



Council of the European Union
General Secretariat

**Interinstitutional files:
2021/0414 (COD)**

Brussels, 22 January 2024

WK 587/2024 INIT

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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Delegations
N° Cion doc.:	ST 14450 2021 INIT
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work - MS Comments

Delegations will find attached the contributions received from the DK, EE, FR, HR, HU, IE, LV, NL, PL and SI in preparation of the Social Questions Working Party meeting of 16th January 2024.

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Comments by DK

General remarks

Given that there was not sufficient support for the compromise proposal in Council in December, we welcome the opportunity offered by the BE Presidency to provide written remarks and the possibility to see some improvements to the text.

The provisional agreement contains significant changes to the GA, including in provisions that are important for DK. In particular, we consider it important to gain clarity on the scope and consequences of these new provisions and in certain cases align the text with the GA.

According to article 4, Member States “*shall have appropriate and effective procedures in place to verify and ensure the correct determination of the employment status of persons performing platform work [...]*”. This is an important requirement in the directive, which DK fully support.

During the negotiations in Council, it has been important for several MS, that a new directive respects well-functioning national systems already in place. We find that some of the new text in the provisional agreement creates uncertainty of whether this is still the case. This is primarily due to a lack of clarity about which bodies the provisions apply to (what is meant by “*competent authorities*”?) and what the scope of the new provisions is.

In DK for instance, decisions on employment status are taken both by administrative authorities (e.g. the Danish Working Environment Authority) and in the industrial dispute resolution system, including the Labour Court, or by the national courts.

DK can support a text that gives a more active role for *administrative* authorities and a closer cooperation between these authorities, but it should be clear in the text that it does not assign new administrative tasks for national courts/the industrial dispute resolution system or requires Member States to establish special authorities to take care of these new tasks, as this would deviate significantly from our existing system.

Article 3

Regarding the introduction of mechanisms of joint and several liability, it is important for DK, that it is clear that Member States who do not have general rules of joint and several liability across subcontracting chains are not forced to introduce them.

Article 5

DK supports a presumption rule as close as possible to the Commission’s initial proposal. We find that the Commission’s proposal with (two out of) five criteria struck a better balance and covered the right persons by the presumption.

Most platforms determine the distribution of tasks and would thereby meet criteria (c) in the provisional agreement. This criterion should therefore be reconsidered/altered.

Article 6, 1

The legal presumption shall not be applicable to tax, criminal and social security proceedings, except where the authorities involved in such proceedings are competent to ascertain the correct employment status.

During negotiations it has been clear that the presumption shall not apply to procedures in tax, criminal and social security cases. However, the current wording creates uncertainty about whether this is still the case. We would therefore encourage the Presidency to keep the wording from GA, which was broadly supported. It should be clear that it is left for Member States to decide, whether the legal presumption should also be applicable to tax, criminal and social security proceedings, cf. GA.

Article 6, 2

Where national authorities and bodies, other than competent authorities responsible for ascertaining the correct employment status, consider that a person performing platform work might be wrongly classified, they shall communicate the information to competent authorities.

Cf. the general remarks, it should be clear, that this provision does not imply new information obligations for e.g. the Labor Court/national courts.

Persons performing platform work, as well as their representatives in accordance with Article 20(1), shall have access to proceedings, according to national law and practice, for ascertaining the correct employment status of the person performing platform work. In those proceedings, competent national authorities shall assist the claimants with a view to applying the presumption in accordance with Article 5.

The last sentence creates ambiguity and potentially breaks with the Member States' procedural rules if it implies that the authority (national courts/labour courts) must assist in conducting the case/burden of proof against the platform.

Article 7, 2

*When the digital labour platform has been determined to be an employer following an administrative or legal proceeding concerning reclassification of one or more workers, the competent authorities shall **[in accordance with national law and practice]** take appropriate action in order to apply the presumption to verify the correct determination of the employment status of the other persons performing platform work in the same digital labour platform.*

The platforms can have many platform workers working in various types of jobs, and we are concerned with the potential consequences of the provision, including the administrative consequences for the authorities.

Furthermore, the extent of the competent authority's obligation is unclear in situations where decisions on employment status are taken by national courts/labour courts. DK therefore does not support the provision. As an alternative, DK propose adding "in accordance with national law and practice".

Article 18 c

Member States shall ensure that digital labour platforms make the following information available to competent authorities, as well as to representatives of persons performing platform work:

(c) the average duration of activity, the average weekly number of hours worked per person and the average income from activity of persons performing platform work on a regular basis through the digital labour platform concerned;

DK find it unfortunate if companies are obliged to disclose business-sensitive information. In addition, according to the provision, the platform companies must make available information that goes beyond what other companies must make available. DK proposes that the provision is deleted. Alternatively, we would propose deleting "the average income from activity of persons performing platform work".

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 16187/23 ADD 1

11 January 2024

As a general comment we regret that the provisional agreement was a step too far away from the General Approach and many amendments exceeded the mandate and had not been discussed by the Council, particularly regarding the legal presumption. The agreement raises legal uncertainty on various aspects, causes additional unjustified administrative burden, includes different over-regulatory additions as well as raises questions about the added value of different additions.

