

DISPATCH NO. 40 – EUROPEAN UNION

THE EU PROPOSAL FOR A DIRECTIVE ON IMPROVING WORKING CONDITIONS IN PLATFORM WORK

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On December 9, 2021, the European Commission put forward a Proposal for a Directive on improving working conditions in platform work.² The Proposal is a part of the European Union's strategic orientation to develop a Europe fit for the digital age and a broader framework of the European Pillar of Social Rights. The Proposal followed two rounds of consultations of social partners under Article 154 of the Treaty of Functioning of the European Union on possible action addressing the challenges related to the working conditions in platform work that took place earlier this year.³ This dispatch outlines the development of the EU approach to regulating digital transformation of the economy and highlights some key provisions of the Proposal.

REGULATING DIGITAL TRANSFORMATION IN THE EU: A SHIFT TOWARD SOCIAL DIMENSION OF DIGITALIZATION

For much of the last decade, the European Union (EU) focus was on ensuring economy growth potential of platform business⁴ and consumer protection⁵ and, most recently, ensuring technological sovereignty and a fair

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2. *Proposal for a Directive of the European Parliament and the Council on Improving Working Conditions in Platform Work*, COM (2021) 762 final (Dec. 12, 2021).

3. *First Phase Consultation of Social Partners under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work*, C (2021) 1127 final (Feb. 24, 2021); *Second-phase Consultation of Social Partners under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work*, C (2021) 4230 final (May 6, 2021).

4. *A Digital Single Market Strategy in Europe*, COM (2015) 192 final (May 6, 2015).

5. Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services, 2019 O.J. (L 186).

and competitive digital economy⁶; protecting workers on platforms was not high on the EU agenda. The Proposal for a Directive on improving working conditions in platform work (Proposal) represents a significant shift in the EU discourse about platform work, but it also denotes the EU as a leader in the regulatory arena where most of the member states have not yet begun regulating platform work in their national legislation.

The year 2017 marks a significant shift aimed at bringing back the social dimension of the EU. Well-functioning labor markets and welfare systems in 21st century Europe, including the issues of digital transformation, were on the agenda of the 2017 Gothenburg Social Summit for fair jobs and growth. Following the Summit, the Council of the EU, the European Parliament, and the Commission adopted The European Pillar of Social Rights. The European Pillar of Social Rights represents a proclamation of a shared political commitment for principles and rights aimed at ensuring equal opportunities and access to labor markets, fair working conditions and social protection and inclusion. The set of 20 principles and rights are not legally binding but serve as a guide to ensure efficient employment and social outcomes. The European Pillar of Social Rights emphasizes that workers have the right to fair and equal treatment regardless of the type and duration of their employment relationship, and any employment relationship that results in precarious working conditions should be prevented. In addition, it calls for assurance of quality of work in any innovative forms of work, as well as the right to social protection for both workers and self-employed. In response to the European Pillar of Social Rights, two initiatives to improve social and employment rights emerged: Directive on transparent and predictable working conditions in the European Union and Council Recommendation on access to social protection for workers and the self-employed, both adopted in 2019.

During the Porto Social Summit in May 2021, the EU leaders, the European institutions, the social partners, and civil society representatives unanimously agreed to reinforce their commitment to the implementation of the European Pillar of Social Rights. The issues of work and employment and welfare state and social protection within digital economy were high on the agenda. The President of the European Commission, Ursula von der Leyen stated that: “*Europe’s social targets must go hand in hand with its green and digital targets.*”⁷

6. *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act)*, COM (2020) 825 final (Dec. 15, 2020); *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, COM (2020) 842 final (Dec. 15, 2020).

7. European Commission, *Porto Social Summit: All Partners Commit to 2030 Social Targets*, (May 7, 2021), <https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=10004&furtherNews=yes>.

Following the renewed commitment to the European Pillar of Social Rights, the European Commission (EC) set plans for a legislative proposal to improve working conditions of people providing services through platforms.⁸ Two rounds of consultation of social partners under Article 154 of Treaty of Functioning of the European Union on possible action addressing the challenges related to working conditions in platform work were initiated on February 24 and April 7, 2021, with the aim of determining whether EU action is warranted and, if so, the possible direction of such actions. Despite disagreement among social partners about the level of the EU action and their unwillingness to enter negotiations to conclude an agreement at the EU level, the EC decided to put forward a proposal for a directive as an appropriate instrument to establish minimum requirements concerning working conditions based on articles 153 (1)(b) and 153 (2)(b) of the Treaty of the Functioning of the European Union.⁹

THE OBJECTIVE OF THE PROPOSAL FOR A DIRECTIVE ON IMPROVING WORKING CONDITIONS IN PLATFORM WORK

The Proposal is aimed at ensuring decent working conditions for people working through platforms. More specifically, it focuses on three specific objectives: establishing a comprehensive framework for correct classification, that is that people working through platforms have or can obtain proper legal employment status and access to associated labor and social rights; ensuring fair, transparent, and accountable algorithmic management; and providing clarity on applicable rules, especially in the case of cross-border activity.

