Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work

Written comments from the Estonian delegation 14.09.2022 (ST 14450/21)

Below are comments by the Estonian delegation. Additional comments, questions or requests for clarification may still arise during further negotiations.

Comments on the legal basis of the Directive

Article 16.2 TFEU covers personal data protection for both workers and self-employed. Article 153.1.b TFEU allows to set minimum rights concerning the working conditions for workers and not for self-employed.

We do not support regulating working conditions of self-employed. Workers and self-employed are separate categories on purpose and in principle we do not support the extension of labour law rights and working conditions to the self-employed persons.

We reiterate our comment and request for assistance of the CLS that the text needs to be examined article by article to clarify whether and how each article complies with the dual legal basis (Articles 16 (2) and 153(1) (b) TFEU) of the Directive. It needs to be clearly clarified which articles in the text address working conditions and are therefore applicable only to workers and not to self-employed, and which articles address personal data protection and are therefore applicable to both workers and self-employed. After understanding this clearly, it would be possible to decide whether it is the substance (exclude or include self-employed into the scope of specific provision) or terminology which needs to be changed (e.g art 6 (1) (b) working conditions, art 8 (4) dismissal etc.), if any.

Unfortunately, this is still very confusing, based inter alia on the discussions of the last SQWP (05.09), where the Commission explained that some articles do not need a legal basis due to their procedural nature (e.g Articles 13, 17) and in some cases the legal basis depends on the right exercised by the person (e.g Article 18).

Article 2 (1) (2) and intermediaries

Estonia has not yet formed the position on the inclusion of intermediaries in the scope of the

Directive. The issue needs further clarification.

However, if intermediaries will be covered by the Directive, it needs to be clearly set out who is responsible for fulfilling the requirements and obligation of the Directive (e.g algorithmic management rules), whether it is an intermediary or platform, taking the original draft version of the text by the Commission as the basis.

Recital 23

Recital 23 states that where a platform decides to pay for social protection, accident insurance or other forms of insurance, training measures or similar benefits to self-employed persons working through that platform, those benefits as such should not be regarded as determining elements indicating the existence of an employment relationship.

We support the principle stated in recital 23 and we believe that this principle should be stipulated in a corresponding article in the operative part of the Directive.

Offering various additional benefits to persons performing platform work can be one of the competitive advantages between different platforms which attracts persons to work through specific platform. In a situation where offering such benefits would be seen as a determining factor in assuming an employment relationship, this would not motivate platforms to offer these benefits and some platforms may begin to avoid offering them. Therefore, we find it important to establish such important principle in an article, aiming to ensure that the Directive does not impede platforms to offer such benefits. This would also encourage negotiations and conclusions of collective agreements between the genuine self-employed and platforms.

We suggest adding a new para (where the PRES sees appropriate) as follows:
"Where a digital labour platform decides to pay for social protection, accident insurance or other forms of insurance, training measures or similar benefits to self-employed persons working through that platform, those benefits as such shall not be regarded as determining elements indicating the existence of an employment relationship.".

Article 4 (2) and legal presumption of employment contract

Estonian comments use the Commission´s original draft proposal, which we support as the basis for amendments.

We strongly support that the criteria for the legal presumption establish a maximum level of harmonization and are the same across the Union. Common harmonized criteria would achieve the most benefits for the digital single market and the cross-border provision of services. If each MS can set additional criteria or modify existing criteria, then this would lead to a fragmented single market. It would also decrease the legal clarity for providers of work platforms since the criteria and the case-law arising from them may vary from one MS to another. We are concerned what would be the added value for the single market if the directive sets only minimum criteria.

We acknowledge that the Commission has taken into account judgments of the Court of Justice, including B v Yodel Delivery Network Ltd. In ECJ law, ILO conception and national court cases, **all the elements and their significance is analysed together as a whole**. Including in Yodel case, the criteria are given conditionally and with a stipulation "***/../ taking account of all the relevant factors relating to that person and to the economic activity he carries on*** /../."

Defining legal presumption is not the same as defining the employment relationship. Criteria used for defining legal presumption should be appropriate for using separately and without qualitative content analysis, so that it can be applied even by non-experts. Therefore, when establishing the criteria triggering legal presumption, we need to leave out the elements which, without content analysis and taking into account all elements of the relationship, entail a high risk that we cover the majority of genuine self-employed with legal presumption. That will unproportionally burden platforms, national supervisory and other authorities, courts and other bodies dealing with claims and complaints from persons performing platform work.