Chapter I: General Provisions

Subject matter and scope, Art. 1 paragraph 1. The GA clearly indicated that the purpose of the directive is to improve working conditions of platform workers. The agreement is vague in this respect. It simply states that the purpose is to improve working conditions, without specifying whose working conditions, and thereby leaving the text open to different legal interpretations. The objective is not to establish working conditions for all persons platform work, because that would not be in line with TFEU art 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).

Subject matter and scope, Art. 1 paragraph 2. According to the agreement the directive lays down minimum rights, but according to GA it does not. The reference to minimum rights leads to legal unclarity in the text. There is no clear understanding what is meant under minimum rights. Despite art 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.

Definitions, Art. 2 paragraph 1. points 8 and 9. 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.

Intermediaries, Art. 3. The regulation of intermediaries has become more complicated and detailed. We are concerned about using the term including as well as joint and several liability. It raises questions whether the use of term including implies that a joint and several liability should always be considered. The second sentence of the article therefore, should be deleted.

Chapter II: Employment Status

Legal Presumption, Art. 5 paragraph 1. According to the GA, 3 out of 7 criteria had to be met, but according to the agreement the threshold is 2 out of 5 “indicators”.

EE's concern is that the criteria are very easy to fulfill and that the presumption essentially always applies has remained. Our goal has been to see a legal presumption with a threshold of at least majority of the criteria.

Furthermore, the fact that the presumption is triggered when certain "indicators" are found and not when concrete criteria is met, is also problematic and the risk of wrong-positive results is therefore even greater. Using term "indicator" implies that any of the points (a) to (e) could be fulfilled even if there is the slightest indication about it. Using criteria is legally sound and does not give rise to different interpretations.

The application of the presumption is made particularly easy to fulfill by the fact that “indicators” contain alternatives (e.g. the use of the word "or" in point d) and are much broader than in the GA (e.g points d and e).

Criterion C is completely new, never discussed before and is extremely easy to fulfill, considering the way digital labour platforms function. Tasks are distributed by the platform's algorithm, therefore the criterion is always fulfilled. Criterion D now refers to "managing elements", as well generally to “the working conditions” or “the performance of work”, which also broaden the criterion and make it easier to fulfill it.

In addition, it is important that complying with collective agreements and providing benefits to persons performing platform work would not be considered to meet the criteria. Adding also term “agreed” between the parties in the chapeau would go against that purpose. This would hinder work platforms from concluding collective agreements or improving the conditions of persons performing platform work. Therefore, this harms persons performing platform work.

Considering article 5 as a whole, in practice, the agreement establishes an absolute legal presumption, because it is highly unlikely that at least 2 of the "indicators" aren't always or almost always fulfilled and therefore the legal presumption triggered.

Legal Presumption, Art. 5 paragraph 2. It is legally unclear how the EU level legal presumption (threshold and criteria) is applied in practice at the national level, if there are additional indicators added from the national law.

Application of the presumption and rebuttal, Art. 6. The article on the application and rebuttal of legal presumption has become significantly more detailed and complicated, reducing legal clarity.

It remains unclear what is the purpose and added value of some of the additions, inter alia:

para 2 obligation for another body to notify the competent authority if there may be a false qualification, which creates additional unjustified administrative burden; para 2 the obligation for competent authorities to assist claimants, which may create the conflict of interests, as the same competent authority ascertaining the employment status cannot assist the claimant in applying the legal presumption.

The text also no longer explicitly states the discretion of the competent authority, that in case the competent authority finds that the application of the presumption leads to a wrong result, it may not apply it. Many of the additions seem over-regulatory and should be left to the MS discretion, inter alia: para 4, which intervenes into procedural autonomy and the regulation should be left to a MS; para 5, which intervenes into administrative organisation of a Member State. In addition its purpose and added value is unclear.

Framework of supporting measures, Art. 7 paragraph 2. We do not support such new addition. It strongly interferes with the autonomy of Member States. The directive should not regulate who, how and when must carry out supervision in such a detailed way. This should be left for the MS to decide and the directive should not interfere with the independence of labour inspectorates.

Chapter III: Algorithmic Management

Article 8 (1) (d) and (e). Processing of personal data, Art. 8 paragraph 1. Would like to point out that processing for these goals is prohibited under the GDPR as unpurposed and discriminatory processing. The text should provide for coherence with the GDPR.

Transparency, Art. 10 paragraph 1 (a). 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 worker of absolutely every type of automatic decisions that algorithms make, then it brings unreasonable administrative burden to platforms.

Human review, Art. 12 paragraph 1. Similarly to art 10 (1) (a) comment, it is unreasonable to obligate the platform to explain absolutely every automatic decision. In GA, only those decisions that "significantly affect" the person must be explained. Extend human review to all decisions. This obligation is disproportionate and too burdensome for platforms. Unclear what is the added value of requesting human review to for example task allocation decisions.

