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MEMORANDUM

To Delivery Platforms Europe

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Ref. **Legal assessment of the European Parliament's amendments to the Platform Work Directive Proposal : "Grasp all, Lose all"**

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(1) On 12th December 12th 2022, just four days after the Council of Employment Ministers failed to reach a qualified majority on a compromise proposal put forward by the Czech Presidency, the Employment and Social Affairs Committee of the European Parliament (the "**Parliament"**) reached an agreement on amendments[1] to the platform workers' directive[2] proposed by the European Commission ("the **Commission**").

(2) The Czech Presidency worked hard over 6 months to find a middle ground between Member States that want to avoid a catch all approach that would impact the genuinely self employed and those who do not find it ambitious enough. While the Czech Presidency almost succeeded in reaching such a compromise, the Parliament's amendments take the file in a completely different direction, much more drastic and radical than the initial Commission proposal. Hence the likelihood of convergence between the EU institutions' on this legislative proposal becomes remote in the short term.

(3) The new direction of travel proposed by the Parliament ignores all basic principles of EU and national case law regarding the definition of independent workers vs employees. Thus, it creates an unprecedented legal uncertainty which risks embracing all 30 million of workers in a radical change forcing long litigations.

(4) Since this has never been the Commission's intention, this raises the question of possible withdrawal of the proposal as allowed by Article TFUE when the Legislator risks denaturing its proposal.[3]

(5) The present note focuses on the main points raised by the Parliament among around 200 amendments.

[1] Draft European parliament legislative resolution on the proposal for a directive improving working conditions in platform work (COM(2021)076), *plenary setting*, first reading, 21.12.2022.

[2] Proposal for a Directive of the European parliament and of the Council on improving working conditions in platform work, COM(2021) 762 final, 2021/0414 (COD), Brussels, 9.12.2021.

[3] CJUE, 14 April 2015, *Council vs Commission*, C-409/13, par. 83

1. AUTOMATIC PRESUMPTION OF EMPLOYMENT

(6) Contrary to the Commission proposal which sets a procedure and criteria to "*ascertain*" a rebuttable presumption as to whether a platform worker is an employee or self-employed, the Parliament sets as a principle that the presumption that a platform worker is an employee of the platform should be "*applied*". After platform workers or local authorities initiation of a case, instead of a procedure and criteria - based on established case law including the hierarchical relationship as mere criteria[4] - that decide whether a platform worker is an employee as proposed by the Commission, the Parliament removes all criteria, extending the presumption automatically to all platform workers (Art. 4 § 1, sub § 1), including those which are and would finally be considered as genuine independent.

(7) This alters the intention, the scope and the effect of the proposal, in a way that could be qualified as a denaturation of the proposed Directive in the meaning of the case law.[5]

(8) The Parliament corrects this systematic approach and thus introduces some contradictions in the text by stating that "*where competent authorities (…) consider that a platform worker might be wrongly classified they shall apply the presumption*" (Art 4, §1, sub§ 1a). By doing so, the Parliament either breaches the "harmonisation[6]" resulting from its approach : what could be the added value for the Internal market to define ex ante in a Directive all platform workers as employees, if it is at the discretion of national authorities to apply the principle and designate them as such ? Or the Parliament is in fact locking national authorities in a false and burdensome escape game : Nothing in the text explains how this could be done and on which criteria.

(9) This creates legal uncertainty not only for both platform workers and for the platforms, but also for national authorities. This raises the risk of arbitrariness and increases the national *alea* compared to the current situation. To limit damages, the Parliament offers the possibility for the presumption to be rebutted by the platform or the worker. However, by reversing the criteria as set by CJEU established case law and reinforcing them, the text makes such rebuttal almost impossible. Two cumulative conditions are set by Parliament (Art. 5 § 3a):

- The contractual relationship in question is not an employment relationship as defined by the Member State in question and the person performing platform work is free from control and direction of the digital labour platform.
- The platform worker is "*usually engaged in an independently established trade, profession or business of the same nature as that with which the work performed is related*".

(10) The 2nd condition is unclear and not explained in any corresponding recital. De facto the implication is that a platform worker can only be regarded as self-employed if he or she pursues the same activity outside the platform as a free agent unaffiliated to any organisation. In other words, a ride-hailing service driver, which is a traditionally established trade, might also require to have a taxi licence

[4] CJEU, 22 April 2020, case C-692/19, *Yodel,* par. 28 : "*the issue whether such a relationship exists must, in each particular case, be* ***assessed on the basis of all the factors and circumstances*** *characterising the relationship between the parties".*

[5] CJEU, 14 April 2015, case C-409/13, *Council / Commission*, par. 83: "*It must be accepted that, where an amendment planned by* ***the Parliament*** *and the Council* ***distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its raison d'être, the Commission is entitled to withdraw it*****"**.

