

## **Proposal for a Directive on improving working conditions in platform work –**

**BE drafting proposals – 13 September 2022.**

### **Articles**

#### **Article 1: Subject matter and scope**

1. The purpose of this Directive is to improve (...) **the working conditions of persons performing platform work by ensuring correct determination of their employment status, by promoting transparency, fairness and accountability in algorithmic management in platform work and by improving transparency in platform work, including in cross-border situations, while supporting the conditions for the sustainable growth of digital labour platforms in the Union.**

*Rationale: We suggest to revert to the original COM text ensuring among others a broader personal scope*

2. **[...] This purpose is pursued** by:
  - **introducing measures supporting the** correct determination of **the** employment status **of persons performing platform work;**
  - **establishing specific rights to protect persons performing platform work ;**
  - promoting transparency, fairness and accountability in algorithmic management **for every person performing platform work; and**
  - improving transparency **on** platform work.

*Rationale: Emphasizing the measures to achieve the objectives of the directive*

#### **Article 2: Definitions**

1. For the purposes of this Directive, the following definitions shall apply:
  - (1) 'digital labour platform' means any natural or legal person providing a [...] service which meets all of the following requirements:
    - (a) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application;
    - (b) it is provided at the request of a recipient of the service;
    - (c) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location;

**Natural or legal persons who act as an intermediary between the digital work platform and the person are assimilated.**

*Rationale: “Intermediary” companies and persons should be included in this definition in order to cover as many situations as possible and avoid any legal construction with a view to evading the application of the rights arising from the directive.*

(2) ‘platform work’ means any work organised through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform **and the individual or another party**, irrespective of whether a contractual relationship exists between **that** individual **or that party** and the recipient of the service;

*Rationale: The reference to “another party” is removed from this definition since the notion of “intermediary” is covered, more appropriately, in the definition of “digital labour platform”.*

(3) ‘person performing platform work’ means any individual performing platform work, irrespective of (...) **the nature of the contractual relationship or its designation [...] by the parties involved; irrespective of whether a contractual relationship exists between the individual and the recipient of the service;**

*Rationale: We suggest to revert to the original COM text.*

(4) ‘platform worker’ means any (...) **person performing platform work who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in the Member States with consideration to the case-law of the Court of Justice;**

*Rationale: We suggest to revert to the original COM text.*

## **Article 4 Legal presumption**

1. Unchanged

2. **Restricting the freedom to organise one’s work and** controlling **its execution** within the meaning of paragraph 1 shall be understood as **de facto** fulfilling at least two of the following:

(1) [...] **having the power to determine**, or set upper limits for the level of remuneration;

(2) **having the power to require** 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;

(3) **having the power to supervise** the performance of work or verifying the quality of the results of the work including by electronic means;

(4) [...] **having the power to restrict** [...] the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;

(5) [...] **having the power to restrict** the possibility to build a client base or to perform work for any third party.

*Rationale : We think that the criteria should be considered to be fulfilled as soon as the platform is entitled to restrict the freedom to organize one's work even if it did not effectively exercise its powers.*

*For example, a platform's settlement could provide that there's a decrease of the person's remuneration once he/she gets 3 negative comments/scores, but the platform does not exercise effectively this possibility of decreasing the remuneration.*

*The use of "de facto" seems to be too restrictive and should therefore be removed.*

3. The legal presumption shall apply in all relevant administrative **or** legal proceedings (...). **Competent authorities verifying compliance with or enforcing relevant legislation shall rely on that presumption.**

(...)

To that effect, Member States shall establish a framework of measures, in accordance with their national legal and judicial systems.

*Rationale : We prefer to include here the initial formulation of the COM text as set in the former article 4.1 §2 which was deleted in the current text. Also, it is important to clarify that the authorities must apply the presumption whenever the question of the status determination needs to be taken into account.*

4. **In line with national law or practice,** 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) ~~**in line with national law or practice,**~~ develop guidance for **competent national** authorities to proactively target and pursue non-compliant digital labour platforms;

(d) ~~**in line with national law or practice,**~~ strengthen the controls and field inspections conducted by labour inspectorates or the bodies responsible for

the enforcement of labour law, while ensuring that such controls and inspections are proportionate and nondiscriminatory.

*Rationale : We suggest to move this reference to the chapeau to cover all aspects.*

#### **Article 5 [...] Rebuttal of the legal presumption**

Member States shall ensure the possibility for any of the parties to rebut the legal presumption (...) **referred to in Article 4 in legal or administrative proceedings or both.**

**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 digital labour platform. Such proceedings shall not have suspensive effect on the application of the legal presumption.**

**National mechanisms for reversing the presumption may neither obstruct the objectives pursued by the directive nor contradict the criteria laid down.**

**Where the person performing the platform work 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, digital labour platform shall be required to assist the proper resolution of the proceedings, notably by providing all relevant information held by it.**

*Rationale : We suggest to revert to the original text of the COM proposal and to add a sentence ensuring the correct and loyal application of the EU Directive when setting the national mechanism and criteria.*