The content and the number of criteria

Points (a), (b) and (c) are easily fulfilled for other types of service contracts as they are also part of conceptual elements of private law contracts. Using the points (a), (b) and (c) of Article 4 (2) in current way, we would, in principle, establish an unconditional legal presumption of employment contract, because it could always be interpreted as two of criteria are fulfilled.

Given the objective of the list in Article 4.2, **the criteria for the legal presumption of an employment contract should be especially those, which are most likely to characterize the employment relationship, taking into account the specifics of business models in the digital economy**. Therefore, points (a), (b) and (c) will create additional ambiguity, if established.

- Point (a) can be fulfilled in principle in all or almost all platform work situations. In practice, platforms usually set prices and bring together supply and demand from different parties.
- Point (b) is fulfilled in case a person performing platform work complies with specific binding rules on appearance. For example, wearing a T-shirt with a certain appearance or other can also be characteristic for genuinely self-employed persons. It may serve a purpose to make it easy for the client to recognize the service provider (which is in the interest of a person performing platform, also) and be a safety feature for the consumer rather than an expression of control as such.

Points (d) and (e) contain several criteria in themselves, which creates ambiguity how and when the legal presumption will be triggered. In addition, to implement points (d) and (e) as they stand ("effectively restricting..."), it is necessary to answer the question of what is and what is not an effective restriction, which requires substantial analysis of the various circumstances, which will resemble the analysis carried out by the competent authority when determining whether there is an employment relationship. In our view, it is not appropriate to carry out such a substantive analysis already at the criteria stage.

The threshold of criteria

The **threshold of criteria** met should be based on the number and content of the criteria agreed in negotiations. If the criteria (a), (b) and (c) are left unchanged then the threshold of two out of five criteria is certainly not adequate. Taking into account that MS have the possibility to add an unknown number of criteria, we should alternatively consider avoiding a concrete reference to a number of criteria as a basis for the assumption to kick in. Rather, "more than half of the criteria" or some other wording in that direction should be used.

For the reasons above, **we propose to amend criteria laid down in Article 4 (2)** as follows:

Article 4

Legal presumption

2. Controlling the performance of work within the meaning of paragraph 1 shall be understood as fulfilling at least two of the following:

(a) restricting the discretion to choose one's working hours or periods of absence,

(b) restricting the discretion to accept or to refuse tasks;

(c) restricting the discretion to use subcontractors or substitutes;

(d) restricting the possibility to build a client base or to perform work for any third party.

Article 5 and the absence of suspensive effect on the application of the legal presumption

Estonian comments use the Commission´s original draft proposal.

Article 5 states "Such proceedings shall not have suspensive effect on the application of the legal presumption.". This means that even while there is a dispute between the parties, until there is no final decision, the platform should treat the person performing platform work as a platform worker and fulfil all the obligations the employers have (minimum wage, working hours, etc).

It is still unclear, what is the legal consequence when according to the final decision there is/was no employment relationship? Reinstatement, depending on the nature of the obligations cannot be possible in all aspects or should the person performing the platform work pay compensation to the platform? How should national authorities act, when a successful rebuttal occurs and social security contributions have already been collected or benefits allocated to the presumed platform worker?

The presence or absence of suspensive effect should be decided by the Member State in accordance with its procedural rules and cannot be provided for in the Directive. The rebuttle can take place in the administrative and in the civil proceedings and the rules on suspensive effect are different. The absence of suspensive effect as provided in the directive leads to unreasonable practical difficulties and complicated reinstatement/compensation claims should the rebuttle be successful for the platform. In addition, it causes discriminatory situations at national level. According to the directive, the absence of suspensive effect would be applicable to rebuttle cases concerning only platform work. However, the same absence of suspensive effect would not apply for example to other labour law civil proceedings in a Member State, where different rules may apply.

We propose to delete the sentence:

Article 5

Possibility to rebut the legal presumption

/…/

Where the digital labour platform argues that the contractual relationship in question is not an

employment relationship as defined by the law, collective agreements or practice in force in the Member State in question, with consideration to the case-law of the Court of Justice, the burden of proof shall be on the digital labour platform.

