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NOTE

From:	Presidency
To:	Permanent Representatives Committee
No. prev. doc.:	6104/24
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Subject:	Proposal for the DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work - <i>Preparation for the trilogue</i>

I. INTRODUCTION

1. Based on the revised mandate that the Presidency obtained on 26 January 2024 (doc. 5816/24 + COR1), the Presidency resumed negotiations with the European Parliament. In the trilogue of 30 January, the Parliament's negotiation team rejected the revised mandate and proposed to work instead on an alternative text of the legal presumption, requiring the Member States to establish a legal presumption of employment at national level that provides for a procedural facilitation for persons performing platform work, when ascertaining the correct determination of their employment status, in order to fight false self-employment and contribute to the improvement of working conditions in the platform economy. The members of the negotiation teams of the Parliament and the Council at the technical level were tasked to come up with a joint exploratory text on the legal presumption, based on four commonly agreed principles, which should serve as a basis for a final agreement on the whole text of the Directive to be reached in the trilogue scheduled for 8 February.

2. The technical level came up with a joint exploratory text related to Chapter II of the Directive, which was circulated to the Social Questions Working Party (doc. 6104/24). The Presidency explained this joint exploratory text in the Social Questions Working Party meeting in the morning of 5 February.
3. By this Note, the Committee of Permanent Representatives is asked to approve a new revised mandate which will allow to conclude a provisional agreement on the Directive in the trilogue of 8 February, subject to a confirmation by this Committee in one of its upcoming meetings.

II. CONTENT OF THE REVISED MANDATE

4. The proposal for a new revised mandate is based on the former revised mandate from 26 January 2024 referred to above under Point I.1. All points which are not expressly mentioned in this Note remain unchanged compared to the revised mandate of 26 January 2024.
5. The joint exploratory text (doc. 6104/24) has been adjusted by the Presidency in order to take the main concerns of Member States into account. It can be found in Annex 1 to this Note.

A. Operative part

6. The changes in the operative part compared to the former revised mandate from 26 January (doc. 5816/24 + COR1) are the following:

Article 5 paragraph 1, Recital 31a: Mechanism of the legal presumption

The reference to indicators and threshold in Article 5 paragraph 1 of the former revised mandate has been replaced by a reference to “*facts indicating control and direction, according to national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice*” that are found.

It is for the Member States to determine what facts indicating control and direction are to be found for the purposes of triggering the legal presumption. In consequence, there are no harmonised conditions for the triggering of the legal presumption in the text of the Directive. This has also been clarified in Recital 31a.

Article 5 paragraph 2: Obligation to create a legal presumption

This is a new provision, which does not build on an existing text. It explicitly obliges Member States to establish an effective rebuttable legal presumption of employment in their national law.

It lays down a positive obligation to ensure that this presumption constitutes a procedural effective facilitation to the benefit of persons performing platform work and should not lead to an increase of the burden of requirements on persons performing platform work in proceedings ascertaining their employment status.

The principle of effectiveness of the legal presumption requires that national law makes effectively easy for the person performing platform to benefit from the presumption. The requirements under the legal presumption should not be overly burdensome and should alleviate a worker's difficulties in providing evidence indicating the existence of an employment relationship in a situation of imbalance of power vis a vis the digital labour platform. The purpose of the presumption is to effectively address and correct the imbalance of power between the persons performing platform work and the digital labour platform.

Article 5 paragraph 3: Proceedings in which the legal presumption applies

This provision is nearly identical to Article 6 paragraph 1 of the former revised mandate.

Article 5 paragraph 4: Proceedings initiated by persons performing platform work

This provision deals with the right of persons performing platform work and their representatives to initiate proceedings. It remained unchanged compared to Article 6 paragraph 2 second sentence of the former revised mandate. In order to clarify that this provision does not affect existing national prerogatives of representatives, Article 27 paragraph 1 has been amended accordingly.

Article 5 paragraph 5: Measures to be taken by national authorities

This provision builds on Article 6 paragraph 2 first sentence of the former revised mandate and deals with the measures to be taken by competent national authorities, when they consider that a person performing platform work might be wrongly classified. The discretion of national competent authorities to assess if a person performing platform work might be wrongly classified has been kept. In addition, the national authorities can decide which action and procedure is appropriate, in accordance with national law and practice, for ascertaining the employment status of that person.

Article 6 paragraph 1(c), Recital 38: Controls and inspections in case of reclassification

In this provision, corresponding to Article 7 paragraph 1 letter (c) of the revised mandate, adjustments were made. Compared to document 6104/24 and taking into account the feedback received by many Member States in the Social Questions Working Party as well as in their written comments, “where appropriate” has been reinstated.

B. Recitals

- **Recitals 30, 31, 32, 32a** of the revised mandate of 26th of January have been deleted. They are replaced by recital 31a as set out in the Annex 1.
- **Recitals 7, 33, 35, 38, 68** have been aligned to the operative provisions. They are set out in Annex 2 of this Note.
- **All other recitals** remain as in the revised mandate.

