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## **WORKING DOCUMENT**

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| From:         | General Secretariat of the Council                                                                                                                           |
| To:           | Delegations                                                                                                                                                  |
| N° Cion doc.: | ST 14450 2021 INIT                                                                                                                                           |
| Subject:      | Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work<br>- European Parliament's non-paper |

Delegations will find in annex a non-paper of the European Parliament's negotiation team setting out a compromise proposal on the legal presumption (Article 4 and 5 of the proposal for a directive on enhancing working conditions in platform work). This non-paper has served as basis for an exchange of views between institutions with took place in the trilogue meeting of 3 October 2023 on which the Presidency will debrief on 6 October 2023 in Coreper and to the members of the Social Questions Working Party in an informal VTC.

## Article 4

### Legal presumption

1. A person performing platform work shall be either a platform worker or a genuinely self-employed person. 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 there is any element indicating control and direction in connection with the performance of the work.

2. The elements indicating control and direction in connection with the performance of work, either by virtue of its applicable terms and conditions or in practice, shall include the following:

- (a) The digital labour platform determines or sets upper limits for the level of remuneration or issues periodic payments 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) Indicia of the fact that the digital labour platform tracks or supervises the performance of work including by electronic means;
- (d) Indicia of the fact that the digital labour platform determines or controls working conditions, including restricting time schedule and working time duration, or enforcing the performance of work, including through penalties or incentives, restricting access to work, or using rating systems as a tool of control and a basis for penalties and as a tool to allocate work assignments;
- (da) Indicia of the fact that 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 or to use subcontractors or substitutes;
- (e) Indicia of the fact that the digital labour platform restricts the possibility to build a client base or to perform work for any third party, including via controlling or restricting the communication between the person performing platform work and the recipient of goods or services during or after the performance of the work.
- (f) Indicia of the fact that the digital labour platform restricts the possibility of the person performing platform work to perform work for any third party, including competitors of the digital labour platforms;
- (g) Indicia of the fact that the digital labour platform restricts the freedom of the person performing platform work to choose social protection, accident insurance, pension scheme or other forms of insurance, including through adverse consequences.

## Article 4a

### **Application of the presumption and rebuttal**

1. 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.

Where competent authorities and bodies, including those responsible for registering administrative procedures, consider that there is any element of control and direction indicating that a person performing platform work might be wrongly classified, they shall apply the presumption.

Where a person performing platform work or a trade union acting on behalf or in support of one or several persons performing platform work, in accordance with national law or practice, dispute their classification in an administrative or legal proceeding, the presumption shall be applied by the competent administrative or legal authorities.

The application of the legal presumption shall not lead to an automatic reclassification of all persons performing platform work as platform workers.

2. The application of the presumption by the competent authorities shall be communicated to the digital labour platform and to the affected persons performing platform work.

The digital labour platform and the affected persons performing platform work shall be given a reasonable deadline by which they have to either accept or rebut the presumption.

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) where the digital labour platform argues that the contractual relationship in question is not an employment relationship in accordance with Article 4(1) and as defined by applicable 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, the burden of proof shall be on the digital labour platform.

b) where the person performing the platform work argues that the contractual relationship in question is not an employment relationship in accordance with Article 4(1), and as defined by applicable law, collective agreements or practice in force in the Member State in question and the case-law of the Court of Justice, 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. Member States shall ensure the possibility to rebut the presumption referred to in Article 4 by means of demonstrating that the person performing platform work is genuinely self-employed. To this effect, the party rebutting the presumption shall prove that the contractual relationship in question is not an employment relationship as defined by 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, and that the person performing platform work is free from control and direction of the digital labour platform in connection with the performance of the work as referred to in art. 4(2), both under the contract for the performance of the work and in fact.

5. If the party rebutting the presumption proves that the persons performing platform work are genuinely self-employed, there shall not be reclassification.

A person performing platform shall be reclassified as a platform worker, where the presumption of employment has not been rebutted by any party or where the party rebutting the presumption of employment has not been able to demonstrate that the person performing platform work is genuinely self-employed.

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, proceedings arising from such a challenge shall not have a suspensive effect on that decision.

#### ADDITION

A recital stating in a clear way that when workers, or trade unions acting on behalf or in support of one or several persons performing platform work, dispute their classification no kind of proof is to be requested to apply the presumption.