[6] See objectives of "minimum harmonization" set by Parliament in its amendment to recital 49.

and to work as a taxi driver to be regarded as self-employed, depending on how the second criterion of the rebuttal would be implemented nationally.. Thus the Parliament puts at risk the status of "complementary independent" that allows workers, even employees or pensioners, in a lot of Member States to supplement their income at a fiscal and social lower cost justified since they have another "main activity"[7]. For obvious reasons, the loss of this complementary independent status will mostly affect low incomes or young entrepreneurs using such ancillary independent activities to live during their start-up phase. Additionally, this requirement ignores the democratisation of access to certain professions that technology facilitated. Platforms have made it easy for many to engage in supplementary activities, also in sectors where existing self-employment has been marginal (e.g. delivery). It would therefore create a lock-in effect where only high paying freelance sectors (i.e. coding) could enjoy the benefits of technology.

(11) As to the 1st condition, Article 5 § 3 b proposed by Parliament contains some indications on the elements that should be "*taken into consideration*" to determine whether there is "*control and direction*" by the platform. These are 8 criteria which reflect to some extent the 5 criteria proposed by the Commission to ascertain whether platform work should be presumed to be an employment relationship. However, these criteria are widely expanded, made much stricter, and since they are used the other way round (not to ascertain the qualification, but to rebut the presumption), hence significantly raising the bar for a rebuttal, if not making it almost impossible. Most importantly, these elements are not exclusive to self-employment/employment making them poor criteria to consider the nature of an employment relationship.

(12) They cover the level of remuneration, control over how the work is performed, preventing contacts with clients, digitally tracking the work performance, appearance and conduct, preventing work for a third party, restricting the use of subcontractors, restricting freedom of choice for social protection. The 8 criteria in question are just a set of indicators which can be "*taken into consideration*" by authorities, none of them giving decisive guidance. This creates considerable legal uncertainty for platforms and platform workers which can in fact not know in advance which elements will be decisive for a rebuttal to be accepted and cannot adapt their business models to ensure compliance with legal requirements. . This legal uncertainty will affect workers, both regarding job opportunities and comfort regarding the nature of the contract signed. This also creates a considerable risk of arbitrariness in decisions by authorities on such rebuttals.

(13) The Parliament limits the use of subcontractors. Attempting to address concerns that some platforms are avoiding the application of national legislation and jurisdiction by recruiting platform workers through subcontractors, it introduces amendments on intermediaries and subcontracting. Art. 12 b) stating that the platform is directly liable for any infringement to workers' right of a subcontractor of its platform workers. In addition, Art. 3 par. 2b) foresees that the proposed Directive should apply in full to "*platforms exerting the functions of temporary work agencies*".

(14) Although these amendments go in the same direction as similar amendments introduced in the compromise proposal of the Czech Presidency, they may reduce the flexibility of operations for digital platforms. Neither the Council, nor the Parliament have assessed the impact on such amendments on Interim and Temp workers even outside the usual drivers and couriers ; indeed it remains unclear as

[7]Typically the Belgian status of "indépendant complémentaire"
https://www.belgium.be/fr/economie/entreprise/creation/independants/complementaire

to whether temporary work agencies will be covered by this Directive as soon as they function as digital platform, how this will be articulate with Directive 2008/104/EC[8] and how far this will affect competition between online and brick and mortar Temp Agencies.

(15) From a legal point of view, all these elements taken together covering and impacting all independent workers, including all "genuine independent" and "complementary independent" that would in the end (long end) be qualified as such according to EU and national law, constitute a violation of the definition of employee vs workers as set by established CJEU case law since *Lawrie-Blum* case in 1986.[9] Furthermore, this would also be in breach of the definition of services and thus of the freedom to provide services under EU Treaty (Article 56 TFUE), as well as of the Freedom to conduct a business as protected by Article 16 of the EU Charter of fundamental rights.

(16) Finally, the Parliament's amendments double down on two contentious issues that were strongly rejected by a significant group of Employment Ministers in the Council:

- Article 5, § 3c specifies that proceedings for a rebuttal do not have a suspensive effect; Practically, this means that even if there is no explicit mentioning of non-suspensive effect between the presumption and the rebuttal, nothing prevents the presumption standing during the legal and judicial proceedings, and a the platform having to assume the obligations of an employer until a decision is made, even if all criteria to qualify as independent worker are fulfilled under the current established case law. In most Member States, this means practically years of legal uncertainty on the status of the platform workers. Such a provision has been fought by a significant group of Member States willing to avoid excessive administrative burden for the self-employed, for the platforms, public administrations and courts, and safeguard national prerogatives as protected by subsidiarity principle. As they form a blocking minority, it is hard to see how the Parliament's position can be reconciled with the Council on this issue.