#### **Article 6 Transparency on and use of automated monitoring and decision-making systems**

4. Digital labour platforms shall make the information referred to in paragraph 2 available to platform workers' representatives and national (...) **competent authorities (---). Updated information should be provided at least once a year.**

*Rationale: It is necessary that workers' representatives and the competent authorities are automatically informed of the updated information and not only upon request. The one-year period seems reasonable in relation to this objective.*

**6. New. Digital labour platforms should ensure proper access and use of workers' data through sufficient means of identification, authentication and control.**

*Rationale : We suggest to add a new para.6 in Article 6 to guarantee legal access and use of workers' personal data. Findings show risks of abuse and/or fraud through the illegal sale/"lending" of access data to, among others, persons with illegal residence*

(sometimes minors) so that a kind of subcontracting - or even exploitation - is established at the expense of legal working conditions.

## **Article 7 Human monitoring of automated systems**

1. Member States shall ensure that digital labour platforms, at least once a year, (...) ~~regularly~~ monitor and evaluate the impact of individual decisions taken or supported by automated monitoring and decision-making systems, as referred to in Article 6(1), on working conditions.

**The results shall be made available to platform workers' representatives and competent authorities.**

*Rationale : The term "regularly" may be subject to different interpretations. It seems appropriate to set a timeframe. A period of one year seems to be a reasonable and proportionate period of time. In order to meet the objective of protecting workers, it is important that this assessment be made available to representatives and authorities.*

2. Without prejudice to Council Directive 89/391/EEC and related directives in the field of safety and health at work as well as EU Directives 2000/78 and 2006/54 prohibiting discrimination in employment and occupation, digital labour platforms shall:

(a) Evaluate (...) automated monitoring and decision-making systems (...) as regards the risks in terms of :

- safety and health in particular as regards possible risks of work-related accidents, psychosocial and ergonomic risks ;

- and discrimination ;

*Rationale : Algorithmic management may also entail risks related to discriminatory factors (i.a. age/gender/race/religion). Algorithms, by their nature, may increase discrimination. The evaluation must also address this type of risk.*

## **Article 8 : Human review of significant decisions**

Member States shall ensure that platform workers have the right to obtain an explanation from the digital labour platform for any decision taken or supported by an automated decisionmaking system that significantly affects the platform worker's working conditions, as referred to in Article 6(1), point (b). In particular, Member States shall ensure that digital labour platforms provide platform workers with access to a contact person designated by the digital labour platform to discuss and to clarify the facts, circumstances and reasons having led to the decision. Digital labour platforms shall ensure that such contact persons have the necessary independence, competence, training and authority to exercise that function.

*Rationale : For reasons of impartiality, it is necessary to specify that the contact person must be able to act independently from the platform.*

## **Recitals**

## Recital 15 bis

**This Directive aims to improve the working conditions of persons performing platform work, (....) As regards Article 153(1)(b) TFEU, this Directive sets out rules aimed at supporting the correct determination of the employment status of persons performing platform work and improving transparency on platform work. As regards Article 16 TFEU, this Directive establishes a framework to improve the protection of natural persons performing platform work regarding the processing of their personal data by increasing transparency, fairness and accountability of relevant algorithmic management procedures in platform work.**

*Rationale : Drafting suggestion in line with the amendment proposed in Article 1.2.*

## **Recital 17bis (new)**

**This Directive applies to all administrative or judicial proceedings aimed at determining the status of the person performing platform work, it being understood that the determination of status may affect other areas, such as applicable social security or tax law.**

*Rationale : It seems important to specify that the determination of the nature of the employment relationship may indirectly affect other areas falling outside the directive such as taxation and social security. In this sense, the directive may have an indirect impact on these matters.*

## Recital 25

Criteria indicating that a digital labour platform **restricts a person's freedom to organise his or her work and** controls the **execution** of work should be included in the Directive in order to make the legal presumption operational and facilitate the enforcement of workers' rights. Those criteria should be inspired by Union and national case law [...]. The criteria should include concrete elements showing that the digital labour platform **de facto** [...] **has the power to**—determines [...] the remuneration [...] , **has the power to require the respect of rules with regard to appearance or conduct, has the power to give** instructions on how the work is to be performed or to **thoroughly verify the quality of the results of that work, including through electronic means, which does not merely consist in using reviews or ratings by the recipients of the service, has the power to restrict the discretion to choose working hours or periods of absence, to refuse tasks, to use subcontractors or substitutes** or **has the power** to prevent the person performing platform work from developing business contacts with potential clients, **including by using a number of conditions or through a system of sanctions.** [...] . **The criteria refer to abilities of the platform to restrict the freedom to organize one's work, regardless of whether it exercises them or not.**

## **Recital 25b**

**The criteria provided for in article 4.2 are to be considered as a minimum amount, so that Member States may add additional criteria as long as these comply with Article 20 by facilitating the triggering of the presumption.**