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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

On improving working conditions in platform work

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1. Can the Union act? What is the legal basis and competence of the Unions' intended action?

1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?

The legal basis for a Directive on improving working conditions in platform work would be a combination of Articles 16 and 153 TFEU.

Article 153 TFEU provides the legal basis for the Union to support and complement the activities of the Member States with the objective to improve working conditions, social security and social protection, workers' health and safety, and the information and consultation of workers, among others. It would thus cover the provisions on the correct determination of the employment status, provisions on specific algorithmic management rights pertaining to the working conditions of workers, information and consultation and health and safety at work, and provisions on the transparency of platform work. Article 16 TFEU provides the legal basis for the Union to lay down rules relating to the protection of individuals with regard to the processing of personal data. It would cover provisions on specific algorithmic management rights for self-employed people and workers vis-à-vis the processing of their data by automated monitoring and decision-making systems.

1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?

In the case of social policy and data protection, the Union's competence is shared for the aspects defined in the Treaties. For the purposes of this initiative, it is relevant that the Union has shared competence as regards social policy (and most notably, working conditions in accordance with Article 153(1)(b) TFEU), and the protection of personal data (Article 16 TFEU).

2. Subsidiarity Principle: Why should the EU act?

2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2[1]:

- Has there been a wide consultation before proposing the act?
- Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?

Before proposing the act, the Commission consulted widely. On 24 February 2021, it launched a two-stage consultation of the European Social Partners, based on Article 154 TFEU. The first stage ran until 7 April 2021. The second stage ran between 15 June and 15 September 2021.

Before launching the two-stage consultation of Social Partners, the Commission organised a series of informal fact-finding events and workshops, engaging social partners, associations representing people working through platforms, platform companies and associations representing platforms, academics and civil society actors.
In September 2021, after the end of the two-stage consultation of Social Partners, the Commission organised two further exchanges with platform companies and representatives of people working through platforms.

[1] Available online.

The Explanatory Memorandum of the act and the Impact Assessment report (Section 3) contain a section on the Principle of Subsidiarity (see question 2.2 below).

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

Yes, the explanatory memorandum contains an adequate justification of why the proposal is conform with the principle of subsidiarity. The following is a relevant excerpt of it (it reflects the arguments presented in the IA report, Section 3).

Flexibility and constant adaptation of business models are key features of the platform economy, whose primary means of production are algorithms, data and clouds. As they are not tied to any fixed assets and premises, digital labour platforms can easily move and operate across borders, swiftly starting operations in certain markets, sometimes closing down for business or regulatory reasons and re-opening in another country with laxer rules.

While Member States operate in one single market, they have taken different approaches on whether or not to regulate platform work, and in what direction. More than 100 court decisions and 15 administrative decisions dealing with the employment status of people working through platforms have been observed in the Member States, with varying outcomes but predominantly in favour of reclassifying people working through platforms as workers. , with varying outcomes but predominantly in favour of reclassifying people working through platforms as workers. In addition to the legal uncertainty this entails for the digital labour platforms and for those working through them, the high number of court cases points to difficulties in maintaining a level playing field among Member States as well as between digital labour platforms and other businesses, and to avoid downward pressure on labour standards and working conditions. Certain digital labour platforms may engage in unfair competitive practices with respect to other businesses, e.g. if they do not comply with the same rules and operate under the same conditions. Consequently, EU action is needed to ensure that the highly mobile and fast-moving platform economy develops alongside the labour rights of people working through platforms.

Digital labour platforms are often based in one country, while operating through people based elsewhere. 59% of all people working through platforms in the EU engage with clients in another country.[2] This adds complexity to contractual relationships. The working conditions and social protection coverage of people performing cross-border platform work is equally uncertain and depends strongly on their employment status. National authorities (such as labour inspectorates, social protection institutions and tax authorities) are often not aware of which digital labour platforms are active in their country, how many people are working through them and under what employment status the work is performed. Risks of non-compliance with rules and obstacles to tackling undeclared work are higher in cross-border situations, in particular when online platform work is concerned. In this context, relevant actions aimed at tackling the cross-border challenges of platform work, including notably the lack of data to allow for a better enforcement of rules, are best taken at EU level.

