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WORKING DOCUMENT

From:	Presidency
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 - Progress report

Delegations can find attached the English courtesy translation of the document 9227/22.

I. INTRODUCTION

1. On 9 December 2021, the Commission adopted a proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work. This directive aims to enable the correct determination of employment status, promote transparency, fairness and accountability in algorithmic management in platform work and ensure transparency, traceability and knowledge of developments in platform work and improve compliance with the rules applicable to all persons performing platform work.

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

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

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

Denmark and the Netherlands maintain parliamentary scrutiny reservations.

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

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

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

II. WORK CARRIED OUT BY THE COUNCIL UNDER THE FRENCH PRESIDENCY

The Social Questions Working Party started discussing the proposal under the Slovenian Presidency on 13 December 2021, a few days after its publication. On that occasion, the Commission presented the proposal for a directive and delegations were given the opportunity to make preliminary general comments.

A questionnaire on the impact assessment was sent to delegations on 22 December 2021 by the French Presidency. 25 Member States responded. The impact assessment was discussed in depth at an informal video conference of the members of the Social Questions Group on 8 February 2022. The Chair's summary of this assessment is attached as Annex 1 to this report.

The first reading of the text at the meetings of 17 January, 3 March and 4 April gave rise to many questions aimed at better understanding the text and how to interpret it, in particular concerning Articles 4 and 5. The Commission provided clarification specifically on the legal presumption and its rebuttal at the meeting on 5 April.

In the light of the explanations provided by the Commission and the requests for clarification expressed by the delegations, the Presidency presented a note on 12 April 2022 in the form of a questionnaire designed to gather the guidelines desired by the delegations with a view to drafting an initial compromise text relating to Chapters I and II, with the main objective of clarifying the text. This stage appeared to be essential in order to allow both a shared understanding of the text and for delegations to be able to position themselves on the most complex points.

The meetings of the Social Questions Working Party on 28 April and 10 May were devoted to delegations' replies, which enabled the Presidency to publish a compromise text on 19 May 2022, covering Chapters I and II and their recitals, which was examined by the group on 24 May.

III. MAIN ISSUES DISCUSSED AT GROUP LEVEL

Scope and purpose

In view of the wish expressed by a large number of delegations that the text should better reflect the legal basis on which it is based, Article 1 has been restructured so as to present the scope in relation to its dual legal basis.

The Presidency has also sought to highlight more clearly its objectives and the means to achieve them in the second paragraph of Article 1. These elements follow, in particular, numerous requests for clarification concerning the application of the text to workers on the one hand (on the basis of Article 153(1)(b)) and to self-employed persons on the other (on the basis of Article 16 TFEU).

In addition, the same effort to clarify the legal basis has been made in the recitals.

Definitions

As the concept of "commercial service" has been the subject of much debate, in particular because of its lack of definition in EU law, it has been proposed to revert to the concept of "service". Article 2, as well as Recital 18, also specifies the type of platforms excluded from the scope ("resell goods or services, or those who provide a service that is of a non profit making nature"), following requests to this effect by certain Member States.

Legal presumption

In the absence of a clear and strong position of a majority of delegations on the criteria, their number, nature and threshold have not been substantially modified.

The Presidency nevertheless proposed to the delegations to introduce an additional concept to refer to the subordination link which would lead to wage-earning by insisting not only on the "control of the performance of work" as in the case of the Commission's proposal, but more broadly on the "restriction of freedom, including through sanctions, to organise one's work and control its execution". The notion of restriction of freedom has been extracted from criterion (d) and introduced in the chapeau in order to be applied more generally to all criteria and to better cover certain criteria, in particular (a).

Furthermore, the word "effectively" in some criteria has been replaced by "de facto" and introduced in the chapeau of paragraph 2, in order to emphasise more generally the principle of the primacy of facts.

Finally, in paragraph 3, the new wording aims to make more explicit the margin of manoeuvre left to the Member States to apply the legal presumption outside administrative or legal proceedings questioning the quality of the employment relationship and in cases where the contractual relationship is clearly not one of employment according to national legislation or practice.

Rebuttal of the presumption

The amendments to this Article have sought to take account of the explanations provided by the Commission and to share a common understanding with all delegations. On the substance, the changes made have made it possible to bring out more substantial requests for amendments relating to the competence of the Member States, as regards the absence of suspensive effect.

The issue of the burden of proof and the role of platforms have also been further elaborated in Recital 28.

Algorithmic management, transparency of platform work, remedies and enforcement

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

- delegations asked, in particular, for clarification on the articulation with other European texts, in particular the Platform-to-business Regulation, the General Data Protection Regulation (GDPR) and the Artificial Intelligence Act and on the application of the provisions of this chapter to persons performing platform work, depending on their status;
- delegations commented on the scope and purpose of Article 11 on the declaration of platform work. They also asked for further clarification as regards the periodicity and modalities for making certain information available (Article 12);
- delegations questioned the Commission on the application of certain articles to self-employed persons (Articles 10, 13 and 18 in particular).

III. CONCLUSION

Tangible progress has been made with regard to the technical examination of the proposal and the mutual understanding of the operational consequences of the Directive. The first reading of the whole text has been completed. The French Presidency devoted the necessary time to the examination of the articles, giving delegations the opportunity to put their questions, including in writing, before the meetings of the Social Questions Group. On the basis of the explanations provided by the Commission and the comments made by the Member States, the French Presidency was able to draw up a first compromise text with the main objective of clarifying the text technically, focusing exclusively on Chapters I and II and the related recitals, which was welcomed by the delegations as a good first basis for negotiations. Further technical work and discussions are indeed necessary before starting deliberations on a general approach.

