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NOTE

From: Presidency
To: Delegations

Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL on improving working conditions in platform work

In preparation of the meeting of the Social Questions Working Party on 13 February 2023,
delegations will find attached a Presidency note.

I. INTRODUCTION

Following the outcome of the EPSCO Council in December 2022, the Presidency is committed to continue looking for avenues of compromise and agreement with a view to reaching a general approach on this file of political priority.

The purpose of this note is to set out the Presidency's appreciation of the current state-of-play and to deepen the understanding of certain outstanding issues in order to forge a way forward. For this purpose, the note contains a number of questions of technical nature designed to clarify the underlying reasons for Member States' positions and/or shed light on the situation on the ground in the Member States in order to find acceptable solutions to the issues at hand.

Thanks to the constructive work done by its predecessors, the Presidency considers that chapters I, III, IV, V and VI have largely been agreed. This, of course, comes with the understanding that nothing is agreed until everything is agreed. The Presidency's intention, therefore, is to focus on Chapter II.

II. OUTSTANDING ISSUES

The Presidency has identified four main outstanding issues which would benefit from further clarification or elaboration with a view to finding avenues for compromise. The issues are set out below. Each point is explained in terms of the current state-of-play and accompanied by a set of questions for Member State feedback. In order to improve the understanding of the situation in the different Member States and to provide a good basis for the discussions, delegations are invited to provide **answers to questions 1b), 2a) and 3c), concerning the current situation in the different Member States, in writing by 7 February 2023**. The Member States are requested to **present their answers to the rest of the questions at the next Working Party meeting scheduled for 13 February**.

1. **Article 4(1), *i.e.* the design of the criteria to trigger the presumption**

Article 4(1)¹ sets out the criteria for triggering the legal presumption, which is construed as a means to facilitate the determination of the existence of an employment relationship between a digital labour platform and a person performing platform work. In order to find a compromise between delegations' diverging views, changes were made to the Commission proposal. Notably, the notion of “controlling the performance of work” as an “umbrella principle” has been deleted from the chapeau; criterion (d) was split into three separate criteria. Consequently, the threshold for fulfilling the criteria was raised from 2 out of 5 to 3 out of 7.

Questions

- a) Do you consider that the criteria are now designed in a way that the right people, *i.e.* mostly the bogus self-employed, will be covered by the legal presumption?
- b) If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.
- c) If you have answered “no” to question a), how could the criteria and the threshold be modified in order to target all bogus self-employed while excluding genuine self-employed?

¹ In its version of document 15338/22 REV1

2. **Article 4(2a), i.e. fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements**

Article 4(2a)² takes inspiration from recital 25 of the Commission proposal. At delegations' request, the text of recital 25 was moved to the operative part and its wording has been clarified and amended to also cover legal obligations under collective agreements. While some delegations maintain that this provision is important as it prevents digital labour platforms from being wrongfully designated as employers, others worry it could create a loophole which digital labour platforms could exploit to escape taking on the responsibilities of an employer.

Questions

- a) Can you provide examples when this provision would be applied in your Member State under the current legislation?
- b) Is this provision necessary? If so, could this issue be addressed in other ways in the directive?

² In its identical version of documents 14514/22 and 15338/22 REV1

3. **Article 3(1) and 4a(1), i.e. the material effects of a reclassification and the application of the presumption in tax, criminal law and social security proceedings**

Article 3(1) and recital 19³ set out *i.a.* the material effects of a reclassification, stating that Member States shall not only have national procedures in place for the correct and clear classification of the employment status of persons performing platform work, but also that they shall ensure that when an employment relationship is established, those persons enjoy the relevant rights deriving from Union and national law applicable to workers. Article 4a(1)⁴, on the other hand, sets out the scope of application of the legal presumption, which is a procedural instrument to be applied within existing procedures in place in the Member States to facilitate the correct determination of his or her employment status.

At the request of some delegations, article 4a(1) 2nd subparagraph was introduced in order to exclude the use of the legal presumption in **tax, criminal and social security proceedings**. These delegations brought forward mainly two reasons. Firstly, they argued that excluding such fields from the scope of application of the legal presumption would safeguard Member States' competences in those areas. Secondly, they argued that in some Member States, the criteria for the existence of an employment relationship in a specific field of law might differ from another area of law, and that, therefore, the application of the legal presumption to these types of proceedings should be left to the discretion of Member States.

As mentioned above, the legal presumption is a way of easing the access for bogus self-employed to the correct classification of their employment status. As reclassification systems for bogus self-employed as workers likely exist already today in Member States' legal systems, the Presidency would like to understand how the different Member States deal with it today. Furthermore, the Presidency would also like to get the delegations' views on article 3(1) and the corresponding recital.

³ In their version of document 15338/22 REV1.

⁴ In its version of document 15338/22 REV1.

Questions

- a) The legal presumption is to be applied in all relevant administrative and judicial proceedings where the correct determination of the employment status is at stake. In proceedings in which fields of law would the correct determination of the employment status currently be at stake in your Member State?
- b) Is the notion of employment relationship the same in all these different fields of law? If not, please spell out in which fields of law these notions are different from each other.
- c) For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, *e.g.* tax, criminal and social security proceedings?
- d) Do you consider that article 3(1), stating that the Member States shall ensure that platform workers enjoy the rights deriving from relevant Union law, nation law, collective agreements and practice applicable to workers, and the corresponding recital 19, are sufficiently clear or would the Directive benefit from clarifying the term “relevant” and, if so, how could this be done?

4. **Article 4a(2), i.e. the discretion not to apply the presumption in ex officio situations**

Another question relates to the discretion of a competent national administrative authority, as laid down in Article 4a(2)⁵, not to apply the presumption, if the double condition is fulfilled that 1) they verify compliance or enforce relevant legislation on their **own initiative** and 2) it is evident that the rebuttal would be successful. The rationale of this provision is to avoid unnecessary administrative burden. However, in proceedings initiated by persons performing platform work themselves in view of their reclassification as worker, the competent national administrative authority is obliged to apply the legal presumption.

Some Member States have requested the deletion of this provision, stating that the protection of persons performing platform work would be lowered if authorities are not in all instances obliged to apply the legal presumption.

Questions

- a) Do you think that this provision could create a gap in the protection of persons performing platform work and if so, in what way?

⁵ In its version of documents 14514/22 to 15338/22 REV1.