National action alone would not achieve the EU's Treaty-based core objectives of promoting

[2] PPMI (2021). Study to support the impact assessment of an EU initiative on improving working conditions in platform work. Available online. Section 7.1.

sustainable economic growth and social progress, as Member States may hesitate to adopt more stringent rules or to strictly enforce existing labour standards, while they compete with one another to attract digital labour platforms' investments.

Only an EU initiative can set common rules that apply to all digital labour platforms operating in the EU, while also preventing fragmentation in the fast-developing single market for digital labour platforms. This would ensure a level playing field in the area of working conditions and algorithmic management between digital labour platforms operating in different Member States. Hence, the specific EU added value lies in the establishment of minimum standards in these areas which will foster upward convergence in employment and social outcomes across the Union, and facilitate the development of the platform economy across the EU.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

The objectives of the proposed initiative cannot be sufficiently achieved by the Member States acting alone. There is therefore necessity for EU to ensure minimum social standards in platform work in all Member States, prevent cross-border legal fragmentation and uphold the functioning of the internal market.

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

Platforms' business models are intrinsically cross-border. This cross-border nature is indeed one of the main problem drivers identified by the IA report (Section 2.2.3), where the issue is analysed in depth and its consequences for stakeholders quantified to the extent possible (Sections 2.3 and 5.1 of the IA report).

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty[3] or significantly damage the interests of other Member States?

National action alone or the absence of EU-level action would not achieve the EU's Treaty-based core objectives of promoting sustainable economic growth and social progress, as countries may compete with one another to attract platforms' investments by lowering the social standards and working conditions of people working through them or simply by not enforcing relevant rules.

Some Member States may also see their interests damaged by the limitations posed to policy action by the legal uncertainty and lack of clear information on platform work stemming from heterogeneous national legislative approaches across the EU and the platforms' atypical way of recruiting a large workforce outside of traditional labour law practices, as well as by authorities' lack of means to ensure compliance of online platforms with such rules.

(c) To what extent do Member States have the ability or possibility to enact appropriate measures?

[3] Available online.

While Member States have, to some extent, the ability to enact appropriate measures at national level, these would only have a limited impact and would not address the cross-border challenges of platform work. Notably, they would face a risk of race-to-the-bottom competition in social standards between countries, caused by the lack of a level playing field in employment and algorithmic management rules. They would also risk engaging in misinformed policy-making and enforcement, due to insufficient access to data concerning international, multi-market digital labour platforms.

(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?

The problem and its causes do not vary substantially across the national, regional and local levels of the EU. Although platform work is mainly carried out in cities and urban centres, the same challenges related to the employment status, algorithmic management and the cross-border nature of platform work persist when it is to be found elsewhere.

(e) Is the problem widespread across the EU or limited to a few Member States?

Although platform work is more prevalent in Western and Southern Member States (ES, NL, IT, FR, DE), its related challenges are observable in every market where platforms operate, including in Eastern Member States (e.g. PL, RO) where platform work is less widespread. The fact that they have been more prominent in the media and on the policy agenda of certain Member States can be explained with different industrial relations systems, where certain actors have been more successful in bringing the issues to the fore.

(f) Are Member States overstretched in achieving the objectives of the planned measure?

No, the proposed measures are proportionate, as they impose few administrative burdens on Member States while bringing substantial social benefits (e.g. increased fiscal revenues, improved policy-making quality, better working conditions and more adequate access to social protection for people working through platforms).

(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?

Different authorities across the EU may have heterogeneous views on how to address the challenges of platform work, with some Member States preferring harmonising approaches and others demanding that many issues be tackled through social dialogue.