III. CONCLUSION

The Presidency considers that the revised mandate as set out in this Note presents an appropriate way out of the deadlock in the negotiations between the co-legislators. The new way of approaching the legal presumption as set out in the Annex 1 of this Note strives for reaching a common objective of fighting false self-employment, whilst giving Member States additional leeway in the implementation of the Directive.

The text strikes a delicate balance and respects the centre of gravity within the Council, and presents at the same time an opportunity to reach an agreement with the European Parliament and to provide for an adoption of the Directive under this legislative term.

The Committee of Permanent Representatives is invited to:

- examine the Presidency's compromise suggestions as set out in this Note; and
- agree on a revised Presidency negotiation mandate for the upcoming informal trilogue.

Adjusted Joint exploratory text

Change markings

Changes compared with document 5816/24 + COR1 are marked with **bold** and deletions by [...].

Change of numbering and place of text are not taken into account in these markings.

Changes compared to document 6104/24 are marked in *italics*, deletions in *italics strikethrough*.

CHAPTER II

EMPLOYMENT STATUS

Article 4

Correct determination of the employment status

1. Member States shall have appropriate and effective procedures in place 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, including through the application of the presumption of an employment relationship in accordance with Article 5~~(2)~~.
2. The determination of the existence of an employment relationship shall be guided primarily by the facts relating to the actual performance of work, including 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.

3. Where the existence of an employment relationship is established, the party or parties assuming the obligations of the employer shall be clearly identified in accordance with national legal systems.

Article 5

Legal presumption

1. 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 **facts indicating control and direction, according to national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice**, are found. [...] Where the digital labour platform **seeks to rebut the legal presumption, it shall be for the digital labour platform to prove that the contractual relationship in question** is not 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 [...]**.
2. **To that effect, Member States shall establish an effective rebuttable legal presumption of employment that constitutes a procedural facilitation to the benefit of persons performing platform work, and Member States shall ensure that that legal presumption does not have the effect of increasing the burden of requirements on persons performing platform work, or their representatives, in proceedings ascertaining their employment status.**
3. The legal presumption shall apply 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 apply to **proceedings ~~solely~~ which concern tax, criminal ~~or~~ and social security matters**. However, Member States may apply the legal presumption in those proceedings as a matter of national law.

4. Persons performing platform work, and, in accordance with national law and practice, their representatives, shall have the right to initiate the proceedings referred to in paragraph 3 first subparagraph for ascertaining the correct employment status of the person performing platform work.
5. [...] **Where** a competent national authority considers that a person performing platform work might be wrongly classified, it shall **initiate** appropriate actions **and proceedings**, [...] in accordance with national law and practice, in order to ascertain the [...] employment status of that person.
6. With regard to contractual relationships entered into before and still ongoing on the date set out in Article 30(1), the legal presumption referred to in this Article shall only apply to the period starting from that date.

Article 6

Framework of supporting measures

1. Member States shall establish a framework of supporting measures in order to ensure the effective implementation of and compliance with the legal presumption. In particular, they shall:
 - (a) develop appropriate guidance, including in the form of concrete and practical recommendations, for digital labour platforms, persons performing platform work and the social partners to understand and implement the legal presumption including on the procedures for rebutting it;
 - (b) develop guidance and establish appropriate procedures in line with national law and practice for competent national authorities, including on the collaboration between different competent national authorities, to proactively identify, target and pursue digital labour platforms which do not comply with rules on correct determination of the employment status;

- (c) provide for effective controls and inspections conducted by national authorities, in line with national law or practice, and in particular provide, *where appropriate*, for ~~appropriate~~ controls and inspections on specific digital labour platforms where **the existence of an employment relationship** has been **ascertained by a [...]**competent national authority, while ensuring that such controls and inspections are proportionate and non-discriminatory.
- (d) provide for appropriate training for competent national authorities and provide for the availability of technical expertise in the field of algorithmic management, to enable those authorities to carry out the tasks referred to under point (b).

Article 27

Non-regression and more favourable provisions

1. This Directive shall not constitute valid grounds for reducing the general level of protection already afforded to platform workers within Member States, including with regard to established procedures for the correct determination of the employment status of persons performing platform work **as well as existing prerogatives of their representatives**.
2. This Directive shall not affect the Member States' prerogative to apply or to introduce laws, regulations or administrative provisions which are more favourable to platform workers, or to encourage or permit the application of collective agreements which are more favourable to platform workers, in line with the objectives of this Directive.
3. This Directive is without prejudice to any other rights conferred on persons performing platform work by other legal acts of the Union.