- Art. 3 § 2 requires that when platforms are recognized to be employers, they shall comply with all obligations relating to "*income tax and financing of social protection*". This amendment is amplified in Art. 11 §1, where Parliament requires that platforms should inform authorities about their platform workers and their status (thus including genuine independent) and share all relevant data in order to "*comply with their fiscal and social protection obligations*". Again, without prejudice to the need to declare employees under labor law, a significant group of Member States is likely to form a blocking minority are opposing these new obligations regarding tax, criminal and social security proceedings, which go against Member States' competences and procedures.

(17) In addition, based on the most recent case law,[10] we have doubts that making platforms liable for fully reporting personal data of genuine independent workers to authorities would be compatible with the GDPR[11] .

[8] Directive 2008/104/EC of 19 November 2008 on Temporary Agency Work.

[9] CJEU, 3 July 1986, case 66/85, *Lawrie-Blum*, para 17. "for and under the direction of another person".

[10] CJEU, 22 November 2022, joined cases C-37/20 and C-601/20, *Luxembourg Business Registers.*

[11] Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

(18) Overall, if the Parliament's approach on the presumption would risk creating significant legal uncertainty and would risk being detrimental to both platform workers and platforms. According to the Commission estimates, there were 28 million platform workers in 2020 (43 million expected in 2025), with 5.5 million are in risk of being wrongly classified out of which it is estimated that between 1.7 million and 4.1 million would be reclassified as a result of the Commission's proposal.

(19) If the Parliament's approach is adopted, a large number of 28 million platform workers could be be presumed to be employees, resulting in a huge number of rebuttal proceedings creating procedural bottlenecks.

(20) ***From an economic*** point of view, the cost could be significant since the cost of both the (wrong) qualification of genuine independents and of the rebuttal procedure will destroy some of these jobs ; ***from a practical*** point of view, it does not make sense to plan all national authorities and jurisdictions to be enshrouded by procedures to qualify as independent, workers who are and have always been independent ; ***from a social*** point of view, in the end, the qualification of platform workers will just be hostage to fortune ; ***from a legal point of view***, the amendments contain clear breaches of CJEU case law and of EU fundamental principle, notably Personal data protection, Legal certainty and Freedom to conduct a business. This is against the limits inherent to Parliament's rights to amend Commission's proposal, which does not allow such denaturation of the initial proposal.

As Parliament is keen on a strict application of Better Regulation principles which also applies to the Legislator, it should normally be expected that an impact assessment should be produced by Parliament services[12] to complete the Commission's impact assessment and quantify the costs of the major changes introduced by their amendments.

2. Algorithmic Management Under Heavy Control.

(21) The essence of the Parliament's amendments is to substantially increase the restrictions already introduced by the Commission in its proposal both on the processing of workers' personal data and the use of automated systems in the management of the platforms. For the Parliament, platform workers should have unlimited access to information on how the algorithms work, how their performance is monitored and evaluated, which personal data are being used and how their behaviour affects decisions taken by automated systems.[13] By doing so, the Parliament risks ignoring and even jeopardising critical elements of the functioning of platforms, as well as the impact this may have on the rest of the participants in the marketplace. For example, there is a risk that unlimited data and information sharing would severely hamper the right of consumers to data protection and to safety.

(22) In several amendments to Art. 6 §2., Parliament adds to the already numerous obligations set by the Commission proposal to inform platform workers on the automated monitoring systems; these additions cover in particular the pricing of individual assignments, the aim of the monitoring, recruitment, promotion,

[12] European Parliamentary Research Service (EPRS).

[13] The Parliament rapporteur wanted to extend these new obligations to all workers, not only platform workers, as indeed many workers outside platforms are also impacted by algorithms in their daily work; she finally had to give up, given the burden it would create on businesses and backlash this proposal caused.

ranking, access to work assignments, performance & behaviour evaluation, termination of accounts.

(23) Parliament also foresees that any change to the automated system of the data processing system should be subject to prior information of the platform workers (Art. 6 § 3.) and even to an impact assessment (Art. 6 § 5 a), while Art. 7 § 1 requires from platforms an annual impact assessment of decisions supported by automated systems. The latter impact assessment which should cover discrimination issues, health & safety, fundamental rights should be submitted to labour and data protection authorities and lead to discontinuing the automated system in case risks are established.

(24) Furthermore, Parliament adds several new prohibitions in the process of personal data of platform workers in Art. 6 § 5. They cover data processing concerning race, political opinions, religion, health, sexual orientation, but also add prohibition of biometric technologies, and discrimination. In fact, these additions are redundant, as both national and European legislations fully provide for similar prohibitions. The Artificial Intelligence Act proposed by the Commission in April 2021 also introduced similar restrictions and prohibitions, including on the use of biometric technologies.

