PT

Comments and Questions about the articles in Chapter V and VI

(Meeting September 5)

- A clarification on how these Chapters affect/apply to the independent workers, namely Articles 13, 18 and Recital 43, would be very useful.

- Article 14

Recital 44 admits the possibility of representing a person or a group of people in any judicial or administrative procedure.

The article in question, in its paragraph 1, speaks of the representation of a person and paragraph 2 of several people.

Is it possible to include the forecast of paragraph 2 in paragraph 1?

Clarification is requested regarding the differences between paragraph 1 and paragraph 2 that justify this division into two numbers.

Article 14(1) states that "…Member States shall ensure that representatives of persons performing on platforms or other entities…", which within the meaning of Article 2 of the proposed Directive covers "any individual performing on the digital platform, irrespective of the contractual designation of the relationship between that person and the digital work platform by the parties involved".

Clarification is requested as to the possibility of extending representation rights to correctly classified self-employed workers.

In PT:

As for employees: article 23 of Law nº 107/2009, of 14 September, provides for the possibility for trade union associations representing workers in respect of which the administrative offense is found to be able to form if assistants in the proceedings instituted under that law, and article 5 of the Portuguese Labour Code (PLC) refers to the legitimacy of structures of collective representation of workers and of employers' associations.

Only workers can join trade unions (cf. article 442, no. 1, subparagraph a) of the PLC.

As for self-employed workers: Even though self-employed workers may grant powers of representation to a legal entity with a legitimate interest in defending the rights of these people, there is no legal framework for them to benefit from the provision contained in article 23 of Law 107/2009, of September 14, as this is legislation only applicable to employees.

- **Article 15**

It provides for digital platforms make available to the necessary channels to contact and communicate with each other, and to be contacted by their representatives, through the platforms' own digital infrastructures or other equally effective means, while complying with the provisions of Regulation (EU) 2016/679.

Recital 45 states: "…. Digital labour platforms should create such communication channels within their digital infrastructure or through similarly effective means, while respecting the protection of personal data and refraining from accessing or monitoring those communications."

However, this situation raises doubts. Article 6(5) expressly determines which data cannot be processed by digital platforms and in this article when it states: "Member States shall require digital work platforms to refrain from accessing or monitoring such contacts and communications.", and the difference in terminology used seems not to be prohibited.

The creation of such communication channels arises within the scope of privileged (professional) relationships, which allow for various conversations/contacts between colleagues, to which the person responsible for this data processing gains access. When workers access communication channels, inside or outside working hours, it always translates into data processing.

How can you ensure that the data collected is not used?

Possible conflict between norms?

- **Article 16**

In PT, article 11 of Decree Law no. 102/2000, of 2 June (which approved the Statute of the General Labor Inspectorate), assigns the necessary powers to Labor Inspectors, in the exercise of their functions, among others, to request any documents for the inspection procedure. The duty of secrecy falls on the labor inspector, under the terms of article 21 of the aforementioned Statute.

Clarification is requested on the meaning of paragraph 2 of article 16.º.

When referring to "Confidential Information", what type of information is this that was not included in paragraph 1?

Is the type of evidence that can be provided at the administrative and judicial stages at issue?

If this confidential information is required at the administrative stage, what is the procedure to obtain it?

Clarification is requested as to the scope and context of paragraph 3 of article 16 of the proposal, since what is at stake is access to evidence.

Examples of more favorable regimes in this matter would be useful.

- **Article 17**

In PT, there are already mechanisms to protect against forms of treatment or unfavorable consequences, such as that provided for in article 186-S of the PLC, which provides for the precautionary procedure for suspending dismissal subsequent to the inspection report contained in art. 15.º-A of Law no. 107/2009, of 14 September.

Within the scope of the specific matter of harassment, the provisions of article 29 of the PLC, according to which the claimant and his testimonies cannot be disciplinary sanctioned, unless they act with intent to cause harm, based on statements or facts contained in the case file, judicial or

administrative offence, triggered by harassment until a final decision, which has become final, without prejudice to the exercise of the right to contradictory.

It is questioned whether what is intended is the inclusion of standards of this type by MS?

We would appreciate clarification as to the meaning of the norm.

Recitals

- **Recital 43**

The recital needs clarification as it is not clear how the protection provided for in this article can be extended to correctly classified self-employed workers.

In PT:

• Employees are protected whenever the dismissal is not based on a legitimate cause (within the framework of the forms of dismissal with just cause provided for in the LC– see article 338, which prohibits dismissal without just cause or for political or ideological reasons).

Under the terms of article 387 of the LC, the regularity and lawfulness of the dismissal can only be assessed by a judicial court (Labor Court).

• Article 389 of the LC provides that, if the dismissal is declared unlawful, the employer is condemned: to compensate the worker for all damages caused, property and non-property; in the reintegration of the worker in the same establishment of the company, without prejudice to its category and seniority (except in the cases of articles 391 and 392).

The terms of compensation are set out in articles 391 (between 15 and 45 days of base pay and seniority payments for each full year or fraction of seniority, taking into account the value of the remuneration and the degree of illegality arising from the order established in article 381. º), 392.º (if the court excludes reinstatement, the worker is entitled to compensation, determined by the court between 30 and 60 days of base pay and seniority payments for each complete year or fraction of seniority, under the terms established in paragraphs 1 and 2.

• Protection of incorrectly classified self-employed workers is ensured, either through the intervention of the ACT (cf. article 15.º-A of Law no. in the Labor Court, for recognition of the employment relationship.

• It also provides for a precautionary procedure for suspending dismissal, subsequent to the inspection report, provided for in article 15-A, no. 1 of Law no. 107/2009, of 14 September, under the terms of article 186.º-S, no. 3 of the LPC, when the contractual relationship is terminated before receipt of the report of the facts.

• In the case of correctly classified self-employed workers and questions arise regarding the termination of the contractual relationship, these are dealt with in the Civil Court.

- **Recital 44**

It admits the possibility of representing a person or a group of people in any judicial or administrative proceeding.

Article 14 of the proposed Directive makes a division, in its paragraph 1 it speaks of the representation of a person and in paragraph 2 of several people.

The recital needs clarification so that the division between paragraph 1 and paragraph 2 of article 14 can be understood.

- **Recital 45**

Doubts arise when comparing with the content of article 6, paragraph 5, which expressly determines which data cannot be processed by digital platforms and in this article when it states: "Member States shall ensure that digital work platforms refrain from accessing or monitoring these contacts and communications.", and the difference in terminology used seems not to be prohibited.

The creation of such communication channels arises within the scope of privileged (professional) relationships, which allow for various conversations/contacts between colleagues, to which the person responsible for this data processing gains access. When workers access communication channels, inside or outside working hours, it always translates into data processing.

The recital needs clarification in order to better articulate it with article 15 and article 6, paragraph 5 of the proposed Directive.

- **Recital 46**

In its last part, it states: "National courts or competent authorities should therefore be able to order the digital labour platform to disclose any relevant evidence which lies in their control, including confidential information, subject to effective measures to protect such information."

From the wording of art. 2 states that the disclosure of evidence containing confidential information, whenever deemed relevant, will be made by order of the judicial courts.

It is necessary to clarify in the Recital the type of information to which the competent authorities and courts have access for better articulation with article 16, no. 1 and no. 2, as there seems to be a contradiction.

Clarification is also requested on what confidential information is, when all information collected is covered by professional secrecy.