

DELIVERY PLATFORMS EUROPE COMMENTS ON PROVISIONAL AGREEMENT: PLATFORM WORK DIRECTIVE

14 December 2023

Many of the proposals previously made by the Parliament and rejected by the Council appear to be included in this provisional agreement. This is concerning not only because it undermines the democratic legitimacy of the decision making process, setting a new precedent in how EU legislation is made, but also because the text itself results in a significant weakening of the Council's position in key areas. If approved risks negatively impacting couriers, partners and European economies. We encourage Member States to reject this proposal which does not reflect the mandate granted to the Presidency.

Below we outline the following concerns:

1. The extent of the deviation from the General Approach in terms of the threshold needed to trigger the presumption and in terms of the content of the criteria or indicators
2. The extent of the deviation from the General Approach in terms of the process of applying the presumption.

1. Deviation of presumption from General Approach and criteria wording

Yesterday's agreement significantly departs from the Council's general approach. The agreement reduces the number of criteria that must be met for the presumption to apply from three to two and now refers to indicators. The Rapporteur in the press conference announcing an agreement [stated](#) that the 'indicators' are preferred to 'criteria' as criteria are linked to providing evidence. According to the rapporteur, 'hints' should be enough to trigger the process. This risks undermining the idea that an examination of the facts would be required before a presumption could be applied, something which was key in the general approach and is a key principle of labour inspections.

The criteria as we understand them to have been agreed are:

- a. the digital labour platform determines the level of remuneration or sets upper limits;
- b. the digital labour platform supervises the performance of work including by electronic means;
- c. the digital labour platform determines or control the distribution or allocation of tasks;
- d. the digital labour platform determines or controls working conditions or the performance of work, or the discretion to choose one's working hours or periods of absence;
- e. the digital labour platform restricts the freedom to organise one's work, or requires the person performing platform work to respect specific rules with regard to appearance or conduct towards the recipient of the service.

There appears to have been a significant change in the criteria - with the addition of "*control over the distribution or allocation of tasks*" now included. This was not included in any of the institutions' texts. This criteria would likely apply to a large number of platforms as most models involve the distribution and allocation of tasks.

In addition, the final two criteria contain multiple elements each meaning while the list states five criteria, there are in fact many more. . If the criteria are broken out, the reality is that only two control factors out of eight must be met to trigger the presumption. Going one step further, given how widely criteria (c) is likely to apply, in practice, one of seven of the remaining factors would result in triggering of the presumption.

This goes far beyond the headline of the press release; and in fact far beyond even the original Commission proposal and the General Approach. We have broken down a comparison table below:

Council General Approach	Provisional Agreement with grouped indicators separated to clarify practical impact
<p>For the purpose of the previous subparagraph, exerting control and direction shall be understood as fulfilling, either by virtue of its applicable terms and conditions or in practice, at least three of the criteria below:</p> <ul style="list-style-type: none"> a. The digital labour platform determines upper limits for the level of remuneration; b. The digital labour platform requires 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 supervises the performance of work including by electronic means; d. The digital labour platform restricts the freedom, including through sanctions, to organise one's work by limiting the discretion to choose one's working hours or periods of absence; e. The digital labour platform restricts the freedom, including through sanctions, to organise one's work by limiting the discretion to accept or to refuse tasks; f. The digital labour platform restricts the freedom, including through sanctions, to organise one's work by limiting the discretion to use subcontractors or substitutes; g. The digital labour platform restricts the possibility to build a client base or to perform work for any third party 	<p>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 any two of the following indicators of control and direction are found, by virtue of agreed or unilaterally determined terms and conditions or in practice:</p> <ul style="list-style-type: none"> a. the digital labour platform determines the level of remuneration or sets upper limits; b. the digital labour platform supervises the performance of work including by electronic means; c. the digital labour platform determines or control the distribution or allocation of tasks; d. the digital labour platform determines or controls working conditions d. the digital labour platform determines or controls the performance of work e. the digital labour platform determines or controls the discretion to choose one's working hours or periods of absence; e. the digital labour platform restricts the freedom to organise one's work, e. the digital labour platform requires the person performing platform work to respect specific rules with regard to appearance or conduct towards the recipient of the service.

In addition to concerns with the drafting of individual criteria, we are unclear about the impact of changing the word 'criteria' to 'indicia' or 'indicators' and the explicit reference to an open

list. We believe that it further confuses when a presumption may and may not apply, particularly as the rapporteur appears to have suggested in the press conference that an indicator represents a lower threshold of evidence than criteria.

This low threshold, ambiguity in the indicators and the term indicators of control will lead to the presumption being incorrectly applied to people that are genuinely self-employed under national law, creating excessive and unnecessary procedures, something which was much better prevented under the Council General Approach.

2. Deviation of procedures from General Approach

There are many elements within the text relating to procedures which Member States rejected the Presidency's request for flexibility on:

- The text no longer explicitly provides that Member States can permit suspensive effect
- The presumption criteria are drafted in such a way that it could be applied to genuinely self-employed individuals.
- The text no longer provides that complying with collective agreements would not be considered to meet the criteria.
- The text no longer ensures that the presumption would not be applied in tax, criminal and social security hearings.
- The text is ambiguous as to third status in the event of a failure of rebuttal
- The text mandates follow-up inspections by authorities in the event of reclassification.

Each of the areas listed above were discussed at length in Council and requests for flexibility on them were repeatedly rejected. Despite this, the Presidency has agreed to them with the Parliament.

Limitations to data processing remain problematic

Finally, we repeat here our concerns regarding Chapter 3 of the Directive.

A broad definition can create legal ambiguity: The lack of consistency between the proposed definition on automated-decision making and its definition in the GDPR leaves room for a lot of ambiguity, on which of the two would take precedence. The proposed broad definitions used in PWD capture almost any electronic system in use by companies. Aligning these definitions with the GDPR would capture only systems producing significant legal effects based solely on automation.

Safety and law enforcement: The PWD definitions should also give platforms the flexibility to process personal data where obligated to by law, for instance in cases of safety incidents. The current limits to processing data related to private conversations, would make simple features, such as reclaiming a lost item impossible.