point in a new recital expressly stating that the relevant action is to be understood in line with the prerogatives conferred on the national authority concerned and giving other examples of actions that can be undertaken. The French authorities emphasize the importance of this point for the compatibility of the mechanism of the legal presumption with its national system and therefore for its acceptability.

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Article 6.3(a) (Application of the presumption and rebuttal):

3. **[…]** Member States shall ensure**, in proceedings where the presumption applies,** the possibility for any of the parties to rebut the legal presumption. **[…]**

To this effect:

(a) **in administrative procedures,** the relevant administrative ~~or judicial~~ authority shall communicate the triggering of the legal presumption to the digital labour platform and to the person performing platform work and inform them about the possibility to rebut the legal presumption;

Recital 35:

(35) The relationship between a person performing platform work and a digital labour platform may not meet the requirements of an employment relationship in accordance with the definition laid down in the law, collective agreements or practice in force of the respective Member State with consideration to the case-law of the Court of Justice. Member States should ensure the possibility to rebut the legal presumption by proving, on the basis of the aforementioned definition, that the relationship in question is not an employment relationship. **In the context of judicial proceedings, adversarial debate guarantees the effectiveness of the possibility for any party to rebut the presumption. In order to give full effect to this possibility as regards administrative procedures, the relevant administrative authority should communicate the triggering of the legal presumption to the digital labour platform and to the person performing platform work and inform them about the possibility to rebut the legal presumption.** Digital labour platforms**, and notably the algorithms through which they manage their operations,** have a complete overview of all factual elements determining the **[…]** nature of the relationship**[…]**. Therefore, **[…]** where they argue that the contractual relationship in question is not an employment relationship**, it should be for the digital labour platform to prove so. This means that the relationship between a person performing platform work and a digital labour platform should be deemed an employment relationship when the absence of requirements of such employment relationship, as laid down in the law, collective agreements or practice in force of the respective Member State with consideration to the case-law of the Court of Justice, have not been sufficiently demonstrated by the digital labour platform during the rebuttal.**

In addition, when the person performing platform work who is the subject of the presumption seeks to rebut the legal presumption, the digital labour platform should be required to assist that person, notably by providing all relevant information held by the platform in respect of that person. A successful rebuttal of the presumption in judicial or administrative proceedings should not preclude the application of the presumption in subsequent judicial proceedings or appeals, in accordance with national procedural law.

Justification: Point a) of article 6 paragraph 3 compels both administrative and judicial authorities to communicate the triggering of the legal presumption to the digital labour platform and the person performing platform work and to inform them about the possibility to rebut the legal presumption. This provision is totally relevant for administrative procedures, as it is necessary in order to enable the platform and the person performing platform work to rebut the legal presumption, if one of these or both consider that there is in fact no employment relationship. However, it is not suited to judicial proceedings, in which adversarial debate already guarantees the effectiveness of the possibility for any party to rebut the presumption. In these proceedings, the obligation for the judicial authority to give such information is useless and implies an unnecessary administrative burden, the effect of which will be to extend the length of the proceedings. It should therefore be clarified both in article 6 paragraph 3 and in recital 35 that the obligation for the authority that is competent for reclassification to communicate the triggering of the legal presumption to the digital labour platform and the person performing platform work as well as to inform them about the possibility to rebut the legal presumption only applies to administrative

procedures. These amendments, limited in their scope, are however necessary in order to ensure the compatibility of the legal presumption mechanism with the diversity of legal systems and in particular with those in which only the judge may reclassify a worker. Its acceptability for the European parliament should be high, as the concerned provision mainly protects platforms. The French authorities emphasize the importance of this point for the compatibility of the mechanism of the legal presumption with its national system and therefore for its acceptability.

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Recital 36:

(36) Effective implementation of the legal presumption through a framework of supporting measures is essential to ensure legal certainty and transparency for all parties involved. Such measures should include disseminating comprehensive information to the public, developing guidance in the form of concrete and practical recommendations for digital labour platforms, persons performing platform work, social partners and for competent national authorities and providing effective controls and inspections, in line with national law and practice~~, including, as appropriate, by establishing targets for such controls and inspections~~.

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Recital 37:

(37) Member States' competent national authorities should avail themselves of the collaboration among themselves, including inter alia through exchange of information, as provided for under national law and practice, for the purpose of ensuring the correct determination of the employment status of persons performing platform work. **Member States should ensure that relevant competent national authorities are informed, as appropriate and in accordance with national law and practice, about final decisions in which the existence of an employment relationship is established.**

Justification: The provisions of this paragraph seem overly prescriptive to the French authorities, and imply an unnecessary administrative burden both for administrative authorities and for the courts. The appreciation of the scope of the effects of reclassification should remain a matter of competence of national authorities, each according to their prerogatives, and should not be adressed in the operative part of the directive. The French authorities therefore propose to delete this provision from the operative part of the directive and to transfer it to recital 37 (or 38).

