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NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work - Preparation for the trilogue

I. INTRODUCTION

The negotiation with the European Parliament on the proposal for a directive on improving working conditions in platform work advance slowly but steadily on more technical subjects like Chapter III on algorithmic management.

Given the limited time to close the negotiations, it is time now to start addressing the main political element of this proposal, which is the legal presumption of employment (Chapter II). The Parliament has to that effect reworked its initial position and has presented a non-paper with a revised position (WK 12693/23), which represents an important step forward. In this paper, it has adapted the structure of its position to the one of the Council, which will facilitate negotiations. In addition, it has dropped some of its initial amendments and provided for important clarifications on how it wishes to see the presumption work. In order to get the negotiations on this particular difficult Chapter going, the Presidency launched discussion on possible areas of flexibility. A first discussion on such flexibilities took place in the Social Questions Working Party on 19 October 2023, based on the Presidency steering note WK 13303/23 REV1.

Against this background, the Presidency addresses a call for guidance to Coreper with a view to the next trilogue meeting on 9 November 2023. As experience has shown and given the technicality of the file, it is difficult to discuss ideas in an abstract manner. Therefore, the Presidency has prepared a text covering Articles 3, 4 and 4a of the legal presumption, which contains certain changes and possible elements of flexibility. It still respects the delicate balance between the diverging position, which was found in the general approach. The text is set out in the Annex to this note.

II. THE STRUCTURE OF THE LEGAL PRESUMPTION

One of the problems of the negotiations with the European Parliament is that the terminology and conceptions used is often different between the two co-legislators. Therefore, before presenting the potential areas of flexibility identified by the Presidency, it is important to clarify some of them as used by the Presidency, which shall serve the discussion in Coreper and among delegations.

1. Initiation of a proceeding

The legal presumption is a procedural instrument. It is not a self-standing tool but can only be applied in the course of proceedings. Such proceedings need to be initiated by someone, typically either by a competent national authority or by a person performing platform work. While Article 3 (1) obliges Member States to have procedures in place -meaning, of whatever nature – to verify the correct determination of the employment status.

The question of who could initiate / launch proceedings is not addressed in the Council general approach.

2. Applicability of the legal presumption

Once proceedings are launched, the relevant administrative or judicial authority needs to assess whether the legal presumption is applicable in said proceedings. In the general approach, the question of in which proceedings authorities or courts have to apply the presumption is regulated in Article 4a (1). Only if the legal presumption is applicable, the authority is obliged to examine, whether the conditions for triggering the legal presumption are fulfilled, thus in the General approach when at least three criteria out of seven are met (Article 4 (1)).

3. Information on the triggering of the legal presumption

If the relevant administrative or judicial authority comes to the conclusion that the conditions for triggering the presumption are fulfilled, as explained in point 2 above, it will inform the parties, in accordance with national procedural law and practice, about this fact and the resulting procedural consequences as set out in Article 4a (3) (a) and (b) of the general approach, thus the shift of burden of proof respectively the obligation to assist the person performing platform work.

4. Rebuttal of the legal presumption

The rebuttal is a procedural declaration of the digital labour platform or the person performing platform work to the relevant administrative or judicial authority that they do not consider that an employment relationship exists, which is the start of the rebuttal phase, in which the digital labour platform needs to provide proof of the non-existence of a labour relationship (Article 4a (3) (a) of the general approach).

5. Decision on the existence of an employment relationship / reclassification

Depending on the proof provided by the digital labour platform during the rebuttal phase, and other facts brought to the attention of the authority, the administrative or judicial authority carries out a factual assessment and takes a decision on the existence (or lack thereof) of an employment relationship between the digital labour platform and the person performing platform work.

This decision is taken – according to the general approach – based on 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 (Article 4a (3)). In the debate, the term *reclassification* is also used for this decision.

III. POTENTIAL AREAS OF FLEXIBILITY

The Presidency has identified at this stage some potential areas of flexibility, respectively for clarifying the Council position. Drafting proposals are to be found in the Annex:

1. Initiation of proceedings (Article 3a in Annex) by:

a) competent national authorities

The European Parliament suggests introducing a provision on the *application* of the legal presumption by a competent national authority (Article 4a(1) of the EP non-paper). This however presupposes as a first step the capacity, by the competent national authorities, to initiate proceedings (see above II. 1.). Depending on national systems, these proceedings (1) might be initiated by the authority itself, if this authority has the power to decide on a reclassification, or, (2), the authority needs to initiate a proceeding in front of another authority, e. g. a court, vested with the power of deciding on a reclassification.

