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From:	General Secretariat of the Council
To:	Delegations
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Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work - Presidency Steering Note

Delegations will find attached a steering note from the Presidency, in view of the Social Questions Working Party on 19 October.

Presidency steering note

on the legal presumption in view of the Social Question Working Party on 19 October 2023

In the negotiations with the European Parliament on the proposal for a Directive on improving working conditions in platform work the European Parliament delegation has presented a non-paper, in which it presents its position on new version of Articles 4 and 5 of the legal presumption in a different manner. This paper has been circulated to delegations as WK 12693/23. A table comparing the EP non-paper with the related text of the Council's General Approach is to be found in annex to this note¹. With this paper, it is for the first time set out clearly what the requests of the European Parliament are. As an agreement will only be possible if the two co-legislators show flexibility towards the position of the other, it is necessary that the Council side reflects about which elements of the Parliament position it can accommodate.

This reflection requires examining the different elements of the legal presumption one by one. The Presidency has identified the elements below as main elements of the legal presumption (LP), which are worth to be looked at. It has added its own preliminary assessment. Delegations are asked to give their views on any of the points below in order to assess where some flexibility can be offered to the Parliament and where no concessions can be made.

¹ Unless indicated otherwise, references to rows refer to this table.

Element	Council	EP	PCY Comments
1. Capacity to launch a proceeding	Not explicit	The EP wants that the person performing platform work and trade unions can launch a proceeding for which the presumption shall always apply (row 102b)	Possible to be flexible, but only conditional upon national law and practice
2. Obligation for competent national authorities to launch/to apply the legal presumption	Discretion to apply the legal presumption, if manifest that no reclassification will take place.	Competent national authorities must launch a proceeding and apply the presumption, if any element of control and direction (out of 8 listed) indicating wrong classification (row102b)	Possible to be flexible, but state that a proceeding needs to be launched, if the competent national authorities considers that an employment relationship might exist [element of doubt/question].
3. Derogation for Social Security, fiscal and criminal proceedings.	Needed in order to take diversity of national systems into account	No derogation	National systems deal with the relationship between labour law and other fields of law in different ways. Cross-sector information is however useful and an obligation to coordinate and communicate might be acceptable to delegations
4. Triggering the Legal Presumption	Only if a threshold of Union level criteria is fulfilled	If there is any element indicating control and direction (rows 89-96)	MS might consider accepting that the LP is applied always, once a proceeding has been launched, provided the access to these proceedings is limited to person performing platform work (also represented by workers representatives acc. to national law) on their own initiative and competent national authorities on their discretion. This concession would simplify the application of the LP and allow for obtaining important concessions of the EP for safeguarding national

Element	Council	EP	PCY Comments
			systems. Genuine self-employed would likely not be affected as they will not be subject to a proceeding.
5. Effect of the Legal Presumption	No material effect	No automatic reclassification (row 102b)	This can be recognised in the text.
6. Procedural effect of the legal presumption	Burden of proof for the digital labour platform (digital labour platform), no Burden of the proof for the person performing platform work.	Burden of proof for the digital labour platform and the person performing platform work. (row 102h)	Risk of circumvention of the LP, if no shift of Burden of the proof in all cases, but risk of unproportioned burden to individuals. Better to leave it to MS, how to address the risk of circumvention and evt. to put the Burden of the proof on person performing platform work.
7. Deadline for rebuttal	Left to national procedural law	Deadline to be set for rebutting (row 102d)	Likely already contained in national procedural law.
8. Consequence of absence of rebuttal in the deadline	None under the directive, left to national law	Person performing platform work is reclassified as worker (row 102h)	Link to the question of Burden of the proof on the person performing platform work. Better to be left to national law.
9. Criteria for the material decision on reclassification	National law, CA, practice with consideration for the ECJ	National law, CA, practice with consideration for the ECJ <u>and</u> full absence of control and direction (see 8 elements in rows 92-96) (row 102h)	In principle, only reference to national law, although as control is an element national courts take into account, there could be a reference, but without any details, thus not to the list of elements
10. Dichotomy of contractual relationships	No rules, full respect of MS systems	Only worker or genuine self-employed (rows 89, 102h)	Not acceptable, the result of the reclassification shall be the correct employment status according to national law

Element	Council	EP	PCY Comments
11.Suspensive effect	Decision left to MS	Absence of suspensive effect (row 102j)	Not acceptable, interference in national procedural law.

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

Council Mandate		EP non-paper of 3.10.2023
Article 4		
G	88	Article 4 Legal presumption
Article 4(1), first subparagraph		
R	89	1. Unless Member States provide for more favourable provisions pursuant to Article 20, the 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 the digital labour platform exerts control and direction over the performance of work by that person. 1. Unless Member States provide for more favourable provisions pursuant to Article 20, the<u>A person performing platform work shall be either a platform worker or a genuinely self-employed person[SFS1]. The contractual</u> 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 the digital labour platform exerts<u>there is any element indicating</u> control and direction over<u>in connection with</u> the performance of work by that person<u>the work</u>.
Article 4(2)		
R	91	For the purpose of the previous subparagraph, exerting control and direction shall be understood as fulfilling, either by virtue of its applicable terms and conditions or in practice, at least three of the criteria below: -2. For the purpose of the previous subparagraph, exerting<u>The elements indicating</u> control and direction shall be understood as fulfilling<u>in connection with the performance of work</u>, either by virtue of its applicable terms and conditions or in practice, at least three of the criteria below<u>shall include the following</u>:
Article 4(2), point (a)		
R	92	(a) The digital labour platform determines upper limits for the level of remuneration; (a) The digital labour platform determines <u>or sets</u> upper limits for the level <u>of remuneration or issues periodic payments</u> of remuneration;
Article 4(2), point (b)		
R	93	(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; (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;
Article 4(2), point (c)		
R	94	