At the same time, the Proposal aims at supporting sustainable growth of digital labor platforms by providing legal certainty and preventing further fragmentation in the single market for digital labor platforms while at the same time creating a level playing field for platforms and between platforms and other (traditional) providers of same or similar services.

THE SCOPE

The proposal's personal scope is strikingly wide—including every person performing platform work in the EU, regardless of their employment status. However, the Proposal does differentiate between persons performing

8. *Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2021 A Union of Vitality in a World of Fragility*, COM (2020) 690 final (Oct. 19, 2020).

9. Article 153 (1)(b) of the Treaty of the Functioning of the European Union empowers the EU to support and complement the activities of the Member States in the field of the working conditions, while article 153 (2)(b) allows the European Parliament and the Council to adopt directives setting minimum requirements for gradual implementation.

platform work who have an employment relationship (platform workers or persons reclassified as platform workers) and self-employed persons performing platform work, whereby the first category receives full protection under the Proposal, while the protection for self-employed platform workers is materially lower, limited to algorithmic management and processing of personal data.

Platform workers include persons who have an employment relationship as defined by law, collective agreements, or practice in member states with consideration to the case-law of the Court of Justice of the European Union and persons performing platform work in the EU who do not have employment contract or employment relationship but who, based on primacy of the facts, could be deemed to have such status. The principle of primacy of the facts means that the determination of the existence of an employment relationship is primarily directed by the facts pertaining to the actual work performed, not contractual conditions.¹⁰ By defining the scope of the Proposal in this way, the instrument is trying to address situations when platform work blurs the lines between employment and self-employment and worker status is ambiguous; at the same time, the Proposal aims to combat bogus self-employment while preserving genuine self-employment.

Another important element of the Proposal's scope is that it is applicable to all types of digital labor platforms providing commercial services, irrespective of their place of establishment or whether such services are delivered on-location or online as long as the service is provided in the EU. The territorial applicability of the Proposal is based on the place where platform work is performed.

REBUTTABLE PRESUMPTION OF AN EMPLOYMENT RELATIONSHIP

To ensure the correct employment status of people performing platform work, the Proposal establishes a rebuttable presumption of an employment relationship. Following the Court of Justice case-law and definitions of employment relationship in member states, the EC based the legal presumption of an employment relationship on the existence of a certain level of control or direction exercised on the part of the digital labor platforms. The Proposal stipulates that the presumption of an employment relationship exists where digital labor platforms control certain aspects of the performance of work such as determining remuneration; requiring adherence to specific rules in relation to workers' appearance or conduct toward the service recipient; supervision of the work performance of electronic verification of the quality of work; restrictions on the freedom to organize work either by restricting

10. In accordance with Int'l Lab. Org. [ILO], *Employment Relationship Recommendation, 2006 (No. 198)*, R198, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535.

choice of working hours and periods of absence, acceptance or refusal of tasks, the use of subcontractors or substitutes and performance of work for any third party or the ability to grow one's own client base. The presumption of an employment relationship will exist if at least two of the criteria listed in the directive are met. As a result, the reclassified worker will enjoy at least minimal labor rights and access to social protection.

Member states are obliged to ensure that the legal presumption is applicable in all administrative and legal proceedings, but also requires member states to ensure that it is possible to rebut the legal presumption in such proceedings. The administrative or legal proceeding to rebut the legal presumption can be initiated either by digital labor platforms or by individuals; in both cases, the burden of proof is on the party arguing that the contractual relationship in question is not an employment relationship. In the former case, digital labor platforms will need to prove that the relationship does not fulfil the criteria for an employment relationship under the national law, collective agreement or practice with consideration of the case-law of the Court of Justice, while in the latter, digital labor platforms are obliged to assist in proceedings by providing all relevant information.

OBLIGATIONS OF DIGITAL LABOR PLATFORMS IN RELATION TO ALGORITHMIC MANAGEMENT

The EC has recognized that algorithmic management poses a specific set of challenges in working relationships that are not sufficiently addressed by the existing (General Data Protection Regulation - GDPR) or proposed instruments (Artificial Intelligence Act) which provide for general safeguards.

