

09.09.22

Proposal for a Directive on improving working conditions in platform work

Article 4

Legal presumption

1. The contractual relationship between a digital labour platform that controls, within the meaning of paragraph 2, the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship. To that effect, Member States shall establish a framework of measures, in accordance with their national legal and judicial systems.

The legal presumption shall apply in all relevant administrative and legal proceedings. Competent authorities verifying compliance with or enforcing relevant legislation shall be able to rely on that 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) effectively determining, or setting upper limits for the level of remuneration;
 - (b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
 - (c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;
 - (d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
 - (e) effectively restricting the possibility to build a client base or to perform work for any third party.
3. Member States shall take supporting measures to ensure the effective implementation of the legal presumption referred to in paragraph 1 while taking into account the impact on start-ups, avoiding capturing the genuine self-employed and supporting the sustainable growth of digital labour platforms. In particular they shall:
 - (a) ensure that information on the application of the legal presumption is made publicly available in a clear, comprehensive and easily accessible way;
 - (b) develop guidance for digital labour platforms, persons performing platform work and social partners to understand and implement the legal

presumption including on the procedures for rebutting it in accordance with Article 5;

- (c) develop guidance for enforcement authorities to proactively target and pursue non-compliant digital labour platforms;
- (d) Ensure that the actions of control and enforcement of legislation, to be promoted by the labour inspectorates or the bodies responsible for the enforcement of labour law, simultaneously ensure the proportionality and non-discrimination of the controls and inspections carried out.

4. With regard to contractual relationships entered into before and still ongoing on the date set out in Article 21(1), the legal presumption referred to in paragraph 1 shall only apply to the period starting from that date.

Rationale: Due to the fact that Article 4 (a)(b)(c) seems to have informative and orientation purposes, whereas (d) could contend which MS national inspective systems; Whitmore one cannot foresee how this rule is to be applied and transposed.

Article 15

Communication channels for persons performing platform work

Member States shall take the necessary measures to ensure that digital labour platforms create the possibility for persons performing platform work to contact and communicate with each other, and to be contacted by representatives of persons performing platform work, through the digital labour platforms' digital infrastructure or similarly effective means, while complying with the obligations under Regulation (EU) 2016/679. Member States shall require digital labour platforms to refrain from accessing or monitoring those contacts and communications, in accordance with Article 6(5).

Rationale: To clarify the difference in terminology used for the purpose of non-processing of data. Article 6(5) expressly determines which data cannot be processed by digital platforms ("Digital work platforms cannot process personal data of platform workers who are not intrinsically related to, or are strictly necessary for the performance of the contract between these workers and the digital labour platform. In particular, they shall not" (...), whereas Article 15 states that "Member States shall take the necessary measures to ensure that digital labour platforms create the possibility for persons performing platform work to contact and communicate with each other". This wording seems to soften the initial forbidness to process certain categories of kinds of data.

We underline that the creation of the communication channels mentioned previously are generated through special, privileged professional conversations and/or texting, which the processor should not access to, irrespective of having place during working time or after hours.

Article 16

Access to evidence

1. Member States shall ensure that in proceedings concerning a claim regarding correct determination of the employment status of persons performing platform work, national courts or competent authorities are able to order the digital labour platform to disclose any relevant evidence which lies in their control.
2. Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the claim. They shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.
3. This Article shall not prevent Member States from maintaining or introducing rules which are more favourable to persons performing platform work.

Comment: We are not proposing new text, but alerting to the need to review Recital 46 since its current wording leads to concluding that both national courts and competent authorities should be able to require the digital work platform to disclose relevant evidence under its control, including confidential information. Whereas it seems to follow from the text of Article 16(2) that this will be an exclusive competence of national courts.

Article 18

Protection from dismissal and measures with equivalent effect

1. Member States shall take the necessary measures to prohibit the dismissal or its equivalent and all preparations for dismissal or its equivalent of persons performing platform work, on the grounds that they have exercised the rights provided for in this Directive.
2. Persons performing platform work 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, **in the official language or languages of the Member State in which the worker carries out the work, using clear and intelligible language and in compliance with Article 6(1)(b), (2)(b) and (3), and the deadline laid down in Article 8(2) of the Directive.**
3. Member States shall take the necessary measures to ensure that, when persons performing platform work 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 persons performing platform work.
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.

Rationale:

Title - Since the scope of the article is not only to protect against the dismissal of workers on employment relationships but also to protect against measures causing equivalent effects, such as cancelling or suspending accounts and user's attributes. It also envisages expanding this protection to people who work on platforms as genuine self-employed workers and could otherwise suffer consequences when seeking to defend and enforce the rights conferred by the Directive (as per article 18, paragraph 1).

N° 2 - The information to be provided to people working on platforms and who consider that they have been fired or subjected through an equivalent effect measure, is equally subject to the grounds provided for in Article 6(1)(b), (2)(b) and (3) of the proposed Directive.

Also, we agree with the proposal made by the European Committee of the Regions when considering it necessary to ensure that the information to be made available to people working on platforms, is to be provided in clear, intelligible, official languages of both the worker and the Member State where the work is being performed.

A concrete deadline should be established which platforms must meet when providing the information requested by persons who work on/through platforms, in order to ensure that access to such information is delivered in due time and does not compromise the timely exercise of the persons rights.

During the 14th July latest meeting, the Commission clarified that this article is not exactly meant to be a deadline and that, in any case, the 30-day deadline in the Duty to Information Directive would ultimately apply. It seems to us that this would be too long, e.g. in circumstances where the platform decides not to pay for work performed by a platform worker, or to restrict, suspend or cancel the account. In addition, this period is not in line with PT's legislative framework, namely when reduction or suspension of employment contracts take place.