/…/

Article 6

Article 6 (1) (b) and *working conditions*

The provision uses the term *working conditions*. It is confusing as Article 6 is also applicable to self-employed and in case of self-employed we can not talk about working conditions. Working conditions are specific to the worker and not to the self-employed. This also brings us back to the general question on substance, what do we mean by working conditions in this Directive? What is the scope of working conditions? Is it defined in Article 6 (1) (b)?

Article 6 (5) and data processing concerning automated systems

Article 6 (5) is currently worded in such a way that the restriction on data processing applies not only to the processing of data by automated monitoring and decision-making systems, but to absolutely any processing of data by a digital work platform. This restriction should be limited to automatic data processing through algorithmic systems since this form of data processing is proven to be most problematic regarding possible infringements of the person`s rights. Also, this creates a situation where digital work platforms are subject to a much broader restriction on data processing outside the use of an algorithmic system than all other employers. We do not see any justification for such a discriminatory approach.

Therefore, **we propose to change Art 6 (5)** as follows:

“Digital labour platforms shall not process any personal data by automated monitoring and decision-making systems concerning platform workers that are not intrinsically connected to and strictly necessary for the performance of the contract between the platform worker and the digital labour platform. In particular they shall not:”.

Article 6 (5) and derogations from it

Article 6 (5) establishes significantly stricter data processing requirements compared to the GDPR. We consider that the proposed prohibition of data processing may be unproportionally restrictive in certain specific aspects.

Notably, the need for digital labour platforms to process certain data of platform workers may be important to ensure the security and quality of service for the consumers of the service. It is unclear whether and to what extent the current wording of the first sentence of Article 6 (5) allows for this.

Therefore, **we propose to establish derogations from the first sentence of Article 6 (5)**. We propose:
1) to establish further safeguards in the interests of consumers. For example, it would be appropriate to include an exception according to which the data processing otherwise restricted by Article 6 (5) is nevertheless permitted if it is carried out to ensure the health or safety of the service consumer. *For example, in case of severe emotional outbursts which may put the taxi client in threat, it should be allowed to process the data in the interests of the consumers*;
2) to allow data processing for the purposes referred to in the GDPR Article 6 (1) (c) - (e). We do not understand why Article 6 (5) does not allow that;
3) to allow data processing based on the consent of the person performing platform work in cases where the processing is (i) strictly in the interest of the person performing platform work; (ii) does not negatively impact the rights or freedoms of the person performing platform work and (iii) does not involve processing of data referred to in sections (a)-(d) of Article 6 (5). *The problem is that the current solution is so data-constrained that the platform cannot offer any additional functionality, even if the person wants it and it is in the person's own interest (e.g. offer statistics on which period or time of day has been the most profitable for the person; offer recommendations for a personalised route for the courier based on the courier's preferences and driving habits.*

In addition, we would also encourage to consider allowing processing of data for the purposes of improving the services of the digital labour platform, provided that it is strictly (i) based on a separate, voluntary consent of the person performing platform work, (ii) does not negatively impact the rights or freedoms of the person performing platform work and (iii) does not involve processing of data referred to in sections (a)-(d) of Article 6 (5).

Clarification of Article 6 (5) first sentence in recital 34

We propose to clarify in the recital 34, by including examples, which data is “intrinsically connected to and strictly necessary” and which is not.

Article 7

The relationship between the human monitoring obligation set out in Article 7 of the Directive and the human oversight obligation set out in Article 14 of the AI Act

As Article 7 establishes a human monitoring obligation of automated systems, we note that the AI Act will also lay down a human oversight obligation of high-risk AI systems, which aims at "preventing or minimizing the risks to health, safety or fundamental rights" that may emerge with the intended use of a high-risk AI system. High-risk AI systems are inter alia worker management systems that are, for example, used "for task allocation and for monitoring and evaluating performance and behavior of persons in such relationships."

Consequently, in many cases the requirements of the AI Act, including the human oversight obligation established in Article 14 of the AI Act, may also apply to the automated monitoring and decision-making systems that are referred to in the given Directive, whereas the aim of the obligations in the two draft laws overlap. Thus, to ensure legal clarity it would be important to clarify the relationship between the human monitoring obligation set out in Article 7 and the analogous obligation set out in Article 14 of the AI Act.