2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?

There are clear benefits stemming from EU-level action, which outweigh the costs caused to some stakeholders. EU action allows for a more efficient pursuit of the objectives of the initiative. This will tackle legislative fragmentation and provide legal clarity to all stakeholders concerned, thereby preventing social dumping and improving the functioning of the internal market.

(a) Are there clear benefits from EU level action?

Yes, there are clear benefits stemming from EU-level action, notably the establishment of common minimum standards, that would prevent race-to-the-bottom competition and foster upward social convergence, and the facilitation of cross-border data access and sharing for effective rules-enforcement and better policy-making purposes.

(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?

(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

The objectives can be more efficiently met at EU level (see Question 2.3). A more homogeneous approach would have the advantage of increasing legal certainty for digital labour platforms, many of which are active at international level. This would allow for economies of scale and scope for these market actors through improved functioning of the internal market.

(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

(e) Will there be improved legal clarity for those having to implement the legislation?

The benefits of EU-level action will outweigh the loss of competence of the Member States (see Question 2.3), including through improved legal clarity for those having to implement the legislation (national and local authorities, national and local courts, platform companies and the worker representatives) and improved minimum rights for people working through platforms.

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

Yes, the explanatory memorandum contains an adequate justification of why the proposal is conform with the principle of proportionality. The following is a relevant excerpt of it.

The proposed Directive provides for minimum standards thus ensuring that the degree of intervention will be kept to the minimum necessary in order to reach the objectives of the proposal. Member States which have already more favourable provisions in place than those put forward in the proposed Directive will not have to change or lower them. Member States may also decide to go beyond the minimum standards set out in the proposed Directive.

The principle of proportionality is respected considering the size and nature of the identified problems. For instance, the rebuttable presumption proposed to address the problem of misclassification of the employment status will only apply to digital labour platforms that exert some level of control over the performance of work. Other digital labour platforms will thus not be concerned by the presumption. Similarly the provisions on automated monitoring

and decision-making systems do not go beyond what is necessary to achieve the objectives of fairness, transparency and responsibility in algorithmic management.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

The foreseen measures are an appropriate way of achieving the objectives of this EU action, in view of their adherence to both the proportionality and subsidiarity principles.

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

Yes, it notably focuses on tackling the incentives to race-to-the-bottom competition in social standards through increased legal certainty on employment and algorithmic management rules and addressing cross-border challenges (see Question 2.3).

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

Yes. An EU directive is the most appropriate legal instrument to establish common minimum standards in platform work while allowing Member States and enforcing authorities sufficient flexibility in the transposition phase to cater rules to specific national, local and industry-level contexts and stakeholders.

(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)

Yes. Member States who wish to put forward more stringent rules may do so, provided they build on the common minimum standards established by this initiative.

(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?

The initiative does should not create additional financial or administrative costs for the Union or other public authorities (including national, regional and local government), since the costs of processing misclassification claims would arguably fall under the already foreseen running costs of national courts and/or already existing administrative bodies. At the same time public budgets would see increased revenues from tax and social security contributions. Platforms would face costs related to reclassification of employment status, with resulting benefits for people working through them (in terms of better working conditions and access to social protection), consumers (in terms of better service quality and overall consumer welfare) and competing companies (in terms of better levelled playing field and legal certainty (see Impact Assessment report, Section 6 and Annex 3). Consumers may also be faced with some costs, in terms of higher service prices. These costs would be proportionate and commensurate to the pursuit of the initiative's objectives.

(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
During the consultation phase of the preparation of the initiative (including the two-stage consultation of social partners and all fact-finding workshops and meetings held with relevant stakeholders, see Annex 2 of the IA report) national, regional, and sectoral views and circumstances were thoroughly gathered and subsequently taken into account (see IA report, particularly Section 6, Annex 3.3 and Annex A4.2).