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Recital 38:

(38) Those measures should support the correct determination of the existence of an employment relationship as defined by the law, collective agreements or practice in force in the Member State in question with consideration to the case-law of the Court of Justice, including, if appropriate, the confirmation of a classification as genuine self-employed. ~~To enable those authorities to carry out their tasks in enforcing the provisions of this Directive, while underlining the competence of Member States to decide on the staffing of national authorities, they need to be adequately staffed.~~ This requires adequate human resources for competent national authorities, having the required skills and access to appropriate training and to provide for the availability of technical expertise in the field of algorithmic management. ~~ILO Labour Inspection Convention 81 (1947) provides for indications on how to determine a sufficient number of labour inspectors for the effective discharge of their duties.~~ **The reclassification of a person performing platform work from self-employed to platform worker should be taken into account by competent national authorities, when deciding on inspections to be carried out.**

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Article 7.1(c) (Framework of supporting measures):

(c) provide for **monitoring of the platforms concerned or** effective controls and inspections conducted by national authorities, in ~~line~~ **accordance** with national law or practice**, and, where appropriate, ~~in particular~~ provide for timely controls and inspections on specific digital labour platforms where a misclassification of employment status has been confirmed,** while ensuring that such controls and inspections are proportionate and non-discriminatory.

Comments by HU

Written comments from the Hungarian delegation (ST 5133/24)

Thank you for the draft text prepared by the Belgian Presidency, which responds in a fundamentally positive and constructive way to the main objections of the Member States to the political agreement presented in December.

We welcome several text amendments, in particular

- the clarification in **Article 6 (1)** of the exception for social security, tax and criminal proceedings;
- the deletion of **Article 6 (4)** in the event of the legal presumption being rebutted or failing
- the deletion of **Article 7 (2)** on prescribing obligatory inspections of competent national authorities on platforms in case of a confirmed misclassification.

Comments on Article 5

- Regarding Article 5, we regret that once again less than half of the five criteria would be enough to be met to qualify an employment relationship. **We continue to support criteria 3/7 as it was in the general approach, but alternatively we consider to show flexibility towards the Belgian text if at least the majority of the qualifying criteria would be necessary to qualify platform workers as employees.**
- In relation to the indicators of the legal presumption, we also welcome the fact that **one criterion contains one condition**, i.e. that the **conditions in paragraph 1 (c) to (e) are not merged,** which was clearly rejected by the Council when it adopted the general approach and also in December.
- However, we **do not consider that the condition in Article 5(1)(b) (monitoring of activities) is sufficiently defined,** as it continues to apply equally to civil law relationships and to employment relationships in this form, i.e. it is **not suitable for distinguishing between the two in this formulation**. In line with our previous proposal, submitted in February 2022, we propose to reflect in the text that, in the case of a platform worker, the control of the employer/platform is carried out for the whole work process. In other words, in the case of the Directive, this means that the platform can control the performance of work in full and in detail.

Proposed text:
Article 5(1)(b): 'the digital labour ***platform exercises a continuous and detailed technical (professional)*** *supervision over the performance of work,'*

- Furthermore, we **are not convinced that in the case of public services** where there are strict and detailed legal requirements for the activity (e.g. taxi sector), these laws and regulations are not **as such to** be understood as **fulfilling one or more** indicators of control and direction for triggering the legal presumption under this Directive.
- What is still missing in the operative part of the proposal is a **clear exclusion of statutory requirements (e.g. official price, consumer protection requirements, etc.) from the application of criteria for qualifying a legal relationship.** Although recital (31) contains a reference to this, but does not do so in the operative part, as the second compromise text did in September 2022 [11593/22, 4(2a)]. In addition, the chapeau of Article 5 could be interpreted as meaning that provisions laid down in other legal sources beyond the conditions and practices unilaterally laid down by the platform cannot result the criteria being met.

- In addition, the **EP proposed to insert an exception for taxi companies in the Recital (27b)[1],** i.e. if they do not exercise any management and supervision beyond facilitating the matching of supply and demand, they would not be considered as a platform within the scope of the Directive.

