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

Delegations will find attached for their information a table with the Presidency non-paper on the legal presumption of 8 November 2023 (and the general approach regarding Art. 3) in the first column and the Rapporteurs non-paper on the legal presumption as presented on 28 November 2023 in the second column.

**Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving
working conditions in platform work (Text with EEA relevance)
2021/0414(COD)**

LEGAL PRESUMPTION

	Council general approach/ Presidency non-paper 8 November 2023	Rapporteur non-paper 28 November 2023
	Article 2(1), point (4b)	
80b	“terms and conditions” means any term and condition or specification, irrespective of their name or form, which govern the contractual relationship between the digital labour platform and a person performing platform work and are unilaterally determined by the digital labour platform.	
	Article 3	
85	Article 3 Correct determination of the employment status	Article 3 Correct determination of the employment status
	Article 3(1)	
86	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.	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 applying the presumption of an employment relationship in accordance with Article 4(1) for the purpose of ascertaining the existence of such a relationship as defined by applicable law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice, and ensuring that such persons enjoy the rights deriving from Union law applicable to workers.
	Article 3(2)	
87	2. The determination of the existence of an employment relationship	2. The determination of the existence of an employment relationship shall

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	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.	be guided primarily by the facts relating to the actual performance of work, including the use of automated decision making and monitoring 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 such facts, the party or parties assuming the obligations of the employer shall be clearly identified in accordance with national legal systems and with Article 12b, and shall dully fulfil those obligations.
	Article 3(2), point a	
87a		2a. Where digital labour platforms are recognised to exercise the responsibilities of employers, they shall comply with the corresponding employers' obligations under national law and collective agreements applicable in the sector of activity, including in relation to labour law, income tax and financing of social protection. Platform workers shall fully enjoy the same employment rights as other workers in accordance with national law, collective agreements or practice in force in the Member States, including the rights to join a trade union, to organise, and to bargain collectively.
	Article 3(2), point b	
87b		2b. This Directive applies in full to digital labour platforms exerting the function of temporary work agencies, in addition to Directive 2008/104/EC.
	Article 3a	
87c	Article 3a Initiation of proceedings	
	Article 3a (1)	
87d	1. Where a competent national authority considers that a person performing platform work might be wrongly classified, it shall take appropriate action, in accordance with national law and practice, with a	

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	view to ascertain the correct employment status of that person.	
	Article 3a (2)	
87e	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	
G 88	Article 4 Legal presumption	Article 4 Legal presumption
	Article 4(1)	
R 89	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 criteria indicating control and direction are found, either by virtue of its applicable terms and conditions or in practice:	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 there is any indicator of control and direction in connection with the performance of the work
	Article 4(2)	
R 91		2. Indicators of control and direction in connection with the performance of work, either by virtue of its applicable [terms and conditions] or in practice, shall include, but shall not be limited to, indicators of one of the following:
	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 or sets upper limits for the level of remuneration or issues periodic payments 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	(b) The digital labour platform requires the person performing platform work to respect specific rules with regard to appearance, conduct towards

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	towards the recipient of the service or performance of the work;	the recipient of the service or performance of the work;	
	Article 4(2), point (c)		
R	94 (c) The digital labour platform supervises the performance of work including by electronic means;	(c) The digital labour platform tracks or supervises the performance of work including by electronic means;	R
	Article 4(2), point (d)		
R	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) 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;	R
	Article 4(2), point (da)		
R	95a (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) 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;	R
	Article 4(2), point (db)		
R	95b (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;		R
	Article 4(2), points (e) – (g)		
R	96 (e) The digital labour platform restricts the possibility to build a client base or to perform work for any third party.	(e) The digital labour platform restricts the freedom, including by 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.	R
	Article 4(1a)		
R	96a 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		R

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	question, with consideration to the case-law of the Court of Justice, regardless of the number of criteria fulfilled.	
	Article 4a	
R 102a	Article 4a Application of the presumption and rebuttal	Article 4a Application of the presumption and rebuttal
	Article 4a(1)	
R 102b	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.	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 a competent national authority considers that there is any indicator of control and direction indicating that a person performing platform work might be wrongly classified, they shall take appropriate action, in order to apply the presumption with a view to ascertain the correct employment status of that person. 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 competent authorities shall take appropriate action, in order to apply the presumption with a view to ascertain the correct employment status of that person. The application of the legal presumption shall not lead to an automatic reclassification of all persons performing platform work as platform workers. When national authorities and bodies, other than the competent authorities to reclassify workers, consider that a person performing platform work might be wrongly classified, they shall communicate the information to the competent authorities.

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Article 4a(1) second subparagraph			
R	102c	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.	R
Article 4a(2)			
R	102d	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.	R
		2. 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. The digital labour platform and the affected persons performing platform work shall be given a reasonable deadline to respond in case they decide to rebut.	
Article 4a(3)			
R	102e	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.	R
		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.	
Article 4a(3) second subparagraph			
R	102f	To this effect:	R
		To this effect:	
Article 4a(3) second subparagraph point (a)			
R	102g	(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.	R
		(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.	
Article 4a(3) second subparagraph points (b) and (c), Article 4a(4) and (5)			
R	102h	(b) where the digital labour platform argues that the contractual relationship in question is not an employment relationship as referred to	R
		(b) where the person performing the platform work argues that the contractual relationship in question is not an employment relationship in	

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	in 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 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 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, 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 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 relevant competent national authorities are informed, as appropriate, about final decisions in which the existence of an employment relationship is established.	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 burden of proof will be on the platform. 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 free from control and direction as referred to in 4(2), and that between the person performing platform and the platform there 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. 5. Persons performing platform work affected by the presumption shall be reclassified as platform workers when the presumption is not rebutted or the rebuttal does not conclusively prove that the persons performing platform work are free from control and direction.

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	Article 4a(6)	
R	102i 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.	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. Member States shall ensure that relevant competent national authorities are informed, as appropriate, about final decisions in which the existence of an employment relationship is established and take the necessary decisions, in line with national law and practice, in order to apply all the effects deriving from the reclassification decision.
	Article 4a(7)	
R	102j 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.	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.