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To: Council

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Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work
- *Analysis of the final compromise text with a view to agreement*

I. INTRODUCTION

The Commission presented its proposal for a Directive on improving working conditions in platform work on 9 December 2021. The proposal seeks to:

- 1) improve the working conditions of platform workers by facilitating the correct determination of their employment status through a rebuttable legal presumption (Chapter II),

- 2) improve the protection of the personal data of persons performing platform work by improving transparency, fairness and accountability in the use of automated monitoring or decision-making systems (Chapter III),
- 3) improve the transparency of platform work (Chapter IV) and put certain remedies and enforcement measures in place (Chapter V).

Under the relevant legal bases, i.e. Article 153(2)(b) TFEU, in conjunction with point (b) of Article 153(1), and Article 16(2) TFEU, the Council is to act by qualified majority, in accordance with the ordinary legislative procedure.

Building on the work of the Slovenian and French Presidencies and following an initial attempt under the Czech Presidency in December 2022, a general approach¹ was achieved by the Council under the Swedish Presidency on 7 June 2023.

The European Parliament voted to commence inter-institutional negotiations on 2 February 2023².

II. STATE OF PLAY

The proposal was subject to eight trilogues, the first of which took place on 11 July 2023 under the Spanish Presidency. At the sixth trilogue on 12-13 December 2023, the co-legislators managed to reach a provisional agreement³. However, this proposal did not find the necessary support at the Coreper meeting on 22 December 2023.

The Belgian Presidency resumed negotiations on the file with the aim of reaching an agreement under the current legislature. It obtained a revised mandate in the Coreper meeting on 26 January 2024⁴ that was largely based on the provisional agreement reached in December, while keeping the provisions of Chapter II close to those of the general approach.

¹ Doc. 10107/23

² A9-0301/2022

³ Doc. 16187/23 + ADD 1 and ADD 2.

⁴ Doc. 5816/24 + COR1

The Parliament informed the Presidency at the seventh trilogue on 30 January that on this basis an agreement could not be found. Following difficult negotiations, the negotiating teams of both co-legislators agreed in the eighth trilogue on 8 February 2024 on a new provisional compromise text. This agreement comprises an alternative approach on the legal presumption, which leaves to the discretion of Member States the establishment of modalities for the introduction of an effective legal presumption in their national law. The main elements of this second provisional agreement are laid out in section III below.

However, in its meetings of 16 February and 8 March 2024, Coreper was not able to support – by a very small margin – the provisional agreement. The Presidency is therefore bringing the issue to ministerial level for analysis with a view to an agreement.

III. MAIN ELEMENTS OF THE PROVISIONAL AGREEMENT OF 8 FEBRUARY 2024

The text of the provisional agreement of 8 February is laid out in Addendum 1 to this Note. The explanations below make reference to this addendum.

Chapter I – General Provisions

Chapter I has remained very much in line with the spirit of the general approach. The Presidency was able to ensure in the negotiations that all of Chapter I, and notably Article 3 on intermediaries, remained unchanged compared to the Council’s revised mandate of 26 January.

The Chapter concerned specifically sets out that, in order to avoid the circumvention of the provisions of the Directive through the use of intermediaries, Member States are obliged to ensure that, when a digital labour platform makes use of intermediaries, those 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 (Article 3). To that effect, they are required to introduce appropriate mechanisms which will include, where appropriate, joint and several liability systems.

Chapter II - Employment status

Chapter II on employment status saw the most significant changes compared to the general approach. Following the Parliament's refusal to continue negotiating based on the revised mandate of 26 January, a different approach regarding the legal presumption became necessary in order to allow for an agreement. This approach, on which the provisional agreement of 8 February is based, relies on obliging Member States to establish an effective rebuttable legal presumption of employment instead of stating in detail the mechanism of the legal presumption (Article 5(1) and (2)).

Member States therefore are responsible for establishing the modalities of the legal presumption. This means that Member States are given discretion in terms of defining the mechanism of the presumption. It also provides that Member States are responsible for defining when sufficient facts indicating control and direction are found to trigger the legal presumption.

Within this framework, Member States remain obliged to ensure a result, meaning that the legal presumption is *effective* in a way that it constitutes a procedural facilitation to the benefit of persons performing platform work. The notion of effectiveness is elaborated on in recital 32, which states that the legal presumption needs to make it effectively easy for the person performing platform work to benefit from the presumption, on the one hand, and that the requirements under the legal presumption should not be burdensome and should ease the difficulties experienced by those performing platform work in terms of providing evidence indicating the existence of an employment relationship, on the other hand.

The final decision on the correct employment status remains a matter of national law, as defined therein, in collective agreements or practice in force in the Member States, with consideration to the case-law of the Court of Justice.

As in the general approach, the rules on a rebuttal set out that in case the digital labour platform rebuts the legal presumption, the burden of proof that the contractual relationship in question is not an employment relationship, as defined in the Member States, lies on the digital labour platform.

