**Presumption by default for all types of platform work in Europe**

**Reflections on the PWD Joint Exploratory Text - 4 February**

The PWD Joint Exploratory Text introduces an obligation of legal presumption based on national criteria after three attempts of failed compromises with the European Parliament.

Process wise:

* This is a **whole new legal approach**, which Member States are asked to validate within 24 hours without possibility to assess its broad legal and practical ramifications for the self employed and the national authorities.
* More time is needed to examine (i) the legality of this approach within the EU Treaty (ii) what the “**obligation of Member States to legal presumption of employment”** means for self employed and national authorities (iii) how this new text fits with corresponding recitals already agreed upon.
* Member States should also have the opportunity to opine on the **entirety of the text,** not only on new proposals introduced in a piece-meal fashion (the Council Presidency document states that *“the draft text agreement on related remaining recitals and a few other points of divergence … will also be prepared in view of the trilogue”).*

In summary:

* The directive **fails to achieve its objective of minimum harmonization** as its key provision will be defined at national level - in Article 5.
* The definition of the “digital labor platform” (article 2), in conjunction with recital 31 - linking algorithms to an employment relationship (art 4 - paragraph 2), would **force all kinds of platforms** - including governmental ones - to deal with endless rebuttal processes.
* A **system of a broad employment presumption without criteria** across Europe will create more legal uncertainty and litigation for platforms and self employed alike, overwhelming labor administrations and courts (Article 5).
* The sector specific **prohibitions on algorithm design and data usage** are non conform with the GDPR and are disproportionate and unworkable: they would interfere with platforms core business models without adding protection to workers.

Analytically:

1. **This proposed directive will not lead to more harmonization**

Thenewly proposed approach on the Platform Work Directive would leave to Member States not only the enforcement, but also the definition and the wording of all essential provisions of the directive. This **raises the question on the very need of an EU directive in such a case**, as well as the legal basis for EU intervention if national legislation is not harmonized.

The Directive aims to set minimum rights for platform workers in the EU, as outlined in Article 1 §2, which mirrors Article 153 (2)(b) of the EU Treaty. However, if these rights are defined by national laws and agreements, the Directive's **effectiveness and justification at the EU level are questionable, given that employment definitions and relationships are already determined by Member States**. The aim of a Directive is not to copy paste the Treaty, but to set the content it calls for.

The inability of Member States and the European Parliament to agree on key aspects, such as the legal presumption of employment, highlights the Directive's potential **conflict with the EU Treaty's subsidiarity principle, which mandates EU action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.**

The current disagreement over the presumption of employment underscores one fact: a presumption of employment is intimately linked to and part of the definition of employment itself; this is a national prerogative, and in practice there are important variations across Member States on this issue. There is no doubt therefore that the incapacity to come to an agreement on the presumption of employment simply reflects these variations; **this also shows that the Directive is not needed**.

1. **A presumption by default for a much wider scope of services than the gig economy, touching all forms of self-employment.**

Little consideration has been given until now to the fact that the “digital labor platform” definition will **sweep a wide array of professions into legal uncertainty**. The new recital 31 introduces an even stronger link between usage of data and employment relationships. In conjunction with the definition of the “digital labor platform” it means that millions of freelance professionals would fall into the scope of the Directive: developers, photographers, cooks, hospitality and cleaning professionals. They are all offering their services through dedicated specialized online platforms, which display predefined tasks connecting a self employed professional with a customer and which have some control processes of the service quality they broker. This would also include government independent contractors, such as healthcare professionals, recruited through online intermediation services managed by public authorities.

This approach lacks clarity on what practices are in scope, and will de facto include many parts of the economy that use digital platforms and algorithms to connect supply and demand and algorithms to dispatch workers to clients and allocate tasks. Such an **approach will throw confusion about employment presumption on sectors where flexibility and independence are crucial**, disrupting traditional freelance and contract-based work models. It may even force public administrations which recruit independent contractors through online platforms to eventually have to employ them, putting at risk State budgets.

1. **This is not the status quo - it places an *obligation* on national authorities and courts to de facto initiate processes without *prior* assessment of criteria.**

The new approach is based on **an employment legal presumption by default for all platform workers,** without defining any conditions for its application, or the process to trigger or rebut it. It suggests that labor authorities would need to presume that all platforms are employers, representing a departure from current practices where labor inspectors evaluate cases based on national criteria, the individual worker’s appreciation and where reclassification is determined by a judge. The presumption system continues to ignore the will of individuals to trigger a process or not.

A directive with ‘shared principles’ will still need to be transposed into national law, and be up for interpretation. It will introduce an **additional procedure in every Member State, without any harmonization**. It will inevitably introduce more legal uncertainty where it didn’t exist before, and cause disruption to labor and social security systems that would need to adapt to accommodate the new employment presumption mechanism.

It risks leading to an **overwhelming number of procedures in all Member States that labor administrations and courts will not be able to deal with** or to the prejudice of other matters. It will put a **massive burden on platforms**, especially those operating in several Member States, which will have to dedicate a disproportionate amount of time and resources to try to rebut presumptions of employment claims. Compliance will be challenging. Legal challenges are also inevitable.

1. **Chapter III of the directive, goes substantially beyond the GDPR, prohibiting the use of data in the workspace.**

The provisions of Chapter III go beyond the GDPR and introduce a new series of rights for workers, and new concepts such as ‘collective design’ of algorithms as expressed by the previous Spanish presidency.

Member States should consider the impact of limitations to data processing on existing privacy frameworks. Data processing should increase safety and trust in the platform economy. Platforms should be able 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. **This must be reflected in Article 8, and corresponding recitals. Member States should move closer to the initial provisions as inscribed in the General Approach.**