Safety and health, Art. 13 paragraph 5. We are not convinced about the necessity of the new obligation to ensure that platforms have a reporting channel in order to ensure the health and safety of platform workers. Considering the text as a whole (e.g the platform must share additional information about automated decision-making and monitoring systems, provide additional information about automatic decisions if necessary or review these decisions, evaluate the effects of automatic systems etc), we are hesitant of such additional obligation.

Chapter IV: Transparency on Platform Work

Access, Art. 18 paragraph 1 (c). According to the agreement, information about average hours worked and the average income must be given to the MS and representatives. We are doubtful about the added value of such additional obligation and it seems unreasonable to demand such information after every 6 months.

Comments by FR

FR comments on the provisional agreement rejected at Coreper of 22 December 2023 (document ST 16187/23 ADD1)

1) Preliminary remarks

Protecting persons performing platform work has always been and will continue to be a priority for France. A number of measures have been implemented in recent years to improve working conditions and social protection for both workers and solo self-employed in our country. In 2016, we launched an innovative and unique system based on social dialogue which, step by step, has improved the working conditions of VTC drivers and platform delivery couriers. Very recently, on 18 December 2023, three new agreements have been reached for VTC drivers concerning the increase in minimum income per journey, the introduction of minimum income guarantees per hour and per kilometre and the strengthening of drivers' freedom to choose their journeys. In total, 7 collective agreements have already been concluded for both VTC drivers and couriers.

France welcomes the efforts made by the Spanish Presidency during the negotiations with the European Parliament. However; the provisional agreement concluded on December the 12th was considerably far from the Council's position adopted in June 2023 and included provisions that had never been discussed before. Our ambition to improve the working conditions of persons performing platform work must not be achieved at the expense of genuine self-employed and their professional freedom and autonomy.

The provisional agreement has not been approved by the Council, therefore it should not be used as a basis to restart negotiations under the Belgian presidency. French authorities suggest to restart discussions on a working version as close as possible to the general approach adopted by the Council, under the Swedish Presidency, in June 2023.

France will continue to try to find a balanced approach that protects persons performing platform work and respects national models, especially with the importance of the social dialogue regulating working conditions of platform work.

France is committed to work with the Belgian presidency in this sense and wish Belgium a lot of success in achieving an interinstitutional agreement.

You will find below the analysis of the French authorities on the major items of the provisional agreement discussed at Coreper on the 22nd of December 2023.

2) Definition of digital labour platform

The text of the provisional agreement in its recital 20 takes up the idea that the relationship between the platform, the person performing platform work and the service recipient may not be triangular, when this is precisely what characterises a digital labour platform.

Also, **references to ‘microwork’ and ‘crowdwork’** raise questions about the inclusion of these activities within the scope of the directive, even though they are not currently recognized as work under national case law. Given the number of people involved and the technical and human resources required, it seems unconceivable to apply the proposed legal presumption to crowdwork and microwork platforms.

For these reasons, **these two points of the provisional agreement represent major difficulties for the applicability of the directive.**

3) Triggering of the legal presumption

French authorities consider that it is important to preserve the fact that persons performing platform work who want the presumption to be triggered must provide a minimum amount of evidence to allow the assessment of their individual situation.

In the provisional agreement, the terms and conditions taken into account in examining the criteria are based not only on what is imposed unilaterally by the platform but also on what has been agreed between the parties. This means that all contractual clauses would henceforth be liable to be examined to determine whether the indicators have actually been met, and does not provide any assurance that genuine self employed will not be affected by the legal presumption.

4) Content of the indicators

The criteria are now called indicators. According to the rapporteur, this would mean that workers would not have to provide any evidence, unlike what would be required for criteria.

The list of criteria was substantially amended during the last dialogue:

- The new wording of indicator a) now contains two separate elements relating to remuneration. Thus, any element of remuneration set by the platform would enable the indicator to be met (lower and upper limits or any other level of remuneration);
- Indicators b) and d) are based on supervision of the performance of work and determination or control of the performance of work. As the nuances between supervision and control are particularly difficult to draw, it seems difficult for criterion b) to be met without indicator d) also being met. Moreover, indicator b), because of its very broad nature (any platform ensuring in one way or another that the work performed by the worker is carried out), would be likely to be systematically met;
- Indicator c) is a new element, never discussed by the Council. It seems to us to be particularly problematic because the very existence of a digital work platform is based on the distribution and allocation of tasks via an algorithm. Whatever the type of platform and how it is organised, we therefore consider that this criterion will be systematically met;
- Finally, indicator e) now has a broader scope by incorporating two criteria from the Council's general approach.

Although the text allows Member States to add indicators, this in no way means that they have any leeway as to the threshold or content of the criteria set out in the directive. **This provision therefore does not provide any flexibility with regard to pre-existing national systems.**

On this basis, **the threshold of 2/5 for triggering the presumption does not seem to French authorities to constitute an element of security enabling genuine self-employed to remain self-employed. Indeed, in the light of this list, it would appear that all platforms, whatever their sector of activity or operating model, would be affected by the application of the legal presumption. The presumption would therefore apply automatically to all platforms.**

Finally, the new wording of recital 31 (formerly recital 24a) in which the reference to the platform's compliance with collective agreements provisions, which would not trigger the presumption, has been amended and only compliance with 'legal obligations' is referred to. **Therefore, French authorities are asking for the inclusion of this reference as agreed in the Council general approach.**

5) Procedural aspects

The principle of non-application of the legal presumption in tax, criminal and social security proceedings now include an exception - the consequence of which would be a greatly extended scope of application of the presumption.