The provisions of Chapter III of the Proposal related to algorithmic management aim at increasing transparency and requiring human evaluation of automated monitoring and decision-making systems that significantly affect working conditions of platform workers. These particularly refer to the obligation to inform workers of the fact that such systems are in use and key features of automated monitoring and decision-making systems, as well as to make that information available to labor authorities and platform workers' representatives upon request. Most of these provisions are consistent with the requirements laid down in the GDPR; however, it is important to note that the Proposal requires digital labor platforms to provide information also in cases when their decision-making is supported by automated systems, while the GDPR specifically governs fully automated decision-making tools. The Proposal further requires digital labor platforms to establish human oversight of automated systems and internal procedures to redress of significant decisions taken or supported by automated systems. In addition, the Proposal

stipulates more specific rules about processing personal data of platform workers.

The provisions of this chapter related to obligation of transparency and personal data processing, human monitoring and evaluation of decisions taken or supported by automated systems and right to review significant decisions apply to persons without an employment relationship—that is, genuine self-employed.

DECLARATION OF PLATFORM WORK

The third and final objective of the Proposal is to provide clarity on the application of rules and support competent authorities in enforcing those rules. This is particularly important given that the nature of platform work allows for increased cross-border or transnational provision of services contributing to the complexity of contractual relationships and an increased risk of non-compliance and instances of undeclared work. To address these challenges, the Proposal obliges digital labor platforms to declare work to competent labor and social protection authorities of the member state where work is performed. This obligation only refers to digital labor platforms clearly identified as employers. Despite being considered during the consultation phase, the Proposal does not have any explicit rules on applicable law and jurisdiction or social security coordination in a case of cross-border performance of platform work.

CONCLUSION

The EC Proposal for a Directive on improving working conditions in platform work marks an important shift in the regulation of platform work and demonstrates the EU's commitment to its social dimension and its ambition to become the global standard-setting leader. Among its most important features is the Proposal's broad personal scope; the EC managed to overcome pressures to fragment the regulation of platform work by differentiating between on-location and online platform work or regulating just specific sectors of digital labor platforms. The Proposal has tackled the issue of the classification of platform workers with the highest possible standard at the time, introducing the rebuttable presumption of an employment relationship. The criteria listed in the Proposal for the legal presumption are easily applied to most digital labor platforms where work is performed on-location and to some extent can cover platform workers performing work entirely online, especially those working for digital labor platforms exercising a high degree of control mostly found on so-called crowdwork platforms. The provisions regarding algorithmic management do not just build on and reinforce provisions of the GDPR but provide specific

measures to protect workers on digital labor platforms and established procedures for redress. The provisions stipulating declaration of platform work along with territorial applicability based on the territory where work is performed should facilitate enforcement and applicability of rules; however, some aspects of platforms' cross-border operations and transnational nature of online labor platforms may still pose issues of choice of law and conflict of laws not addressed by the Proposal. Strikingly absent from the Proposal are provisions on collective bargaining for genuine self-employed. During the consultation phase the EC was reluctant to weigh in on this issue and was content with drafting Guidelines clarifying the application of EU competition law to collective agreements of solo self-employed people seeking to improve their working conditions.¹¹ Finally, the Proposal sets minimum requirements concerning working conditions on digital labor platforms for member states, leaving possibility for member states to provide greater protection.

Given the renewed commitment to the European Pillar of Social Rights and the strong stance of the European Parliament toward regulating platform work and support from the Council, European Economic and Social Committee and the Committee of the Regions, it is likely that the Proposal will go through the legislative process without major changes. Once adopted, member states will have two years to ensure that at least minimum requirements set by the EU are implemented if not to provide more favorable conditions.

The set of legislative instruments adopted under the European Pillar of Social Right, the Directive on transparent and predictable working conditions in the European Union and Council Recommendation on access to social protection for workers and the self-employed along with Proposal for a Directive on adequate minimum wage and Directive on pay transparency along with this Proposal for Directive on improving working conditions in platform work will, without a doubt, strengthen the social dimension of the EU and contribute to improved labor and social protection.

11. Draft Guidelines on the application of the EU competition law to collective agreement regarding working conditions of solo self-employed people providing services aims at clarifying the circumstances in which the EU competition law does not preclude improving working conditions of certain categories of solo self-employed by means of collective agreement. As part of a package for improving working conditions in platform work, the draft Guidelines points to the direction of explicitly allowing collective bargaining for all platforms workers regardless of an employment status.