

Written Comments from the Swedish delegation

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

Social Questions Working Party 5th of September

Article 3

Correct determination of the employment status

1. Member States shall have appropriate procedures in place **in accordance with national law or practice**, to verify and ensure the correct determination of the employment status of persons performing platform work, with a view to ascertaining the existence of an 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, and ensuring that they enjoy the rights deriving from Union law applicable to workers.
2. The determination of the existence of an employment relationship shall be guided primarily by the facts relating to the actual performance of work, taking into account the use of algorithms in the organisation of platform work, irrespective of how the relationship is classified in any contractual arrangement that may have been agreed between the parties involved. Where the existence of an employment relationship is established based on facts, the party assuming the obligations of the employer shall be clearly identified in accordance with national legal systems.

SE Comments:

COM has confirmed that the "appropriate procedures" in para 3 of the directive are the procedures already established in the Member States. In order to make it clear that no new authorities are needed if existing systems are in place, we support the suggestion to add "in accordance with national law or practice" following the discussion at SQWP of 28 April 2022.

Article 4

Legal presumption

1. The contractual relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship when the digital labour platform restricts that person's freedom, including through sanctions, to organise his or her work and controls its execution, within the meaning of paragraph 2.

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: **criteria to be defined by Member States in national law.**

- ~~(a) determining, or setting upper limits for the level of remuneration;~~
- ~~(b) requiring 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;~~
- ~~(c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;~~
- ~~(d) restricting 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) restricting the possibility to build a client base or to perform work for any third party.~~

3. The legal presumption shall apply in all relevant administrative or legal proceedings **within labour law** where the employment status of the person performing platform work is at issue.

In addition, competent authorities verifying compliance with or enforcing relevant legislation may also rely on that presumption in assessing whether a contractual relationship should be considered an employment relationship, unless it is manifest that the presumption would be rebutted on the basis of 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.

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

4. 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) **in line with national law or practice** ensure that information on the application of the legal presumption is made publicly available in a clear, comprehensive and easily accessible way;
- (b) **in line with national law or practice** 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 non-discriminatory.

5. 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.

SE Comments:

4 (2)

An EU common statutory presumption, including the detailed criteria for the performance of work in the presumption, is not in line with national systems where an overall assessment of all aspects in each individual cases are taken into consideration. The amendments that have been presented in option B in CZ PRES note do not solve this problem. SE also notes that several Member States have different views on which criteria in the presumption should be used, and that there is no consensus between the Member States in this regard.

SE proposes that it should be up to each Member State to determine the criteria of the presumption in accordance with national law, in line with option C in the CZ PRES note. Such an arrangement would still be in line with the purpose of the directive and give the Member States the opportunity to create effective systems that are predictable at the national level for platform companies and the persons performing platform work.

SE is further questioning the purpose stated in CZ PRES note that option B are giving a better "level playing field" among Member States, since also option B allows Member States to stipulate more favourable criteria. Furthermore, the type of platform work that the directive intends to regulate cannot be considered cross-border in the sense that people who perform work for platforms move freely between national borders and take assignments in different Member States.

SE also believes that the suggested solution, where the criteria triggering the presumption are different from the ones it's tested against when rebutting, constitutes an unusual construction, as have been mentioned also by the Council Legal Service during previous SQWP meetings.

4 (3)

Since the presumption applicable in labour law proceedings and not in proceedings such as tax, social security or criminal law, SE suggests that this matter is clearly stipulated in the wording of art 4 (3) and that “labour law” is added to the sentence.

4 (4)

For greater certainty, it is also needed to add “in line with national law and practice” for 4 (4) (a) and 4 (4) (b) in line with the previously amendments from the FR PRES. Furthermore, we don’t see the added value with the subparagraph “Member States shall establish a framework of measures” in this context.

Article 5

Possibility to rebut 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 the digital labour platform. ~~Such proceedings shall not have suspensive effect on the application of the legal presumption.~~

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

SE Comments:

Procedural rights such as suspensive effects are a question for each Member States and should be up to Member States to decide upon national level. SE propose that the sentence is removed.

Article 13

Right to redress

Without prejudice to Articles 79 and 82 of Regulation (EU) 2016/679, Member States shall ensure **, in line with national law or practice, that platform workers** ~~that persons performing platform work~~, including those whose employment or other contractual relationship has ended, have access to effective and impartial dispute resolution and a right to redress, including adequate compensation, in the case of infringements of their rights arising from this Directive.

SE Comments:

Ensuring compliance with working conditions normally takes place within the framework of agreed dispute resolution systems in the Swedish national labour model. It is important that the directive does not prevent the application of existing national dispute resolution systems. SE therefore suggest the amendments above where this is made clear.

Article 14

Procedures on behalf or in support of platform workers ~~persons performing platform work~~

1. Without prejudice to Article 80 of Regulation (EU) 2016/679, Member States shall ensure that representatives of **platform workers** ~~persons performing platform work~~ or other legal entities which have, in accordance with the criteria laid down by national law or practice, a legitimate interest in defending the rights of **platform workers** ~~persons performing platform work~~, may engage in any judicial or administrative procedure to enforce any of the rights or obligations arising from this Directive. They may act on behalf or in support of a **platform worker** ~~person performing platform work~~ in the case of an infringement of any right or obligation arising from this Directive, with that workers ~~person's~~ approval or in accordance with national law or practice.
2. Representatives of **platform workers** ~~persons performing platform work~~ shall also have the right to act on behalf or in support of several **platform workers** ~~persons performing platform work~~, with those workers ~~persons'~~ approval or in accordance with national law or practice.