In general, **the provisional agreement took over many of the overly prescriptive and detailed provisions of the European Parliament on the different steps of the triggering and application of the legal presumption, as well as its consequences.** As a result, the functioning of the legal presumption is not fully consistent on a technical level nor compatible with the diversity of national systems and in particular the French national system in which only the judiciary may reclassify a person as a worker. Such national models of reclassification should be taken into account in negotiations in order to insure the right implementation of the directive; an insufficient consideration of these systems would represent a clear red line for France.

The obligation for "competent national authorities" to take action in order to apply the presumption, in order to ascertain the correct employment status of a person performing platform work which might be wrongly classified, does not appear clear in its scope, in particular as the notion of "competent national authorities" is not defined in the text, thus opening an extremely wide margin of appreciation to the CJEU, a source of legal uncertainty. This obligation seems in any event incompatible with the French national system in which only the judiciary may reclassify a person as a worker. Indeed, according to the general principles of civil proceedings, the initiating of a reclassification proceeding is a prerogative of the person seeking its reclassification and the jurisdiction may not proceed ex officio. **France is therefore opposed to this provision.**

It is also planned to require the authorities who find that a person performing platform work may be incorrectly classified to inform the authorities responsible for reclassification, which would entail a considerable administrative burden, of no use in the national system in which the initiating of a reclassification proceeding is a prerogative of the person seeking its reclassification and the jurisdiction may not proceed ex officio. **France is therefore opposed to this provision.**

In addition, the competent authorities which are not responsible for ascertaining the correct employment status are under an obligation to assist complainants (who may be persons performing platform work as well as platforms). This exceeds the duty of the labour inspectorate to provide information, which does not include any duty to assist, especially in reclassification disputes. Furthermore, it is totally incompatible with the national legal system, which does not open the possibility to administrations to assist a party in court. **France is therefore opposed to this provision.**

Splitting the application of the presumption into two procedural phases, with the obligation for the authority applying the presumption to inform parties of the triggering of the presumption and of their possibility to rebut it is not compatible with civil legal proceedings, in which parties communicate to each other their arguments and evidence prior to the oral hearing and the judge issues a single ruling both on the applicability of the presumption and on its possible rebuttal. **France is therefore opposed to this provision.**

The provisional agreement also provided for an obligation to inform “competent national authorities” (though no definition of these authorities is provided for) about final decisions in which the existence of an employment relationship is established. This would imply an excessive administrative burden for the courts, whose function is not to deliver information to administrative authorities. **France is therefore opposed to this provision.**

6) Rebuttal of the presumption

In cases where the presumption is not rebutted or where the rebuttal is unsuccessful, it is provided that the person is to be reclassified as a worker on the basis of the national definition, collective agreements or practice in the Member States, taking into account the case law of the CJEU, and that the person is free of all control and direction. **This clarification would mean asserting a European definition of worker on the basis of Article 5, which is a clear red line for French authorities.**

There is also an obligation to inform the competent national authorities of final reclassification decisions, so that they can take all the decisions necessary to apply the effects arising from this decision: **the assessment of the effects of a reclassification is a matter for the national authorities and cannot be imposed automatically by a directive.**

7) Framework of supporting measures

The text provides for the obligation, in the event of a person performing platform work being reclassified as a worker, to monitor the relationship between the platform and the other persons performing platform work. It does not appear possible to consider that the platform applies the same conditions a priori to all the persons working through it, particularly in cases where a platform offers to bring together a variety of skills covering a variety of uses and uses of the platform. **This obligation also runs counter to the principle of the independence and autonomy of the labour inspectorate under ILO Convention 81. Moreover, the implementation of such a provision would require a large number of labour inspectorates to be dedicated only to the control of digital labour platforms to the detriment of other important sectors or areas.**

8) Intermediaries

The obligation to provide for systems of joint and several liability is not likely to address all situations, which must be examined on a case-by-case basis to ensure that liability is clearly established. The judge must also be able to mobilise other mechanisms, such as the offence of complicity in undeclared work, as distinct from a joint and several liability mechanism.

9) Data protection and algorithmic management

The provisional agreement adds a prohibition of the processing of personal data on the basis of consent in the case of platform work. This entails in our opinion a substantial change to what the GDPR provides for.

Types of decision-making mechanisms concerned by the provisions laid down in the provisional agreement have been modified from the texts discussed at the technical level to include those which have no major impact on persons performing platform work. We fear this would mean providing representatives with a massive amount of information, not necessarily useful to them, and that would be unnecessarily constraining for platforms.

