



22 November 2023

Members of the Council of the European Union

Dear Sir/Madam,

I am writing to express Privacy International's (PI) concerns in relation to the European Union Council's (the Council) position on the Platform Workers' Directive (EU) 2021/0414 (PWD).

We believe that Articles 4 and 4a of the Council's general approach must be amended to prevent many genuine platform workers being excluded from the legislation's critical protections surrounding algorithmic management and automated decision making (ADM), in particular those set out in Chapter III of the Council's general approach.

Privacy International (PI) is a non-profit (EU Transparency Register: 78180074927-85) that campaigns against unlawful corporate and government surveillance. We have followed the progress of the PWD with interest since the publication of the Commission's proposal back in December 2021.

Overall, PI welcomes the aim of the PWD as a mechanism to protect workers' rights in response to transformations in the workplace, specifically with regard to the growing adoption of algorithmic management systems and the risks that accompany it. PI welcomes in particular the efforts to improve the protection of personal data and increased transparency, fairness, and accountability in algorithmic management to ensure workers are not unfairly affected by ADM systems.

However, as we noted in our initial recommendations on the Commission's proposal, the protections around algorithmic management and ADM should apply as widely as possible given the stated purpose of the PWD and the rapidly changing nature of work.¹

In that regard, PI is concerned about the approach that the Council has taken towards the presumption of employment in its June 2023 proposal. The current framing of the presumption risks undermining a premise that underpins the PWD – namely that protections against potential harms resulting from algorithmic management should apply to all platform workers. This is

¹ See our initial recommendations on the PWD, available at <https://privacyinternational.org/advocacy/4961/privacy-internationals-proposed-amendments-eu-directive-working-conditions-and>

notwithstanding the application on paper of the protections at Chapter III of the Council's general approach to all platform workers.

The Council's position that platform workers must meet at least three of seven criteria in order to be legally presumed to have employment status increases the risk that significant numbers of them will be misclassified as freelancers and self-employed. We note that the problem of misclassification has been a fundamental issue at the heart of platform work that national courts have been grappling with in recent years.² PI fears that this risk will result in large numbers of platform workers in practice excluded from the new algorithmic management protections in the legislation, in particular the provisions at Chapter 3, for the following three reasons:

1. First, the Council's proposal presupposes an equality of arms and bargaining power between platforms and their workers. At least some of the protections against harmful deployments of ADM (such as the human review of significant decisions enshrined at Article 8 of the Council's general approach) rely on workers themselves invoking certain rights. Freelance platform workers are less likely than employees to have the resources and bargaining power (including through the assistance of trade unions) to invoke these protections.
2. Second, the proposals of both the Commission and the Parliament included a provision that prevents legal proceedings initiated by platforms seeking to rebut the presumption from having a suspensive effect on the application of the presumption. By contrast, Article 4(a)(5) of the Council's general approach would allow Member States to provide that such litigation has a suspensive effect on the application of the presumption. We consider that this is likely to deny critical protections to platform workers throughout the course of potentially lengthy litigation for the reasons set out in our first point above. PI therefore considers that the position as regards the suspensive effect of litigation on the presumption should be aligned with the proposals of both the Commission and Parliament.
3. Thirdly, a number of the criteria that workers will need to meet in order to satisfy the rebuttable presumption may actually incentivise behaviours by platforms that are directly contrary to the aims and purpose of the PWD. For example, digital platforms could use dynamic pay and pricing models (itself arguably a form of algorithmic management that can be harmful for workers who do not have transparency as regards their rate of remuneration) to prevent workers from demonstrating that there is an upper limit on their rate of remuneration (Article 4(a)). The same is true of the criterion relating to the use of

² For example, in 2021 the Amsterdam Court of Appeal ruled that both riders and drivers working for Deliveroo and Uber are employees: <https://iuslaboris.com/insights/uber-drivers-are-employees-new-ruling-from-the-netherlands/>



substitutes (Article 4(db)). Platforms have been documented³ making use of substitution clauses to avoid their workers being recognised as employees. The current framing of the presumption could therefore encourage platforms to continue to use harmful algorithmic and other practices that actively inhibit workers from satisfying the criteria for employment status.

In view of these concerns, we ask the Council members to re-visit their position on the presumption of employment to reduce the risk of misclassification and ensure that the protections relating to algorithmic management genuinely apply to all platform workers. We also consider that this can be done in ways that does not interfere with the preferences of those workers who genuinely wish to be self-employed.

We are happy to answer any questions you might have or provide any further clarifications on the points above. We would also be grateful for the opportunity to further discuss these points with you in a virtual or in person.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Eliot Bendinelli', written over a faint circular stamp.

Eliot Bendinelli

Corporate Exploitation Programme Director, Privacy International

³ <https://www.workerinfoexchange.org/post/report-reveals-the-algorithmic-dismissal-of-workers-over-false-fraud-allegations-at-just-eat>