We propose supplementing Article 7 of the Directive by a clause stating that, to the extent that a digital labour platform is subject to the obligation of the AI Act, then by complying with Article 14 of the AI Act it is presumed to have complied with the obligations set out in Article 7 (1) and (3) of the given Directive.

We propose to add a new paragraph 4 of Article 7:

"4. Where the automated monitoring or decision-making system, as referred to in Article 6 (1), is subject to the obligations of the Artificial Intelligence Act [COM(2021) 206 final], then by complying with the human oversight obligation established in Article 14 of the Artificial Intelligence Act, the system is presumed to be in compliance with the obligations set out in sections 1 and 3 of this Article.".

Article 7 (3) and the protection from dismissal of the persons charged by the digital labour platform

Article 7 (3) provides that the persons charged by the digital labour platform with the function

of monitoring shall enjoy *protection from dismissal, disciplinary measures or other adverse treatment*. The used terminology refers to the employment relationship and not to any other kind of contractual relationship.

The person charged with the function of monitoring may have an employment contract with the digital labour platform and in that case, it is possible to provide an employee with the same level of dismissal and disciplinary protection as other employees enjoy. However, the person charged with the function of monitoring may have a contract of work with the digital labour platform which has a different level of protection than an employment contract.

Is the last sentence of Article 7 (3) applicable only to persons who work under employment contract or has it a broader scope covering also other contractual relationships? If it also covers other contractual relationships, then what kind of protection should be provided to persons who work under contract of work? Does it mean that a special protection from dismissal should be created to these kinds of persons?

We are on the opinion that the last sentence of Article 7 (3) should be applicable to employees only and we propose to make the necessary changes in the text.

Article 11

We would see the added value in broadening the scope of Article 11. We are on the opinion and support that all digital labour platforms, and not only the employers, should declare work performed by all persons performing platform work, and not only by platform workers. Today we do not have sufficient data for knowledge-based policy making and for inspecting, where the accessible individual data would be a valuable source. Inspectorates need individual data, it is difficult to carry out inspections based on aggregated data.

We understand that the data to be declared under Article 11 is an individual. However, we are still confused what kind of data should be declared on a *work performed* by an individual or is it solely up to a Member State to defines when, what and how should be declared on a *work performed*?

We also propose to use words "competent authorities" instead of the "competent labour and social protection authorities". Article 11 should not state specific competent authorities in the Member States (e.g labour authorities, social protection authorities). The directive should

leave the discretion to choose competent authorities to Member States. For example, depending on the MS national law and practice, in some countries tax authorities fill the obligation in article 11 but in other countries again different authorities may fill the obligation. Same is accordingly applicable as concerns Article 12.

Therefore, **we propose to amend Article 11** as follows:

Article 11

Declaration of platform work

"Without prejudice to Regulations (EC) No 883/2004 69 and 987/2009 70 of the European Parliament and of the Council, Member States shall require digital labour platforms to declare work performed by persons performing platform work to the competent authorities of the Member State in which the work is performed and to share relevant data with those authorities, in accordance with the rules and procedures laid down in the law of the Member States concerned.".

Article 12

We understand that Article 12 (1) allows competent authorities to request information only when such information is necessary in exercising their functions (to ensure compliance with legal obligations applicable to the employment status of a person). At the same time, Article 12 (2) provides for a regular obligation to provide information to a Member State.

It remains unclear what is the purpose of providing regularly information about the general terms and conditions applicable to people performing platform work (Article 12 (1) (b) and Article 12 (2))**.** We question the necessity of this obligation to provide such large quantity of data. At the same time, we agree that such information is important when relevant authorities exercise supervision and should be accessible to authorities at their request. Therefore, we believe **it should be specified in Article 12 (2) that the obligation to provide regular information includes only information stated in Article 12 (1) (a) and not in Article 12 (1) (b).**

We also believe that **one year is a sufficient frequency to provide aggregated data**, which also keeps the administrative burden of platforms at a reasonable level. This would also enable Member States to harmonize the reporting obligations in this proposal with that of the recent changes in the directive on administrative cooperation in the field of taxation (DAC7), meaning

that the relevant information would be reported once per year. We also see that the frequency of reporting should be same across the EU, as the platforms are operating across the borders.