Comments by HR

Chapter I: General provisions

a. Definitions, Art. 2 Digital work platform, Art. 2nd paragraph 1st point (1) We believe that the definition of a digital work platform could include crowd work, but only as a three-way relationship between a digital work platform, an intermediary in that relationship, or an aggregator, and a natural person who performs work using a digital work platform for the recipient of the service (client).

Representatives, Art. 2. paragraph 1. points 6 and 7. We can show flexibility that the definition of workers representatives also includes trade unions and that a definition of representatives of persons who perform work on the platform is introduced, provided that they are subject to regulation in national systems as such. b.

Intermediaries, Art. 3 We welcome the introduction of joint and several liability of the digital work platform for the obligations that their intermediary has towards the workers it employs. However, we do not support spreading such responsibility to several persons who appear in the role of intermediaries in such relationships (chain of subcontractors).

Chapter II:

Work status a. Legal presumption, Art. 5 Regarding the legal presumption, in relation to the text of the General Approach, we can agree to reduce the number of criteria from the previous 3 to 2 for the mandatory triggering of the legal presumption, and the introduction of the so-called open list of indicators, i.e. prescription of additional criteria. Regulation of the matter of the legal presumption for determining the employment relationship in the Croatian Labor Law largely coincides with the text of the Interim Agreement, with the note that this Law does not prescribe a certain number of criteria that are sufficient to trigger the legal presumption, but the competent court decides on it depending on the circumstances of each individual case. Although they would prefer to retain criteria instead of indicators for the purpose of greater legal certainty and preventing unnecessary administrative burden on bodies responsible for applying the legal presumption, we can be flexible in relation to the text in question. Namely, the fact that aggregators (intermediaries) operate on our market, who employ people who work through the platform on the basis of an employment contract, contributes to this attitude, and we emphasize that during the adoption of the Labor Law, this group of workers represented as much as 80% of the total number to people who work through platforms. Given that in the Republic of Croatia, people who work through platforms have the option of working as self-employed persons (mostly directly for the platform) or through an employment contract with the platform or aggregator (mostly with the aggregator), we estimate that there will not be a large number of lawsuits to determine the employment relationship or other labor legal disputes.

b. Application of presumption and rebuttal, art. 6 Deviation for social security, tax and criminal proceedings We stick to the text of the General Approach, and we believe that the presented proposals should be subject to regulation of the procedural rules of the member states. Integration of the provisions on initiation of the procedure, paragraph 2 We remain with the text of the General Approach.

Rebuttal, paragraph 3. We can show flexibility in relation to the presented proposal. Absence of rebuttal/unsuccessful rebuttal § 4 The proposed provision cannot be part of the Proposal for a Directive, but exclusively of national legislation. Information from competent national authorities on reclassification decisions, § 5 We believe that the above is subject to regulation of the procedural rules of the member states. Suspension effect, § 7 We remain with the text of the General Approach. d. Support measures, Art. 7 We cannot show flexibility, we remain with the text of the General Approach, considering that the mentioned proposal would represent too great an administrative burden for the bodies responsible for carrying out inspection supervision and affect the scope of their work. Also, the appropriate provisions of the text of the General Approach already provide for support measures, by conducting controls and inspections.

Chapter V: Remedies and Enforcement: a. Class action, Article 20. We remain with the text of the General Approach, whereby we emphasize that the possibility of bringing a collective action should be left to national law. Channel for reporting violence, Art. 21 We remain with the text of the General Approach, in the latter case the existing protection mechanisms in the national systems will be applied. Penalties, Art. 25 (3) We remain with the text of the General Approach, considering that the said proposal has no added value. 4. Chapter VI.: Final provision: More specific rules, Article 29. We can show flexibility regarding the proposed provision.

Finally, we emphasize that certain parts of the text encroach too much on the competence of the member states and that the same could lead to the re-normation of the text of the Proposal for a directive.

Comments by HU

Proposal for a directive improving the working conditions of platform workers Comments regarding the Provisional agreement by the Hungarian delegation

Hungary expresses its sincere gratitude for the commendable efforts of the Spanish Presidency, and its appreciation for the notable work accomplished during their tenure. In addition, we would like to welcome the Belgian Presidency and look forward to working closely and constructively, building upon some positive developments of the text achieved by the Spanish Presidency.

We would like to ask the Presidency to maintain the achievement of the Council's general approach as much as possible and represent the mandate given by the Council. Regrettably, the provisional agreement presented on last Coreper deviates significantly from the established framework we had collectively endorsed. The text being proposed in December 2023 for political agreement raised substantial concerns about the alignment of our objectives and expectations. It is crucial for us to ensure that our collaboration adheres to the originally agreed-upon principles, and addressing these discrepancies promptly will be instrumental in achieving that objective.

We would like to formally articulate our apprehensions regarding the following matter. The numbering of articles is based on document **16187/23 ADD 1**.