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	(c) The digital labour platform supervises the performance of work including by electronic means;	(c) <u>Indicia of the fact that</u> the digital labour platform <u>tracks or</u> supervises the performance of work including by electronic means;
	Article 4(2), point (d)	
95	(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;	(d) <u>Indicia of the fact that</u> the digital labour platform restricts the freedom <u>determines or controls working conditions, including restricting time schedule and working time duration, or enforcing the performance of work,</u> including through sanctions, to organise one's work by limiting the discretion to choose one's working hours or periods of absence <u>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;</u>
	Article 4(2), point (da)	
95 a	(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;	(da) <u>Indicia of the fact that</u> 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 <u>or to use subcontractors or substitutes;</u>
	Article 4(2), point (db)	
95 b	(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;	
	Article 4(2), point (e)	
96	(e) The digital labour platform restricts the possibility to build a client base or to perform work for any third party.	(e) <u>Indicia of the fact that</u> the digital labour platform restricts the possibility to build a client base or to perform work for any third party, <u>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.</u> <u>(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;</u> <u>(g) Indicia of the fact that the digital labour</u>

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		<u>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.</u>
Article 4(2), point (ea)		
96 a	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.	1a.(ea) 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.
Article 4a		
10 2a	Article 4a Application of the presumption and rebuttal	Article 4a Application of the presumption and rebuttal
Article 4a(1)		
10 2b	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.	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. <u>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.</u> <u>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.</u> <u>The application of the legal presumption shall not lead to an automatic reclassification of all persons performing platform work as platform workers.</u>

	Council Mandate	EP non-paper of 3.10.2023
	Article 4a(2), first subparagraph	
10 2c	The legal presumption shall not apply to tax, criminal and social security proceedings. However, Member States may apply the legal presumption in those proceedings as a matter of national law.	
	Article 4a(2)	
10 2d	2. Member States may grant competent national administrative authorities a discretion not to apply the presumption, in cases where: a) those authorities are verifying compliance with or enforcing relevant legislation on their own initiative, and b) it is manifest that the person performing platform work is not a platform worker.	2. Member States may grant competent national administrative <u>The application of the presumption by the competent</u> authorities a discretion not to apply the presumption, in cases where: a) — those authorities are verifying compliance with or enforcing relevant legislation on their own initiative, and b) — it is manifest that the person performing platform work is not a platform worker <u>shall be communicated to the digital labour platform and to the affected persons performing platform work.</u> <u>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.</u>
	Article 4a(3)	
10 2e	3. Member States shall ensure, in proceedings where the presumption applies, the possibility for any of the parties to rebut the legal presumption.	<u>3.</u> Member States shall ensure, in proceedings where the presumption applies, the possibility for any of the parties to rebut the legal presumption <u>referred to in Article 4 in legal or administrative proceedings or both. To this effect:-</u>
	Article 4a(4)	
10 2f	To this effect:	To this effect:
	Article 4a(5)	
10 2g	(a) where the digital labour platform argues 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 State in question, with consideration to the case-law of the Court of Justice, the burden of proof shall be on that digital labour platform;	<u>a)</u> where the digital labour platform argues that the contractual relationship in question is not an employment relationship <u>in accordance with Article 4(1) and</u> as defined by <u>applicable</u> 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

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		of proof shall be on that <u>the</u> digital labour platform;
Article 4a(6)		
10 2h	(b) where the person performing the platform work argues 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 State in question, with consideration to 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.	<u>b)</u> where the person performing the platform work argues that the contractual relationship in question is not an employment relationship <u>in accordance with Article 4(1), and</u> as defined by the<u>applicable</u> law, collective agreements or practice in force in the Member State in question; with consideration to <u>and</u> 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 <u>to assess the factual relationship.</u> <u>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.</u> <u>5. If the party rebutting the presumption proves that the persons performing platform work are genuinely self-employed, there shall not be reclassification.</u> <u>Persons performing platform work affected by the presumption shall be reclassified as platform workers when:</u> <u>- the presumption is not rebutted by any of the parties</u> <u>- the party rebutting the presumption does not demonstrate that the persons performing platform work are genuine self-employed.</u>
Article 4a(7)		
10 2i	4. With regard to contractual relationships entered into before and still ongoing on the date	<u>6.</u> With regard to contractual relationships entered into before and still ongoing on the date

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	set out in Article 21(1), the legal presumption referred to in Article 4 shall only apply to the period starting from that 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.
Article 4a(8)			
10 2j	5. Where a digital labour platform challenges an administrative or judicial decision determining the employment status of a person performing platform work on the basis of the application of the presumption, Member States may provide that such a proceeding shall not have a suspensive effect on that decision.		7. Where a digital labour platform challenges an administrative or judicial decision determining the employment status of a person performing platform work on the basis of the application of the presumption, Member States may provide that, <u>proceedings arising from</u> such a proceeding <u>challenge</u> shall not have a suspensive effect on that decision.