While the application of the presumption is clearly set out in Article 4a (1) of the general approach, there is no provision on the initiation of proceedings, and in particular not on the question, when a competent national authority is obliged to initiate a proceeding in view of ascertaining the existence of an employment relationship.

The Presidency suggests adding such a provision (Article 3a(1) Annex). This provision would set out a discretion of competent national authorities, when they assess whether there *might be a wrong classification* on the one hand side, but there would be on the other hand the obligation to launch a proceeding, if they come to the conclusion that there might be a wrong classification.

This provision would replace Article 4a(2) of the general approach. This provision would not be needed anymore as the discretion under Article 3a(1) Annex provides for a broader discretion of competent national authorities than Article 4a(2) of the general approach.

b) person performing platform work and representatives

The European Parliament wishes to introduce a provision on the application of the legal presumption in proceedings launched by persons performing platform work. The Parliament objectives are twofold: first to set out that these proceedings can also be launched by trade unions on behalf of the person performing platform work; and second that the legal presumption shall *apply* ((Article 4a(1) of the EP non-paper).

The Presidency suggests taking this up and stating in Article 3a(2) Annex that persons performing platform work shall be able to launch proceedings (the question of the applicability of the legal presumption being addressed in Article 4a(1)) and that they might be represented. As to the representation, the conditions are set by national law, therefore the Presidency refers to the text of the general approach in Article 14(1).

2. Chapeau of Article 4(1) Annex

The Parliament has presented a chapeau of Article 4(1) which is much shorter than the one of the Council. In the Parliament text, the legal presumption is triggered already when only one element is fulfilled. This was considered unacceptable by delegations in the Social Questions Working Party on 19 October 2023. However, in order to show a sign of good will to the Parliament, the Presidency considers it acceptable to use the wording of the Parliament, while integrating the fulfilment of three out of seven criteria as threshold for triggering the legal presumption.

3. No automatic establishment of an employment relationship (Article 4a(2) Annex)

The Parliament wishes to state that there shall not be an automatic reclassification, even when the presumption successfully meets the criteria. As this is also the objective of the Council, the Presidency considers that this could be stated as a clarification, although some modifications of language were required.

4. Information on the triggering of the legal presumption (Article 4a(3)(a) Annex)

The Parliament suggests stipulating that the *application*, which according to the Council terminology means *triggering*, of the legal presumption is to be communicated to the digital labour platform and to the person performing platform work and that a deadline is to be set by which the rebuttal needs to happen.

While the obligation to set a deadline was clearly not acceptable to delegations in the Social Questions Working Party on 19 October 2023, the Presidency suggests stipulating that the triggering of presumption needs to be communicated to the parties of the proceeding, since the Presidency is of the view that such an element would nonetheless be already part of the applicable procedural rules in every Member State.

5. Decision in the absence of a rebuttal

The Council general approach is silent on the question what happens if the legal presumption is not rebutted. The Parliament, to the contrary, seeks to extensively regulate what happens after the rebuttal phase is completed. The Presidency considers that this is too far reaching, although it believes that the effects of the legal presumptions in absence of a rebuttal need to be clarified. The Presidency therefore asks the delegations to express their views on the possibility to state clearly that the existence of an employment relationship is to be established by the relevant authority or court if no party rebuts the legal presumption.

6. Discretion of courts and competent authorities to decide on the existence of an employment relationship (Articles 4 (1a) and 4a(4) Annex

The European Parliament introduces substantive elements in the criteria for the final decision of the relevant competent authority, with a view to establish harmonised criteria for reclassification stemming from Union law. This is not acceptable for the Council. The reference in Article 4(1a) Annex to Article 4a(4) Annex and the new Article 4a(4) Annex proposed by the Presidency serve the purpose of clarifying that the decision of the relevant authority or a court is based solely on the applicable law, collective agreements, or practice in force in the Member State in question, with consideration to the case-law of the Court of Justice.

7. Information about decisions in which the existence of an employment relationship is established (Article 4a(5) Annex)

The Parliament wishes to apply the legal presumption in all proceedings, while the Council has excluded social security, tax and criminal proceedings from the relevant proceedings in which the legal presumption shall be applied. The Presidency does not have an intention to compromise in this point.