Article 4 (1), first subparagraph

In case that employees do not need to provide evidence to support their status as employees, the legal presumption will ipso iure applied. The criteria must be examined not only in the light of the general contractual terms and conditions but also in the light of the contractual terms and conditions agreed by the parties. **In our view, this rule does not provide a guarantee that the legal presumption does not apply to genuine self-employed workers.**

Article 5 (1) (a) and (c)

The list of criteria was significantly modified during the trilogue negotiations. **Some conditions have become more complex**, so that a single element within a given point is sufficient to give rise to a presumption. In our view, the list also includes an indicator that was not discussed by the Council.

In our view, **point (a)**, by virtue of its extension, **may constitute an automatic triggering of the legal presumption** because it effectively sets out two separate conditions within one point. We would like to **return here to the general approach**.

The basic concept of digital work platforms is the distribution and allocation of tasks through algorithms. Thus, regardless of the type of platform and the way it is organised, **we believe that the qualifying criterion in (c) will be systematically met.**

The 2/5 threshold does not guarantee that genuine self-employment can be maintained in the future for platform work. This objective is in line with the original position of the European Parliament. Under the EP's proposal, workers on digital platforms covered by the Directive would automatically be considered as employees. **This approach raises proportionality concerns about the consequences for genuine self-employed workers.**

Article 6

The principle of non-application of the legal presumption in tax, criminal and social security proceedings now includes an exception - the scope of the presumption would be significantly

extended (qualification of the legal relationship is also mandatory in these proceedings, if the authority's powers under national law extend to it).

It is envisaged that authorities that find that a platform worker may have been incorrectly classified would have to inform the co-authorities responsible for the classification of the relationship, which would **create a significant administrative burden**.

Similarly, the competent authorities would be obliged to provide assistance to complainants (who may be platform workers or platforms), which goes beyond the duty and competence of the labour inspectorate to provide information (and also beyond the competence of the Member States) (Article 6(3) (c)).

In the absence of rebuttal of the presumption, or in the case of unsuccessful counter-proof, the platform worker must be reclassified as an employee. This amendment would mean raising the definition of worker to EU level under Article 5, which is a red-line for the Council.

Comments by IE

Proposal for a Directive on improving working conditions in platform work

Following request by BE Presidency for MS written comments on the proposal for a Directive on improving working conditions in platform work after the rejection of the provisional agreement (DOC 16187/23 ADD1) at Coreper on 22 December 2023, please find Ireland comments below.

Ireland supports the ambition behind this proposal, including the objective that Member States have in place mechanisms for the determination of a persons' employment status in platform workplaces.

It is worth recalling that the negotiations at Working Party level took 18 months, and the subsequent Council General Approach agreed was a delicate compromise. This meant that the mandate for Trilogues was quite restricted. It should also be borne in mind that the result of any agreed text by the co-legislators will be a piece of legislation that will bind all Member States. Accordingly, the resultant legislation must be deliverable and proportionate to its objectives.

Ireland wants a directive that adds something to our labour protections but in a fair and proportionate way. This means that we also want to ensure that persons who want to be self-employed may exercise that right.

Ultimately for Ireland, legal clarity and fair procedures are key objectives to be achieved with any compromise text, including for it to be left for Member States national law and practices to determine where the employment/workplace related obligations lie.

It is important that the legal presumption will only have legal affect once proceedings determining the question of employment status have concluded. It is also important that the scope of the proposal does not extend to tax and social welfare matters, not least because these are matters of Member State competence.

While Ireland could accept a low threshold, the notion of "indicators" has significantly broader scope than "criteria" as used in the Council General Approach, where "indicators" undermines the reality that Platforms legitimately facilitate the work of the genuinely self-employed person.

With regard to the December 2023 provisional agreement requiring 2 of 5 indicators to be met for a legal presumption to arise, a simple analysis of the text suggests that 2 of the indicators would be systematically met by any person engaged in platform work. Accordingly, any person engaged in Platform Work would be presumed to be in a contract of employment, which amounts to an extensive administrative burden on the State, and an unfair system difficult to operate in practice. That provisional agreement also appeared to interfere with the independence of labour inspectorates, as the national competent body in this area, and accordingly, not acceptable to Ireland. Any criteria used must be meaningful and serve a purpose in ultimately assisting with the correct determination of employment status of workers, where this is in doubt. Ireland can support the 2 out of 5 criteria suggested in the original Commission proposal.

Furthermore, and a red-line issue for Ireland, is that any reclassification of workers who are free from any control and direction, could create of a 'third category' of a worker. How do employment rights apply in such circumstances? Ireland cannot support a possible third category of worker, a hybrid for the purposes of this sector that arguably the provisional agreement text gave rise to.

During the negotiations on this file, Ireland has consistently called for legal clarity and certainty with regards the reality that there are genuinely self-employed persons engaged in Platform Work. The provisional agreement, which did not have support at Coreper on 22 December 2023, assumed that all persons engaged in platform work are de facto employees, based on two of the ‘indicators; or ‘hints’ alone; *‘Supervising performance of work including through electronic means, or ‘controlling or distributing the allocation of tasks’*, are inherent in the functioning of all platforms. This is not acceptable.