SE Comments:

Provisions in labour law directives normally apply only to workers. SE proposes deleting the provision for the persons performing platform work as it risks creating a third category in reality, where the solo self-employed obtain workers rights, which they instead could agree upon in accordance with national contractual law.

Furthermore, is important that the directive does not prevent the application of existing national procedures in this area. SE therefore suggest the amendments "in accordance with national law or practice".

Article 15

Communication channels for platform workers ~~persons performing platform work~~

Member States shall take the necessary measures to ensure that digital labour platforms create the possibility for **platform workers** ~~persons performing platform work~~ to contact and communicate with each other, and to be contacted by representatives of **platform workers** ~~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.

SE Comments:

Provisions in labour law directives normally apply only to workers. SE proposes deleting the provision for the persons performing platform work as it risks creating a third category in reality, where the solo self-employed obtain workers rights, which they instead could agree upon in accordance with national contractual law.

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.~~

SE Comments:

Access to evidence is a question for each Member States and should be up to Member States to decide upon national level. SE propose that the para is removed.

Article 17

Protection against adverse treatment or consequences

Member States shall introduce the measures necessary to protect **platform workers** ~~persons performing platform work~~, including those who are their representatives, from any adverse treatment by the digital labour platform and from any adverse consequences resulting from a complaint lodged with the digital labour platform or resulting from any proceedings initiated with the aim of enforcing compliance with the rights provided for in this Directive.

SE Comments:

Provisions in labour law directives normaly apply only to workers. SE proposes deleting the provision for the persons performing platform work as it risks creating a third category in reality, where the solo self-employed obtain workers rights, which they instead could agree upon in accordance with national contractual law.

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**

~~persons performing platform work~~, on the grounds that they have exercised the rights provided for in this Directive.

2. **Platform workers** ~~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.
3. Member States shall take the necessary measures to ensure that, when **platform workers** ~~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 **platform workers** ~~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.

SE Comments:

Provisions in labour law directives normally apply only to workers. SE proposes deleting the provision for the persons performing platform work as it risks creating a third category in reality, where the solo self-employed obtain workers rights, which they instead could agree upon in accordance with national contractual law.

Article 19

Supervision and penalties

1. **The member states shall designate a** ~~The supervisory authority or authorities responsible for monitoring the application of Regulation (EU) 2016/679 shall also be responsible for monitoring the application of Article 6, Article 7(1) and (3) and Articles 8 and 10 of this Directive, in accordance with the relevant provisions in Chapters VI, VII and VIII of Regulation (EU) 2016/679. They shall be competent to impose administrative fines up to the amount referred to in Article 83(5) of that Regulation.~~
2. The authorities referred to in paragraph 1 and **competent** ~~national labour and social protection~~ authorities shall, where relevant, cooperate in the enforcement of this Directive, within the remit of their respective competences, in particular where questions on the impact of automated monitoring and decision-making systems on working conditions or on rights of **platform workers** ~~persons performing platform work~~ arise. For that purpose, those authorities shall exchange relevant information

with each other, ~~including information obtained in the context of inspections or investigations, either upon request or at their own initiative.~~

3. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to provisions of this Directive other than those referred to in paragraph 1 or of the relevant provisions already in force concerning the rights which are within the scope of this Directive. The penalties provided for shall be effective, proportionate and dissuasive.

SE Comments:

SE suggest that the reference to social protection authorities should be removed, as this is outside the legal basis of the directive, and it has been established that the presumption should not be valid in the area of social law, in line with the CZ PRES note. Furthermore, it should be up to each Member State to designate the supervisory authority in the directive responsible for monitoring the application of articles 6, 7, 8 and 10. Those regulations are as we see it not only in the area of data protection, as COM mentioned during the last SQWP meeting, but also labour law.

Article 20 a (new) **Collective agreements**

1. This Directive shall not affect in any way the right to negotiate, conclude and enforce collective agreements in accordance with national law or practice.

2. Member States may allow the social partners to maintain, negotiate, conclude and enforce collective agreements, in accordance with national law or practice, which differ from this Directive, provided that the purpose of this Directive is ensured at all times.

SE Comment:

The platform economy is a relatively new sector. Digital labour platforms are in the process of adapting to the Swedish labour market model by engaging in collective bargaining and by concluding collective agreements. It is important to respect the autonomy of the social partners and not disturbing that process. Therefore, it is important that the Directive gives the Member States the possibility to entrust the social partners to agree on conditions that differ from those in the Directive, provided that the purpose of the Directive is ensured.

Collective bargaining is an effective way to achieve decent working conditions. By regulating working conditions through collective agreements, adjustments can be made on different levels and amendments be achieved swiftly when needed. Collective bargaining presupposes that the national social partners are given the confidence and space to agree on conditions that differs from the Directive to the benefit for both sides of the negotiations. They need to be able to find their own solutions that are appropriate for the pursuit of the purpose of the Directive.