Delivery Platforms Europe Remarks on 6289/24

The Belgian Presidency is seeking approval from Member States on a new provisional agreement found with the Commission and Parliament last Thursday.

This provisional agreement is close to a copy-paste of the text which was proposed to COREPER I on 6 February and which did not secure a qualified majority. While almost no changes have been made to address the concerns raised by the Council last week, there are changes made which presumably seek to accommodate the Parliament's views and they are in some instances concerning.

Overall, after more than two years of negotiations, the sudden change of approach introducing a rebuttable labor presumption, but leaving it up to Member States to define the presumption and rebuttal, is problematic and disappointing. It will create legal uncertainty and fails to achieve the goals – including harmonisation across the bloc – the Directive set out to address.

We urge Member States not to give up on shaping a clear and legally sound Directive which delivers on its promises to improve working conditions in platform work and ensure the sustainable development of the digital platform economy. Getting it right is more important than getting a deal at all costs.

The proposed agreement continues to raise significant legal concerns.

Beyond the light changes that have been made, the proposal on its own remains highly problematic. The simplistic approach to sweep controversial provisions (criteria wording, number, threshold) under the carpet to finalise the Directive as soon as possible may sound appealing, but effectively introduces great legal uncertainty.

It raises the question of the need for an EU directive: after more than two years of trying to define the presumption and rebuttal parameters at EU level, the approach to leave it up to Member States not only to enforce the Directive, but also to define most of its provisions casts doubts on the legitimacy and credibility of the Directive. Such an approach could even contradict the principle of subsidiarity anchored in the EU treaty. It could also create a bad precedent in EU law making by enacting a EU regulation in a shared competence area which ultimately admits that the topic should be a national prerogative.

It would provide no EU harmonisation: A presumption of employment based on nationally defined criteria, plus a rebuttal based on national definitions of employment would offer no EU-wide harmonisation. In launching this proposal, the European Commision said *"A common set of EU rules will provide increased legal certainty, therefore enabling digital labour platforms to benefit fully from the economic potential of the Single Market and a level playing field."* This goal and intention would be entirely defeated by this approach.

It shifts the burden to Member States: after more than two years of negotiations, the proposed approach would simply shift the responsibility to Member States to fix what EU negotiators have been failing to address so far. It would come at an unnecessary political and administrative cost, as most Member States have already regulated platform work.

This new proposal fails to address the concerns raised by Member States.

On February 6, the Council did not sign off on the Belgian proposal for a revised mandate making it mandatory for Member States to introduce a presumption of employment in platform work, but leaving it up to them to define the presumption and rebuttal parameters. While still deciding to further negotiate with the Parliament, the Belgian Presidency committed to address the concerns from Member States.

However, the provisional agreement does not answer recent concerns:

- Definition of "facts": Art. 5 states that "*the contractual relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship when facts indicating control and direction, according to national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice, are found"* remains very unclear and has not been further clarified in the provisions, nor in the recitals. This could cause great uncertainty as, theoretically, it could mean that anything could be used as an indicator of employment, for example the sole "fact" that a person uses a digital labor platform to perform platform work.
- Case-by-case application: it continues not to be specified that the presumption should be assessed at an individual level. Not introducing such a provision would leave much room for interpretation and increase the risks of collective presumption.
- Compliance with national regulations, including collective bargaining agreements: the proposal fails to clarify that compliance with national regulations, including CBAs, should not be considered as a "fact" when assessing the presumption. A clarification (former recital 24a) would be very welcome to give more legal clarity and certainty to the industry and national authorities. Such a derogation could help platform workers negotiate agreements, given CBAs would then provide a degree of clarity and certainty amidst all the lack thereof.
- Implied EU Criteria of the use of algorithms: Article 4 and recital 31 contradict the new Article 5, as "the use of automated monitoring or decision-making in the organisation of platform work", could be understood to be presented as a criterion/indicator of an employment relationship. This goes beyond Article 5 which refers to national legislation.
- Commission's role during transposition: Given the margin that Member States will have in defining the process and criteria, the role of the Commission as defined in article 34, paragraph 3, in sharing best practices on the implementation of the legal presumption, needs to be clearly defined as consulting and not as defining what an 'effective' presumption should be.

New problematic amendments have been made:

- Definition of an "effective legal presumption": while recital (32) aims at clarifying what an "effective legal presumption" is, it introduces greater uncertainty on how a presumption should work. By stating that an effective legal presumption *"requires that national law makes it effectively easy for the person performing platform work to benefit from the presumption"*, it revives concerns on the risk of automatic presumption; it should be added that an effective legal presumption should be based on an assessment of facts and that that process in itself does not constitute a burdensome process.

No further changes have been made to Chapter 3:

- This Chapter continues to include provisions directly in contradiction with GDPR and - the now approved - AI Act. This will create problems during the transposition phase that

will force Member States to enact domestic laws contradicting EU regulations. We continue to urge Member States to review this chapter to align it with existing and existing and upcoming EU legislation.
- Overall, with the changes made to Chapter 3, many of the provisions have become impossible to comply with and to enforce. It is unclear why the original focus on material decisions and relevant features of algorithmic systems has been expanded to essentially all actions and systems a digital labour platform might take or have.

If approved and implemented as such, it offers little value.

While the political urge to finalise the Directive before the EU elections can be understood, it should not be the goal at the expense of persons performing platform work and the digital platform industry.

Past years have proven that regulating platform work is a complex topic that requires more than a simple solution. **Giving up now on proposing a legally clear and solid EU Directive, for the sake of the political urgency would:**

- Fail to deliver on the original ambition to improve working conditions in platform work and harmonise regulations.
- Fail to address the concerns of persons performing platform work whose majority has made it clear that they want to remain self-employed, while benefiting from more protection.
- Fail to provide a legally clear and harmonized framework that is necessary to ensure the sustainable growth of digital labor platforms.
- Create significant political, legal and administrative hurdles for Member States.