Furthermore, **we propose to use words "competent authorities" instead of the "labour, social protection and other relevant authorities"** in paragraphs 1 and 3. It gives the necessary flexibility for the Member States because a Member State itself can define who is the right competent authority in concrete cases, as the authorities may differ from Member State to Member State.

We propose to amend Article 12 (1) – (3) as follows:

"1. Where competent authorities exercise their functions in ensuring compliance with legal obligations applicable to the employment status of persons performing platform work and where the representatives of persons performing platform work exercise their representative functions, Member States shall ensure that digital labour platforms make the following information available to them:

(a) the number of persons performing platform work through the digital labour platform concerned on a regular basis and their contractual or employment status;

(b) the general terms and conditions applicable to those contractual relationships, provided that those terms and conditions are unilaterally determined by the digital labour platform and apply to a large number of contractual relationships.

2. The information in the paragraph 1 (a) shall be provided for each Member State in which persons are performing platform work through the digital labour platform concerned. The information shall be updated once every year.

3. Competent authorities and representatives of persons performing platform work shall have the right to ask digital labour platforms for additional clarifications and details regarding any of the data provided. The digital labour platforms shall respond to such request within a reasonable period of time by providing a substantiated reply.".

Chapter V

As already referred above, it still remains confusing what is the legal basis for different articles in chapter V (e.g articles 13 till 18). In the last working party the Commission explained that Articles 13 and 17 do not need a legal basis and that the legal basis of Article 18 depends on

which right of the article is used and who uses it (worker or self-employed). Based on the Commissions explanations, it remains unclear how some procedural provisions have legal basis, while others do not need a legal basis due to their procedural nature.

Furthermore, if we understand correctly, self-employed persons only could have protection provided by Article 18 stemming only from these rights of the Directive, which are based on TFEU art 16. What are those rights?

Again, we believe that throughout the proposal it is necessary to clearly understand which provisions are applicable only to platform workers and which apply to self-employed persons.

Article 18

We are on the opinion that legal basis of Article 18 for self-employed persons is highly questionable and kindly reiterate our request for assistance of CLS in defining what is the legal basis of Article 18 for self-employed.

The protection from dismissal in Article 18 should be established to platform workers only, not to all persons performing platform work. Such protection in case of termination of a contract and reversed burden of proof is and should be characteristic to labour law and employment relationships. Employees work in subordination to the management and control of the employer. Due to the strong dependency arising from the employer-employee relationship, the employee needs special protection (e.g., protection from wrongful dismissal). At the same time, self-employed persons are independent in choosing the manner and place of performance of work and they are free in determining their working time. Therefore, self-employed persons' need for extra protection is not comparable to the position of employees.

Member State should have the procedural autonomy and discretion in ensuring that the rights of those self-employed when terminating the contract get effectively protected in accordance with principles and rules applicable to civil law contracts and to civil law procedure.

Furthermore, when establishing a special protection from termination of contract and a reversed burden of proof to self-employed persons performing platform work, this leads to unequal treatment in terms of material and procedural law of other self-employed persons who don't strictly perform platform work, but are self-employed on other fields (e.g why are we

introducing the reversed burden of proof in case of platform self-employed but there is no burden of proof in case of rental agreement).

In addition, regarding the burden of proof, in court proceedings the burden of proof generally rests on the person submitting the claim. Reversed burden of proof as an exception to the principle of the general burden of proof should only be provided in clearly justified cases. Therefore, **we do not consider it appropriate nor efficient to stipulate a reversed burden of proof in case of dismissal based on every exercised right stated in the directive.**

The act provides for an extensive set of rights (e.g., the right to receive explanations about automatic decisions, right to a private communication channel, protection against adverse treatment etc.). By establishing reversed burden of proof for all rights provided in the directive, the reversed burden of proof loses its purpose, determining the assumption that platforms/employers always behave unlawfully in contractual relations. Such a broad assumption is unreasonable and disproportionately increases the platform's/employer's burden of proof.