In line with the general approach, the rule that the legal presumption should 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 has been kept alongside the carve-out for proceedings concerning tax, criminal and social security matters (Article 5(3)).

The competent national authorities are obliged to act, where they consider that a person performing platform work might be incorrectly classified. They however have a discretion as to the choice of the measure to be taken (Article 5(5)). The competent national authorities might therefore initiate appropriate actions *or* proceedings.

Similarly, authorities in the Member States are responsible for deciding to carry out, *where appropriate*, controls and inspections where the existence of the employment status of a person performing platform work has been ascertained by a competent national authority. This corresponds to the revised mandate of 26 January and provides significant discretion for competent national authorities.

Chapter III - Algorithmic management

The Chapter dealing with algorithmic management remained unchanged compared to the revised mandate of 26 January. It contains the necessary safeguards for protecting persons performing platform work against the risks linked to the use of automated monitoring and decision-making systems as defined in Article 2(1) numbers (8) and (9). These safeguards include in particular:

- The prohibition of processing of certain types of data, for example personal data on the emotional and psychological state of a person performing platform work, or for some specific purposes, for example the processing of biometric data for the purpose of identification or the processing of personal data to predict the exercise of fundamental rights (Article 7);
- Enhanced transparency on automated monitoring and decision-making systems for persons performing platform work and their representatives (Article 9);
- Human oversight of automated monitoring and decision-making systems, including by a biennial evaluation and by specifically qualified staff empowered to override automated decisions, who enjoy a particular protection (Article 10);
- Decisions to restrict, suspend or terminate the contractual relationship or the account of a person performing platform work or decisions of equivalent detriment are be taken by a human being (Article 10(5));
- The right to human review of decisions taken by automated monitoring and decision-making systems, including the right to reach a human contact person and receive a written statement of reasons (Article 11);
- The obligation to evaluate the risk of automated monitoring and decision-making systems for the safety and health of workers (Article 12);

Chapter IV - Transparency in platform work

The Chapter dealing with transparency in platform work remains unchanged compared to the revised mandate of 26 January. It requires digital labour platforms to declare work performed by platform workers (Article 16) and includes the provision that certain types of information relating to persons performing platform work are to be made available to competent authorities and representatives of persons performing platform work (Article 17).

Chapter V - Remedies and enforcement

This Chapter provides, notably, for the right to redress for persons performing platform work (Article 18), the possibility for representatives to engage in proceedings to enforce rights arising from the Directive (Article 19), the setting up of a dedicated and protected communication channel for persons performing platform work (Article 20), the possibility for national courts to order the digital labour platform to disclosure evidence relevant to a proceeding (Article 21) and for effective, dissuasive and proportionate penalties applicable to infringements of national provisions adopted pursuant to provisions of the Directive (Article 24).

The only change to this Chapter compared to the revised mandate of 26 January was the addition of a new paragraph 3 in Article 24. This provision provides for the collaboration of the competent national authorities of different Member States, with the support of the European Commission, through the exchange of relevant information and best practices on the implementation of the legal presumption.

Chapter VI - Final provisions

Compared to the revised mandate of 26 January, this Chapter was only subject to minor changes.

IV. CONCLUSION

The Presidency considers that the provisional agreement set out in Addendum I to this note provides a sound and balanced regulatory framework for platform work.

On the one hand, it provides strong protection for persons performing platform work against classification as false self-employed; it addresses, for the first time in Union law, the challenges linked to the use of automated monitoring and decision-making systems; it provides for transparency and regulates the use of these systems, makes platform work transparent even in cross-border situations as well as providing for a strong role for the representatives of persons performing platform work.

On the other hand, it provides for a clear regulatory framework, contributing to the alignment of the legislation of Member States, which provides digital labour platforms with the legal certainty they need and therefore fosters the sustainable growth of digital labour platforms.

At the same time, the provisional agreement of 8 February respects the spirit of the general approach and corresponds in most parts to the revised mandate granted by the Committee of Permanent Representatives on 26 January 2024.

The Presidency calls on ministers to open the way for this groundbreaking piece of legislation, which addresses in an exemplary manner many of the risks linked to the digital revolution at the workplace, and not to delay further its entry into force.

The Council is invited to:

- agree on the text of the final compromise, as set out in Addendum 1 to this Note, and to
- mandate the Presidency to send a letter to the President of the EMPL Committee of the European Parliament confirming that, should the European Parliament adopt its position at first reading, in accordance with Article 294(3) of TFEU, in the exact form of the compromise text set out in the Addendum to this Note (subject to revision by lawyer-linguists of the two institutions), the Council, in accordance with Article 294(4) of TFEU, will approve the European Parliament's position of the European Parliament and the act shall be adopted in the wording which corresponds to the position of the European Parliament.