Any agreement between the co-legislators must be proportionate to the objectives that the proposal is designed to address. Ireland has mechanisms in place for the determination of an employment status. While an examination in Ireland can be triggered on a low ‘statable case’ criteria, the suggestion that such an examination should be carried out without any evidential basis is a step too far, and not something Ireland could support.

While Ireland recognises the importance of this file, it does not believe that it is appropriate for a Directive to interfere with the independence of our national labour inspectorate. Labour inspectors enforce compliance with national laws. This Directive must be workable across the Member States. While its purpose is to ensure improved working conditions for persons engaging in work through platforms, it should deliver a regulatory framework that is balanced and legally certain for both the persons engaged via platforms as well as the platforms themselves.

Accordingly, Ireland believes that this file should be returned to Trilouges under the Belgian Presidency. Ireland will continue to work constructively to find an agreeable outcome that is in the best interests of all, and for a mechanism that is legally clear and sound on determining the question of employment status of platform workers.

Comments by LV

Latvia's written comments on the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work (DOC 16187/23 ADD1)

The solution proposed in the DOC 16187/23 ADD1 (2 out of 5 indicators of legal presumption), compared to the Council's general approach, in our opinion, is more complicated as it simultaneously foresees many new elements and does not provide sufficient legal certainty for the later implementation in practice. This solution also imposes a more significant administrative burden on the competent state authorities and may require additional financial resources to implement all the measures contained in these amendments.

The text provides for several additional tasks for the competent authorities. For example, **Article 6, Paragraph 2** provides for the competent state authorities to assist claimants in applying the legal presumption. Also, the competent authorities are required to perform appropriate actions to apply the legal presumption to verify the correct employment status of other persons working on the digital labour platform if at least one wrongly classified person is found working for this platform (**Article 7, Paragraph 2**).

Likewise, **LV still believes that the majority of the defined indicators would be of significant importance in applying the presumption.** The existence of only two indicators can limit the existence of genuine self-employment.

Considering the above, the complexity of the proposed legal presumption indicators and their application and rebuttal system, including in connection with the conditions of the applicable provisions of algorithmic management and declaration of platform work, as well as additional duties of the competent state authorities, resulting from the application of the above-mentioned conditions of the proposed directive, we consider that the 2-year transposition period is insufficient (at least three years would be necessary).

The most crucial issue for LV is **Article 5** on the application of legal presumption and the threshold of indicators. We believe that the amendments proposed in the DOC 16187/23 ADD1, particularly, the proposed amendments - 2 out of 5 indicators for the application of legal presumption with their proposed wording, are still not proportionate and fair in relation to all involved parties.

Additionally, the meaning of the exception included in the second part of **Article 6, Paragraph 1**, which stipulates that the presumption shall not be applicable to tax, social security and criminal proceedings, except where the authorities involved in such proceedings are competent to ascertain the correct employment status, and its potential application is unclear in general. As a result of such an exception, the presumption could be used always and the mentioned regulation would have no meaning.

Finally, the proposed **Article 25, Paragraph 4** stipulates that the penalties shall be proportionate to the nature, gravity and duration of the infringement and the number of affected workers. LV considers that the number of affected workers could be used as one of the criteria to be evaluated, but we do not support an approach that directly links the penalty amount to the number of workers affected as a result of the infringement.

Comments by NL

9 January 2024 - All comments refer to the Provisional Agreement (16187/23 ADD 1)

The Netherlands is of the opinion that the upcoming negotiations to finalise the Directive should be based on the text of the Provisional Agreement.

The Netherlands is supportive of the Provisional Agreement except for the provisions indicated below, which are listed in order of importance.

- **Art 7, para 2**
 - Delete entire paragraph as it interferes with national competences.
- **Art 6, para 4**
 - Delete entire paragraph as it interferes with national competences.
- **Art 6, para 5**
 - Delete entire paragraph as it interferes with national competences.
- **Art 6, para 2**
 - Delete “Where national authorities...with Article 5.” as it interferes with national competences.
- **Art 5, para 1**
 - For legal clarity, we suggest reverting to the criteria/indicators from the General Approach but to merge d, da and db into one indicator as it was in the COM proposal.
- **Art 25, para 3**
 - Change text to improve legal clarity and avoid unnecessary burdens: “Where persons performing platform work perform platform work in a Member State different from that in which the digital labour platform is established, the competent authorities of those Member States shall exchange information [...] **when it is necessary for** enforcing this Directive.”
- **Recital 36**
 - Delete “,including, as appropriate, by establishing targets for such controls and inspections” as it interferes with national competences and undermines the independence of inspectorates.
- **Recital 37**
 - Delete or improve entire recital as it is unclear.

Comments by PL

Written comments from the Polish delegation on document 16187/23 ADD 1

Poland has supported the draft directive and its main objectives. Poland is committed to protecting the rights of workers and minimizing abuses; at the same time strives for solutions that do not overburden national authorities and digital labour platform.

