

PWD update October 2023

Key points:

- Several provisions go significantly beyond the political agreement reached by Member States at Council in June. The current compromise would effectively automatically reclassify all platform workers as employees, which is the opposite of the previous political agreement.
- Several provisions can blunt the effect of national employment laws and customs on the application of the directive. Meanwhile, exceptions on where the directive does not apply for social, tax, law enforcement issues are not clearly defined.

Our main asks are that:

- The Council negotiators stay within the limits outlined by June's general approach. The final Directive should neither lead to automatic reclassification of all platform workers, nor ban the use of algorithms in platform work.
- Allied Member States should encourage the Spanish Council Presidency not to seek a new negotiating mandate at the meeting of 27/10 when Member State ambassadors to the EU will meet (COREPER) to discuss the file.
- Proper legal advice is taken at every stage of this process to clarify the effect of compromise provisions on existing national laws. Clear, written guidance by the Council's and the Commission's legal service can ensure a workable Directive that does not erode national laws and competences, or overwhelm local and national enforcement.

Spain - which has the Council rotating Presidency until the end of 2023 - is pushing EU countries to accept a system leading to automatic reclassification. This clearly exceeds the limits of the mandate agreed in June by Member States within the Council.

The recent "compromise" put forward by the European Parliament and warmly received by the Council Presidency, goes beyond the well defined objective to keep self-employment a viable option:

- In practice, any ride-hailing driver or delivery courier who works through a platform that uses a rating system, enables payments, or insists on appropriate standards would be considered as an employee under the Directive.
- The 'indicators' currently discussed are designed in a way that makes it practically impossible for workers to remain self employed. A more balanced approach is possible through the criteria agreed upon in the Council's text (requiring 3/7 criteria, an examination of the facts and suspensive effect).
- This change of employment status would not only be automatic, but also apply on tax, social security and law enforcement issues. This would erode the procedural autonomy of Member State Courts, cause significant administrative burdens and prolong cases by reforming largely irrelevant points of law.

- Platforms cannot rebut the presumption unless they show that the same criteria (which are impossible not to meet) do not apply. And so, even if a platform worker is legally self-employed under national laws, the presumption automatically becomes reclassification.
- This effective reclassification could happen without a complaint from the person in question. A Trade Union, or a labour inspector could trigger the presumption independently, as it has happened in countries where such a system exists.

This goes beyond the Council's position which aimed to protect genuine self-employment. Therefore, the Council Presidency should stay within clearly defined red lines.

The current compromise can both undermine clearly defined national competences, and erode well-functioning existing laws

- Council Presidency and Parliament both want to require national labour authorities to apply the presumption, removing their discretionary power (as defined in the Council text) to not apply it when it is clear that national law does not indicate the existence of an employment relationship.
- Council Presidency and Parliament both want the presumption to apply automatically when a person or a trade union launches a proceeding, without reference either to criteria, Member State law or the facts of the case.
- Council Presidency and Parliament want to set arbitrary deadlines for rebutting the presumption in EU law, bypassing the procedural autonomy of Member State courts and creating a significant administrative burden on national legal systems.
- Council Presidency and Parliament want the rebuttal to require that the conditions for the presumption are not met, making the entire process determined by European rather than national employment criteria.
- In addition, existing laws protecting passengers and drivers, and improving working conditions by promoting collective agreements between platforms and workers are in peril, as the derogations separating them from the effect of the directive may be sacrificed for the sake of a compromise.
- Even so, many of the recitals which protect national competences still remain open to legal interpretation, within a highly litigious process. Meanwhile the Commission avoids providing reassurances that national sectoral legislation will not need to change following the adoption of the directive.

Member States need legal certainty on how the current text will interplay with national laws, and legal reassurances that they can continue to exercise their competence. The Council Presidency should ask for clear written guidance from the Council's legal service, or the Commission on that matter.

A blanket ban on data processing will make the platform economy less transparent and less safe

- Leveraging data is part of the platform economy and the future of work. According to the Council's political agreement in June, all platform workers should have the right to put

their data to use. Consent-based processing, in accordance with the GDPR, can ensure more trust and transparency.

- The Council Presidency is ready to compromise with the Parliament, accepting a blanket ban on automated systems, without taking into account national specificities. Definitions on what constitutes automated decision making will be set at an EU level, and are currently broad and open to interpretation.
- The unintended consequence is that several innovative features increasing trust within the platform economy would no longer be possible. This ranges from data-driven fraud prevention to an expedited handling of a workers complaint. Even safety features, such as sharing audio recordings to protect both drivers and passengers would be a thing of the past.

The final rules on Algorithmic Transparency should remain proportionate and ultimately serve to improve transparency, safety and trust in the platform economy. Rules on algorithms should be consistent with existing and upcoming rules on platforms, trade secrets, and artificial intelligence.