  This EP proposal **was not accepted in the trilogue negotiations**, but was even **not discussed in the working group.**

In our view a **more precise and clearer provision with normative content would be necessary in order to** ensure a uniform interpretation and proper implementation of the Directive.
Therefore we are proposing to clarify the wording in Article 5 by stating that only the assessment of the contractual terms and conditions defined and applied by the platform company should be subject to the qualification of the relationship and to **mention in the operative part the exception rule as in recital 31.**

- Further comments:

- Recital 32 still contains an explanation in connection with the provisions of the political agreement rejected in December, which are no longer part of the text. Furthermore, it duplicates, for example, statements on the verifying of the results of work.
- With regard to Article 7 (1) (c), we are concerned about the overly prescriptive nature of the text which endanger the independence of national labour inspectorates and goes beyond the competence of Member States regulating the procedural aspects of labour inspections. Hungary therefore proposes *either the deletion* of the addition made in st. doc. 5133/24, or *complete it with the content inserted to Recital (38).*

[1] *27b) Taxi dispatch services, as regulated under national law and practice, can be distinguished from ride hailing digital labour platforms, when they are merely an 'add-on' to a pre-existing service and only connect genuinely self-employed licensed taxi drivers with their customers, sending the communications received from persons seeking a taxi service to licensed taxi drivers, provided that they do not exert any type of control or direction, in accordance with this Directive, over the licensed taxi drivers, namely that, inter alia, the service provider does not set and collect the fare for the journey and does not have control over the quality of the vehicles or over the drivers and their performance of the work. Self-employed taxi drivers are usually free to choose how to generate their turnover due to the rights typically received with their license, such as the right to access clients freely by means of street-hailing, dedicated public taxi stops or equivalent ways.*

Comments by IT

Italian comments and proposals on doc. n. 5133/24

Art. 5 – Legal presumption

(b) the digital labour platform supervises the performance of work **and requires the person performing platform work to comply with specific binding rules**.

Justification: In our view, we should better define the indicator, which seems now too broad (especially after the list and the threshold have been reduced), in order to further limit the possibility that genuine self-employed may be included in it, and this is a common goal as we understood. With this addition we mix, as PCY said, some elements we had before and that now are only in the recital. We are open to consider different wording.

Recital 32 should be changed accordingly.

e) the digital labour platform restricts the freedom to organise one's work, by **excluding** the discretion to use subcontractors or substitutes to perform the work […].

Justification: In Italy, the limitation of the discretion to use subcontractors or substitutes is also legally foreseen for self-employed persons in some circumstances. Therefore, to ensure that only employees are 'caught' in this indicator, we propose to use the verb 'exclude' instead of limit.

Finally, we believe it is more appropriate to delete point 2 of Article 5, in order to have a common and certain regulatory framework. We are regulating work on platforms that are by nature mobile and transnational, so there is a need for uniformity and harmonisation, especially in relation to the core of the proposal. Furthermore, we do not think it is a necessary provision since we have article 27 on non-regression and more favourable provisions.

Comments by LU

- **General comments:**

LU was able to support the provisional agreement reached by the previous Spanish Presidency with the EP on 13 December 2023 (doc 16187/23 ADD1). LU supports the approach of the Belgian Presidency to consider the text of the provisional agreement as basis for further negotiations. The revised text is still under scrutiny, in particular the new formulation of the criteria in article 5. Below are some preliminary written suggestions/comments. Changes compared to document 5133/24 ADD1 are marked in **bold**, deletions by a strikethrough.

- **Article 5§1 (chapeau)**:

The contractual relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship when any two of the following indicators of control and direction are found, by virtue of ***agreed or*** *unilaterally determined terms and conditions or in practice*:

Rationale:

LU cannot accept the deletion of "agreed" terms and conditions between the platforms and the persons exercising platform work from the scope of the application of the legal presumption. Some "agreed" terms and conditions govern contractual relationships between platforms and bogus self-employed. This deletion may lead to a serious risk of circumvention of the application of the legal presumption.

- **Recital 31:**

*… Conversely, digital labour platforms might need to enable measures to comply with legal obligations****, ~~including resulting from collective agreements with solo-self-employed~~****.*

Rationale:

This insertion in conjunction with the deletion of the term "agreed" in article 5§1 is counterproductive and may lead to the risk of circumventing certain important provisions of the directive. The platforms as eventual employers may have a certain control of the content of collective agreements in the process of negotiation. In addition, it is rather unorthodox to put these two different legal sources on an equal footing. An opinion of the Council Legal Service is welcome.

In Luxembourg by virtue of the hierarchy of norms, the law generally supersedes collective agreements. In addition, there is no collective bargaining agreement for the self-employed in numerous MS including Luxembourg.

We could, if need be, agree with such an insertion if it were limited, for example, to health and safety, as was already the case in one of the earlier proposals.