We had some doubts as regards understanding of some provisions of the preliminary agreement, which has been clarified in bilateral contacts with the Presidency and the Council Legal Service, and some with the European Commission, before the COREPER in 22 December 2023. This allowed us to support the project. We expect that the understanding below can be confirmed and that future arrangement will follow this direction and take these findings into account:

1. A number of issues have been left to the discretion of the Member States, so as not to infringe national systems and the autonomy of national authorities, in particular:
 - 1.1 the possibility of rebutting the presumption in one single procedure - The rebuttal of the presumption can – and actually should – occur in the same judicial or administrative procedure as the application of the presumption. Nothing in the provisional agreement suggests that it would be otherwise. The presumption does not have to be applied through a definitive decision, and that will be a matter of national law. The final decision to reclassify will be taken in the same proceeding or another one depending on the Member State.
 - 1.2 the effect of a final decision on a reclassification on other (competent) authorities - The wording of Article 6(5) *“in order to apply all the effects deriving from the reclassification decision.”* does not affect national law. It may mean direct effects, like the possibility for the worker to enjoy labour rights (dismissal protection, working time, safety at work, etc.). However, it is also possible that other consequences will require initiating additional proceedings before different authorities. The consequence will depend on national law. The (final) reclassification decision of the one authority will be binding to another (competent) authority only when that is already provided for in the national law. Thus, the autonomy of other branches of the judiciary or other administrative bodies is completely preserved, as they are only obliged to act according to the existing national law. If they have a discretion to decide whether to act or not, they will still be able to decide freely.
 - 1.3 the possibility to provide the platform work on a basis other than employment relationship or self-employment - In this context, the Directive respects national systems.
2. Sales representatives (commercial agents) are excluded from the Directive – A key element of the definition of digital labour platforms is the organisation of the work and this element is not present in the case of sales representatives.
3. We have already received some explanation concerning **indicators**. Inter alia that indicators have to be precise to be taken into account. This means that only circumstances that can clearly be presented (as determining or managing elements of working conditions or the performance of work) will be considered. If not, the competent authority can simply deem that said circumstances are not an indicator of control and direction, because their discretion to do so is clearly guaranteed in Article 6(2).

As regards **Article 5(1)(c)** we have already received explanation that making a task available only to a certain region would fall under indicator c). Therefore, we would like to ask for further clarification how broad this indicator is to be understood. Whether the functionality in the application that allows a person performing platform work to choose that tasks that will be presented to her/him are limited (e.g. only orders from a particular region, not all the orders for entire world or a country, or only request for specific translations like related to space law in a given language) is also to be considered as fulfilling the indicator c)?

During the in-depth analysis of the preliminary agreement, some additional doubts arose. The clarification in that respect might be addressed in future negotiations, which would be helpful for the future implementation of the Directive:

In **Article 2(1)(5)** how to understand “*platform work available to or through a digital labour platform*” in the definition of intermediary? How it relates to the definition of „platform work“ (platform work means any work organised **through** a digital labour platform)? Could you give us some practical examples when platform work is „available to a digital labour platform“ ?

In **Article 2(2)** and in recital 21 – could you please clarify what does it mean *individuals who are not professionals*. Does it refer to those who are not professional sellers or to those who are not producers of the good being resold ? Please provide examples. Does a person who works for a cosmetics company as a salesperson and organises sales meetings at home fall under this provision if the meetings are arranged through a platform ?

In **Article 6(2)** an obligation of the competent authorities to **assist** complainants is unclear. Could you please provide for examples ? Does this mean that the authority has to some extent replace the attorney?

Bearing in mind wording in **Article 12(1)** “the obligation to provide the person performing platform work with a written statement of the reasons for (...) **any other decision affecting the essential aspects of the employment or other contractual relationships**” , could you explain what aspects of the contractual relationship can be considered non-essential? This seems to be open to a broad interpretation. Furthermore a person's view of what is essential and what is not may differ from the platform's view. Does it mean that in fact every decision must be justified in writing? A clarification would be helpful.

Article 18(1)(c) states the obligation to make available to competent authorities, as well as to representatives of persons performing platform work, (and update at least every six months), the information on “the average duration of activity, the average weekly number of hours worked per person and the average income from activity of persons performing platform work on a regular basis through the digital labour platform concerned” – bearing in mind that for some persons platform works, even if regular, is only a marginal or part-time work, “the average” does not give a clear picture of actual engagement. Do the competent authorities not always have always the possibility, if necessary, to request the above-mentioned data concerning the controlled group of persons?

Comments by SI

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

(doc. ST 16187/23 ADD1)

Slovenia supported the provisional agreement in Coreper meeting of 22 December as a package.

Slovenia remains supportive; however, we would like the Presidency to consider the following comments while preparing for the negotiations with the EP:

Article 5, para 1: SI prefers the content of the indicators (criteria) as suggested by the Commission in its original proposal.

Article 6, para 1: SI prefers deletion of the last two sentences of the paragraph as they interfere with national competences.

Article 6, para 3a: SI disagrees with imposing additional administrative burden to competent national authorities and suggests a deletion of the relevant part.

Article 6, para 4: SI suggests deletion of the paragraph as it creates a logical inconsistency.

Article 7, paragraph 2: SI is not in favour of this paragraph and suggests its deletion.
