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NOTE

From: Presidency
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Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL on improving working conditions in platform work
- *General approach*

Delegations will find in Annex a Presidency compromise text for discussion by the Council (ESPCO) at its meeting of 8 December 2022. This text is to be read as amending the last presidency compromise text contained in document 15338/22 REV1.

PRESIDENCY ROOM DOCUMENT

Proposal for a Directive on Improving Working Conditions in Platform Work

Art. 4

1. The [...] relationship between a digital labour platform [...] and a person performing platform work through that platform shall be legally presumed to be an employment relationship [...], if at least three of the criteria below are ***de facto*** fulfilled, **when the digital labour platform exerts, in its terms and conditions or in practice, its control and direction by:**
 - (a) ~~The digital labour platform~~ [...] determining **upper limits for the level [...]** of remuneration [...];
 - (b) ~~The digital labour platform~~ requiring the person performing platform work to respect specific [...] rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
 - (c) ~~The digital labour platform~~ [...] supervising the performance of work [...] including by electronic means;
 - (d) ~~The digital labour platform~~ [...] restricting the freedom, including through sanctions, to organise one's work by limiting the discretion to choose one's working hours or periods of absence [...];

- (da) ~~The digital labour platform~~ restricting the freedom, including through sanctions, to organise one's work by limiting the discretion to accept or to refuse tasks;
- (db) ~~The digital labour platform~~ restricting the freedom, including through sanctions, to organise one's work by limiting the discretion to use subcontractors or substitutes;
- (e) ~~The digital labour platform~~ [...] restricting the possibility to build a client base or to perform work for any third party.

~~2a. When a digital labour platform fulfils any of the criteria referred to in paragraph 1 solely as a result of its compliance with a legal obligation under Union law, national law or collective agreements, that criterion shall not be deemed fulfilled for the purpose of this Article.~~

(+ recital 25b adjustment)

Article 4a para 1

The legal presumption shall apply in all relevant administrative or judicial proceedings where the correct determination of the employment status of the person performing platform work is at stake.

Competent national authorities and persons performing platform work shall be able to initiate proceedings to trigger the legal presumption.

~~The legal presumption shall not apply to tax, criminal and social security proceedings.~~

~~However, Member States may apply the legal presumption in those proceedings as a matter of national law.~~

Member States may decide that the legal presumption shall not apply in tax, criminal and social security proceedings.

(+ recital 25a adjustment)

Article 4a para 2

When verifying compliance with or enforcing relevant legislation on their own initiative, competent national administrative authorities shall enjoy a discretion not to apply the presumption, when it is manifest, **in view of previous judicial and administrative decisions**, that it would be successfully rebutted in accordance with paragraph 3.

Article 18

1. Member States shall take the necessary measures to prohibit the dismissal, **termination** or its equivalent and all preparations for dismissal, **termination of contract** or **their** equivalent of persons performing platform work, on the grounds that they have exercised the rights provided for in this Directive.
2. Persons performing platform work who consider that they have been dismissed, **their contract has been terminated** or have been subject to measures with equivalent effect, on the grounds that they have exercised the rights provided for in this Directive, may request the digital labour platform to provide duly substantiated grounds for the dismissal, **termination of contract** or **[...]** equivalent measures. The digital labour platform shall provide those grounds in writing without undue delay.
3. Member States shall take the necessary measures to ensure that, when persons performing platform work referred to in paragraph 2 establish, before a court or other competent authority or body, facts from which it may be presumed that there has been such a dismissal, **termination of contract** or equivalent measures, it shall be for the digital labour platform to prove that the dismissal, **termination of contract** or equivalent measures were based on grounds other than those referred to in paragraph 1.
4. **[...]**

(+recital 48a adjustment)

Recitals

- (25) Criteria indicating that a digital labour platform controls the execution 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 criteria should be inspired by Union and national case law. The criteria should include concrete elements showing that the digital labour platform *de facto* determines the upper limits of the level of remuneration or its range, requires the respect of rules with regard to appearance or conduct, gives instructions on how the work is to be performed, [...] restricts the discretion to choose working hours or periods of absence, to refuse tasks, to use subcontractors or substitutes or prevents the person performing platform work from developing business contacts with potential clients, including by using a number of conditions or through a system of sanctions. The criteria should also comprise concrete elements showing that the digital labour platform closely supervises the performance of work, also by 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 for matching the person performing platform work and the recipient of the service, ~~asking recipients of the service or person performing platform work to confirm the successful achievement of a task in order to release payment or allowing customers to review or rate the service, merely suggesting a route for a journey or a delivery, or give the possibility to the customer or the person performing platform work to report any difficulty encountered, in particular related to safety.~~ 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 the freedom of work can take different forms, considering that the platform economy model is constantly evolving.

- (25a) Member States should, in accordance with their national legal and judicial systems, establish a framework of supporting measures to ensure the effective implementation of the legal presumption. **Competent national authorities and persons performing platform work should be able to initiate the presumption. Member States may decide that, in line with their national law and practice, representatives of persons performing platform work and other organizations deemed relevant by Member States should be able to rely on that presumption.** In order for the presumption to be effective in practice, three of the criteria indicating that the person performing platform work is likely to be considered in an employment relationship should be always fulfilled to trigger its application. The purpose of these criteria is to provide a set of easily understandable indications that point to the likely existence of an employment relationship and thus facilitate the access of the person performing platform work to the relevant rights derived from the existence of an employment relationship by means of the legal presumption.
- (25b) **When a digital labour platform fulfils any of the criteria referred solely as a result of its compliance with a legal obligation under Union law, national law or collective agreements of genuine solo self-employed, that criterion may not as such be understood as indicating that the criteria of the legal presumption are fulfilled within the meaning of this Directive. It is important that Member States take into account the opportunities given by the Guidelines on the application of Union competition law to collective agreements regarding the working conditions of genuine solo self-employed persons, C(2022) 6846 final. According to those guidelines, collective agreements between solo self-employed persons and digital labour platforms relating to working conditions fall outside the scope of Article 101 TFEU, offering the opportunity to improve working conditions of such solo self-employed persons, in particular those performing platform work. These collective agreements should not undermine the objectives pursued by this directive, in particular correct classification of persons performing platform work with regard to their employment status.**

(48a) In order to make the protection by this Directive effective, it is essential to protect persons performing platform work, who exercise their respective rights granted by the Directive from dismissal, **as far as platform workers are concerned, or termination of contract, as far as self-employed persons performing platform work are concerned**, and **from** equivalent measures.