It is however evident that a decision on the establishment of an employment relationship by labour inspectorates, labour courts or others is not without effect on the application of tax, criminal and social security rules to the reclassified person. This effect might be, depending on the national systems, of a legal or a purely factual nature, but it would be useful, if social security, tax and criminal authorities are informed about a decision on the establishment of an employment relationship, where such a decision is relevant.

IV. **CONCLUSION**

Delegations are asked to share their assessment of these areas of potential flexibility identified by the Presidency and set out in the text in the Annex to this Note. The feedback of delegations will help the Presidency to decide, how to pursue the negotiations with the European Parliament.

Any indications on other areas of flexibility, which are not listed under point III above are very welcome.

CHAPTER II**EMPLOYMENT STATUS****Article 3****Correct determination of the employment status**

1. Member States shall have in place appropriate procedures 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 platform workers enjoy the rights related to that employment relationship.
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 automated monitoring or decision-making systems 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.

Article 3a**Initiation of proceedings**

1. Where a competent national authority considers that a person performing platform work might be wrongly classified, it shall initiate a proceeding, in accordance with national law and practice, with a view to ascertain the correct employment status of that person.
2. Persons performing platform work, as well as their representatives in accordance with Article 14 paragraph 1, shall have access to proceedings, according to national law and practice, for ascertaining the correct employment status of the person performing platform work.

Article 4

Legal presumption

1. Unless Member States provide for more favourable provisions pursuant to Article 20, 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 three out of the following elements indicating control and direction are found, either by virtue of its applicable terms and conditions or in practice:
 - (a) The digital labour platform determines upper limits for the level of remuneration;
 - (b) The digital labour platform requires 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) The digital labour platform supervises the performance of work including by electronic means;
 - (d) The digital labour platform restricts the freedom, including through sanctions, to organise one's work by limiting the discretion to choose one's working hours or periods of absence;
 - da) The digital labour platform restricts the freedom, including through sanctions, to organise one's work by limiting the discretion to accept or to refuse tasks;
 - db) The digital labour platform restricts the freedom, including through sanctions, to organise one's work by limiting the discretion to use subcontractors or substitutes;
 - (e) The digital labour platform restricts the possibility to build a client base or to perform work for any third party.
- 1a. The rules laid down in this Article and Article 4a shall not affect the discretion of courts and competent authorities to ascertain the existence of 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, regardless of the number of criteria fulfilled, in accordance with Article 4a (4)

Article 4a

Application of the presumption and rebuttal

1. The legal presumption shall be applicable in all relevant administrative or judicial proceedings where the correct determination of the employment status of the person performing platform work is at stake.

The legal presumption shall not be applicable to tax, criminal and social security proceedings. However, Member States may decide that the legal presumption shall be applicable in those proceedings as a matter of national law.

2. The triggering of the legal presumption shall not lead to an automatic establishment of the existence of an employment relationship as referred to in paragraph 4.
3. 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. To this effect:
 - a) the relevant administrative or judicial authority shall communicate the triggering of the legal presumption to the digital labour platform and to the person performing platform work and inform them about the possibility to rebut the legal presumption.
 - b) where the digital labour platform argues that the contractual relationship in question is not an employment relationship as referred to in paragraph 4 the burden of proof shall be on the digital labour platform.
 - c) where the person performing the platform work argues that the contractual relationship in question is not an employment relationship as referred to in paragraph 4, the digital labour platform shall be required to assist the proper resolution of the proceedings, notably by providing all relevant information held by it to assess the factual relationship.

4. The relevant administrative or judicial authority shall establish the existence of an employment relationship if the legal presumption has not been rebutted.

Where the legal presumption is rebutted, the decision to establish the existence of an employment relationship shall be taken upon the basis of the applicable law, collective agreements, or practice in force in the Member State in question, with consideration to the case-law of the Court of Justice.

5. Member States shall ensure that all other relevant competent national authorities are informed about decisions in which the existence of an employment relationship is established where relevant.
6. 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 Article 4 shall only apply to the period starting from that date.
7. Where a digital labour platform challenges an administrative or judicial decision determining the employment status of a person performing platform work, Member States may provide that such a proceeding shall not have a suspensive effect on that decision.