Draft summary of the evaluation of the Impact Assessment

All the delegations considered **the policy context** to be clearly explained in the IA.

The **Union's competence and the legal basis** were considered by most delegations to be at least partly clearly established although a limited number of delegations raised the question as to whether the legal basis of the initiative enables the establishment of a presumption of employment. Furthermore, many delegations asked for more information on the selection of the criteria underpinning the legal presumption of employment and the regulations for the solo self-employed. Some delegations pointed out that the rebuttable presumption of employment might affect social security and taxation policies which might require broadening the legal basis.

Most delegations were satisfied with the IA analysis on **compliance with the principle of subsidiarity and proportionality**. Regarding the principle of proportionality, one delegation questioned whether the imposition onto the affairs of self-employed was proportionate. Few delegations requested further elaborations on the proportionality of the legal presumption.

Delegations generally were of the opinion that the **problem definition** was clearly shown. However, while recognising the challenges related to platform work, some delegations asked why platform workers needed particular legislation when the same challenges were found in other areas. Some regretted that there was no integrated gender equality perspective. A number of delegations **pointed to the fact** that the directive **focused** mainly on **misclassified** workers.

A large majority of delegations found that the **analysis of the problem was supported by evidence**. Yet, one delegation meant that views of different categories of stakeholders were not sufficiently reflected in the impact assessment.

As regards the **acknowledgment of possible gaps in evidence**, delegations were divided. Some thought that due to the difficulty in accessing and collecting data it was difficult to make an estimation of who will be affected by the initiative and to what extent.

A broad majority of delegations recognised that the **methodology, the limitations and uncertainties** were made clear, but regretted that the analysis was based on estimates.

All Member State considered that the **policy objectives, including general aims and more specific/operational objectives**, were clearly set out. The policy objectives were also largely thought to correspond to the identified problem. All delegations agreed that **the policy objectives** were **consistent with the broad EU policy strategies and the Strategic Agenda**. Delegations generally considered that the **impact assessment took into account action already taken or planned at EU or MS level**. Delegations broadly agreed that the IA has identified many feasible **policy options** and most affected **stakeholders**. The delegations were fully or partly satisfied with information regarding how stakeholders' inputs fed into the policy options.

A broad majority of Member States found that the **criteria used to determine the impact of the different policy options** were **transparent** and that the impact of the different choices were set out in a way making it easy to compare them.

Most delegations found that **both the short and long-term costs and benefits of the different policy options had been taken into consideration**. Yet, some of the delegations would have liked to see information about the impact on consumers; how the increased income from tax and social security contributions had been calculated; consequences on social security expenses for the Member States if a number of platform workers are reclassified as employees; impact of the rebuttable presumption. Besides, quite a few delegations **noticed** that the directive can have negative effects on the income of the self-employed as well as on the number of working hours of the reclassified workers.

A majority of delegations found that the **impacts on affected public and stakeholders were clearly analysed, for each policy option**. However, some delegations noted that the administrative costs for the Member States in the case of a rebuttal of the presumption and the impact on the business environment, in particular the information obligation on employers in Article 11 were not sufficiently addressed. Some delegations enquired how case law and administrative law would be affected when people performing platform work as independent workers would be classified as employees and in the case of a rebuttal of this legal presumption. Another request concerned the need for a more exhaustive evaluation of the impact of the legal presumption in the Member States where such presumption had been introduced in the field of platform work. A few delegations meant that possible impacts on the autonomy of the social partners and for different national labour market models needed to be further addressed.

A majority of delegations appreciated that the impact had been sufficiently assessed, both in qualitative and quantified terms and most of them considered **that the data and evidence used were appropriate**.

A large majority of delegations found that most of the **economic aspects of the proposal** had been fully assessed and were based on evidence. Some delegations would however have welcomed information on the impacts on consumers following a possible increase of the prices of platform work services. For some delegations, a detailed description of what impact the implementation of the Directive would have on SMEs was missing. As for **futureproofing** of the proposal, a few delegations would have welcomed more information on algorithmic management practices, the relationship between this proposal, the GDPR and the AI Act as well as the impact on innovation.

Regarding the social aspects, most delegations found that they had been assessed. Nevertheless, some delegations would have welcomed a gender dimension of the expected effects of the platform work Directive. Most delegations also found that environmental aspects and territorial impacts were sufficiently assessed.

All Member States considered that the IA set out, at least partially, the **responsible for monitoring (and compliance)**.

As for the **monitoring**, most delegations thought that the indicators were only partly able to measure the intended effects. Some delegations pointed out that some indicators were based on data that were very complex, which made it hard to estimate the impact. Another perceived problem was the lack of baseline data and the difficulty to implement indicators as well as the difficulty to detect indicators. Many delegations were sceptical as to whether the indicators would make it possible to measure the intended effects. Furthermore, delegations suggested other indicators that could be used, such as indicators assessing the number of people losing the opportunity to platform work, change in number of platform workers, percentage of platform workers satisfied with their working status, percentage of platform workers satisfied with information on algorithmic management.

The **comments and recommendations of the Regulatory Scrutiny Board (RSB)** were thought to have been considered.

Some delegations indicated that their position was only preliminary.