- (31a) Control and direction can take different forms *in concreto*, considering that the platform economy model is constantly evolving; for instance, the digital labour platform might exert direction and control not only by direct means, but also by applying sanctions or other forms of adverse treatment or pressure. In the context of platform work, it is often difficult for the persons performing platform work to have appropriate access to the tools and the information required to assert before a competent authority the actual nature of their contractual relationship and the rights derived therefrom and, the management of persons performing platform work through automated monitoring and decision-making systems is characterised by an opaque flow of information from the digital labour platform. These features of platform work perpetuate the phenomenon of misclassification as false self-employment, thus hindering the correct determination of the employment status and the access to decent living and working conditions for platform workers. Member States should therefore lay down measures providing for an effective procedural facilitation for persons performing platform work when ascertaining the correct determination of their employment status. In this light, the presumption of an employment relationship in favour of the persons performing platform work is an effective instrument which greatly contributes to the improvement of living and working conditions of platform workers. *Therefore, such relationship should be legally presumed to be 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, when facts indicating control and direction are found. The modalities of the legal presumption should be set out by the Member States, in so far as those ensure the establishment of an effective rebuttable legal presumption of employment that constitutes a procedural facilitation to the benefit of persons performing platform work, and do not have the effect of increasing the burden of requirements on persons performing platform work, or their representatives, in proceedings ascertaining their employment status.*

The application of the legal presumption should not automatically lead to the reclassification of persons performing platform work. Where the digital labour platform seeks to rebut the legal presumption, it should be for the digital labour platform to prove that the contractual relationship in question is not 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.

Modified recitals

Changes compared to document 5816/24 are marked in **bold** and deletions with [...].

All other recitals remain as in document 5816/24.

- (7) Court cases in several Member States have shown the persistence of misclassification of the employment status in certain types of platform work, in particular in sectors where digital labour platforms exert a certain degree of direction or control [...]. While digital labour platforms frequently classify persons working through them as self-employed or ‘independent contractors’, many courts have found that the platforms exercise de facto direction and control over those persons, often integrating them in their main business activities [...]. Those courts have therefore reclassified purportedly self-employed persons as workers employed by the platforms.
- (30) to (32a) [...]
- (33) In line with the objective of this Directive to improve working conditions for platform workers, by correctly determining their employment relationship and thereby ensuring that they enjoy the relevant rights deriving from Union law, national law and collective agreements, the legal presumption should apply in all relevant administrative or judicial proceedings, where the employment status of the person performing platform work is at stake. **While** this Directive does not impose any obligation on Member States to apply the legal presumption in tax, criminal and social security proceedings, **nothing** in this Directive should prevent Member States, as a matter of national law, from applying that presumption in those or other administrative or judicial proceedings or from recognising the results of proceedings in which the presumption has been applied for the purposes of providing rights to reclassified workers under other areas of law.

- (35) The relationship between a person performing platform work and a digital labour platform may not meet the requirements of an employment relationship in accordance with the definition laid down in the law, collective agreements or practice in force of the respective Member State with consideration to the case-law of the Court of Justice. Member States should ensure the possibility to rebut the legal presumption by proving, on the basis of the aforementioned definition, that the relationship in question is not an employment relationship. Digital labour platforms, and notably the algorithms through which they manage their operations, have a complete overview of all factual elements determining the nature of the relationship. Therefore, where they argue that the contractual relationship in question is not an employment relationship, it should be for the digital labour platform to prove so. This means that the relationship between a person performing platform work and a digital labour platform should be deemed an employment relationship when the absence of requirements of such employment relationship, as laid down in the law, collective agreements or practice in force of the respective Member State with consideration to the case-law of the Court of Justice, have not been sufficiently demonstrated by the digital labour platform during the rebuttal. [...]

- (38) Those measures should support the correct determination of 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, including, if appropriate, the confirmation of a classification as genuine self-employed. To enable those authorities to carry out their tasks in enforcing the provisions of this Directive, while underlining the competence of Member States to decide on the staffing of national authorities, they need to be adequately staffed. This requires adequate human resources for competent national authorities, having the required skills and access to appropriate training and to provide for the availability of technical expertise in the field of algorithmic management. ILO Labour Inspection Convention 81 (1947) provides for indications on how to determine a sufficient number of labour inspectors for the effective discharge of their duties. A [...]decision of a competent national authority resulting in a change of the employment status of a person performing platform work should be taken into account by competent national authorities, when deciding on inspections and controls they intend to carry out.
- (68) This Directive lays down minimum requirements, thus leaving untouched Member States' prerogative to introduce and maintain provisions which are more favourable for persons performing platform work. Rights acquired under the existing legal framework should continue to apply, including as regards mechanisms to ascertain the existence of an employment relationship, unless more favourable provisions are introduced by this Directive. The implementation of this Directive cannot be used to reduce existing rights set out in existing Union or national law in this field, nor can it constitute valid grounds for reducing the general level of protection in the field covered by this Directive **as well as existing prerogatives conferred on representatives.**
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