We also believe that a definite and clear list of specific rights exercised where the reversed burden of proof applies is important to achieve legal clarity. In **directive 2019/1152** on transparent and predictable working conditions the directive **similarly stated the reversed burden of proof in case of dismissal based on any exercised right provided in the directive. This made the transposition process more complex** and it was difficult to put together the catalogue of rights where the reversed burden of proof applies. At the same time, **directive 2019/1158** on work-life balance for parents and carers **named specific rights in which the reversed burden of proof shall apply** (firstly, when a person has applied for or has taken paternity, parental and carers' leave, and secondly, when a person has exercised the right to request flexible working arrangements). **Such regulation was clear and brought no unnecessary complications in the implementation process.**

Therefore, **it is crucial to stipulate specific cases, if necessary, in which reversed burden of proof is essential for the protection of a persons' rights.** For example, we suggest establishing reversed burden of proof when using rights such as right to request information about automated systems at any time (article 6(3), right to obtain an explanation from the

platform for automated decisions (article 8(1)) and right to request to review that decision (article 8(2)).

We propose amending Article 18 as follows:

Article 18

Protection from dismissal

"1. Member States shall take the necessary measures to prohibit the dismissal or its equivalent and all preparations for dismissal or its equivalent of platform workers, on the grounds that they have exercised the rights provided for in this Directive.

2. Platform workers who consider that they have been dismissed, or have been subject to measures with equivalent effect, on the grounds that they have exercised the rights provided for in this Directive, may request the digital labour platform to provide duly substantiated grounds for the dismissal or the equivalent measures. The digital labour platform shall provide those grounds in writing.

3. Member States shall take the necessary measures to ensure that, when platform workers referred to in paragraph 2 establish, before a court or other competent authority or body, facts from which it may be presumed that there has been such a dismissal or equivalent measures, it shall be for the digital labour platform to prove that the dismissal or equivalent measures were based on grounds other than those referred to in paragraph 1.

4. Paragraph 3 shall not prevent Member States from introducing rules of evidence which are more favourable to platform workers.

5. Member States shall not be required to apply paragraph 3 to proceedings in which it is for the court or other competent authority or body to investigate the facts of the case.

6. Paragraph 3 shall not apply to criminal proceedings, unless otherwise provided by the Member State.".

Article 19

According to Article 19 (1) the data protection supervisory authority referred to in GDPR supervises the fulfillment of obligations arising from Article 6, Article 7 (1) and (3) and Articles 8 and 10 of platform work directive. **We believe that determining the supervisory authority should be left to the discretion of the Member State.**

The obligations of monitoring, transparency and human supervision of automated systems established by the articles mentioned in art 19 (1) are analogous in nature to the obligations set out in the proposed Artificial Intelligence Act, in which the Member State has discretion to decide which institution performs supervision. Also, the Platform to Business regulation and the pending Digital Services Act stipulate obligations related to transparency and accessibility of platforms and leave Member State the discretion to decide the supervisory authority.

It would be reasonable that in the case where a supervisory authority other than a data protection supervisory authority has been appointed as the supervisory authority in relation to analogous obligations (in the Artificial Intelligence Act, Platform to Business Regulation, Digital Services Act), the Member State would be able to appoint the same authority as the supervisor of the fulfillment of the obligations stipulated in current platform work directive.

Member State should also have the **flexibility to sanction only certain more serious violations** (based on the principle of ultima ratio). Every violation does not have to be punishable under the mandatory procedure. Furthermore, the extensive harmonization of administrative punishments outside the legal basis provided for in Article 83 of the TFEU raises the question of what is the meaning of Article 83 of the TFEU (and paragraph 3 of it, which protects criminal justice systems).

Lastly, sanctions of up to 20 million euros provided for in Article 19 (1) is extremely high and does not allow a person to predict the size of the sanction that may follow his or her act. It is problematic to stipulate such high penalty ceilings for natural persons, who can also manage platforms, without a (clear) possibility to differentiate the penalty ceilings or make the fine rate dependent on specific circumstances related to the natural person (e.g. income). Although it is understandable that different circumstances can be taken into account when determining a specific fine, such a regulation probably contradicts Article 49 (1) of the EU Charter of Fundamental Rights, according to which a person should be able to foresee both what kind of behavior is punishable and the sanction that may follow for it. As the directive allows sanctions of up to 20 million euros, it is impossible for a person to predict even approximately what size sanction may follow their act (e.g. 1,000 euros, 10,000 euros, a million or more).