(25) Several amendments are added to Art. 7 of the Commission proposal to ensure human oversight on all decisions significantly affecting working conditions (§1). The objective is that a human must always remain the ultimate decision-maker for all essential aspects of professional life. Therefore, algorithms should not be able to decide on their own on the dismissal of workers or the organisation of their working schedule (Art 6 §2 a)).

(26) However, these provisions, just like the initial proposals of the Commission on this point are redundant. They duplicate Article 22 of the General Data Protection Regulation (GDPR), which provides that "*the data subject shall have the right not to be subject to a decision based solely on automated processing", and that "the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision."*

(27) Article 22 of the GDPR has already been actively used to protect against automated decision-making in the context of digital platforms. This has been an active area for active litigation: for example, drivers have been challenging their algorithm profiles in courts. In other words, Parliament's amendments are redundant with the existing legal protection already granted to workers.

(28) Such duplications are even more clear when considering the Commission proposed regulation on Artificial Intelligence (AI) which sets harmonised rules for certain AI systems, notably for high-risk AI systems which include "*AI intended to be used for making decisions on promotion and termination of work-related contractual relationships, for task allocation and for monitoring and evaluating performance and behaviour of persons in such relationships*." As soon as the AI proposal is adopted, digital platforms will have to perform a conformity assessment by a third party covering risk management, transparency, interpretation of decisions, and guaranteeing human oversight while in use.

(29) Article 22 of the GDPR and the proposed Regulation on AI means that platforms will be subject to harmonised rules across the Internal Market which oblige them to provide drivers with information about all AI systems and algorithms used to monitor, supervise, and evaluate them. The amendments proposed by Parliament

(as the Commission proposal) risks creating confusion: the GDPR and the AI proposal are both regulations, hence directly applicable acts, contrary to the Platform Work proposal, which is a Directive, requiring transposition in Member States, with the risk of divergent national rules.

3. EXCESSIVE ADMINISTRATIVE BURDEN AND CONTROLS

(30) The Parliament's amendments add a considerable new administrative burden on platforms, authorities and new controls, without any proportional benefit for workers. Here are a few examples taken from the amendments across the Committee's proposed articles:

- For the implementation of the employment presumption, amendments ask Member States to provide guidance (which may prove difficult in the absence of the criteria deleted by Parliament), capacity building and training, sufficient resources for labor inspectorates, technical assistance regarding algorithms and even ask to establish national targets for inspections of platforms (Art. 4 § 3). This is far reaching and will not be accepted by Member States as interfering with their national competences.

- In addition to the requirement of impact assessments for data protection and to review the use of automated systems, workers must be informed about data transfers, and have the right to erase such data (Art. 6 § 5 a), b), c)). For instance, workers might contest how the automated tools assess time for completing a delivery. Again, these amendments duplicate similar provisions of GDPR. Moreover, all the algorithm's elements to assess the workers' performance could be subject to collective bargaining as per amendments to Art. 8 & 9.

- Platforms are requested to share much more information with national authorities. Article 11 is amended by Parliament to say that platforms must inform authorities of work performed by all platform workers, irrespective of their status, in order to "comply with fiscal and social obligations" and Article 12 §1 details the information to be submitted (average weekly hours, average income etc.).

- Platforms are requested to develop policies against violence and harassment (Art. 15 § 1a), again an issue fully covered under national and European legislations applicable to the workplace.

- Cross-border cooperation is increased, with automatic exchange of information between labour, social protection and tax authorities (Art. 12 a).

(31) Moreover, Parliament has added several paragraphs to Art. 19 requesting the establishment of dissuasive financial penalties in case of infringement, for instance "*setting a percentage of the digital labour platform's total annual turnover in the preceding financial year*".

4. CLARIFICATION/ADAPTATION OF THE SCOPE.

(32) Finally, Parliament wants two adaptations regarding the scope of the Directive. Recital 17 c) clarifies that platforms providing outsourcing or task allocation for many clients online (crowdwork or microwork platforms) would be covered. According to the Parliament, no micro-work should escape from its artificial requalification of workers.

(33) Adding to confusion and competition imbalances, Recital 17 b) establishes a distinction between ride-hailing platforms which would be covered by the new rules, and taxi dispatch services which would not be covered. ("*Taxi dispatch services, as regulated under national law and practice, can be distinguished from ride hailing digital labour platforms, when they are merely an 'add-on' to a pre-existing service and only connect genuinely self-employed licensed taxi drivers with their customers, sending the communications received from persons seeking a taxi service to licensed taxi drivers, provided that they do not exert any type of control or direction, in accordance with this Directive, …/…").* What will happen to licensed PHV drivers that are offering pre-existing services and are genuinely self-employed even before the invention of platforms if not again face more restrictions than taxis with whom they compete for booked journeys.

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