Comments from the BE delegation

Answers to questions 1b), 2a) and 3c)

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

We would like to go back to the provision as set in the compromise proposal 11593/22 concerning the criteria d).

Our will is to cover most of the situations through a strong and effective rebuttable legal presumption in order to provide protection for this vulnerable group of workers. In practice, it is known that it is complicated for platform workers to have their status as employees effectively recognized. Adding two more criteria (by dividing criteria d)) makes this presumption more difficult. Our goal is to ensure the workers of platforms avoid falling in the precariousness due to a wrong status.

All the criteria provided for in the COM proposal already exist in Belgian law, even before the introduction of the specific presumption relating to digital platforms into the legislation. The proposed criteria are indeed very close to our general criteria and/or certain sectoral criteria, for example in the transport sector. These elements have therefore already been examined by the courts, in particular the Brussels Labour Court in the UBER case (21/12/2022).

In the UBER case, the criteria (a) and (db) of the proposal were considered to be met (2 out of 7) and the other criteria not met (5 out of 7).

These criteria are worded somewhat differently in Belgian law, but they cover the same aspects. It can therefore be seen that before the same court, Uber drivers would still be considered as self-employed after the implementation of the Directive. What appears here is that following the same reasoning as the judge in the UBER case, there will not even be a need to reverse the presumption by means of the general criteria of Belgian law, since too few of the criteria of the Directive are fulfilled for the presumption to apply.

If the criteria (d) is split in three different criteria, the Uber driver only meets one criterion out of the three. However, to be presumed to be in an employment relationship, now he has to fill in 2 more criteria in article 4 (3/7).

While, if we go back to the criteria as set in the proposal 11593/22, the driver would fill in the criterion d) and a) and the presumption of an employment relationship therefore will apply (2/5).

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 a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

It could happen in cases in which the platform obliges workers to use certain equipment that is made compulsory by legislation for safety reasons (e.g. transport), or checks that the professionals active on the platform meet the rules of access to their profession (e.g. lawyers, chartered accountants), or obliges workers to comply with tariffs that would be set by the regulations (e.g. self-employed carers covered by a convention who have to comply with the fees set by the sickness institution).

In Belgium, it is already provided that platforms cannot require a worker to comply with binding rules on presentation, behaviors towards the recipient of the service or performance of the work, unless this is provided for by legal provisions on health and safety applicable to users, clients or workers.

When such a legal provision applies, the platform will not be considered to fulfill criterion b) of the proposal.

The derogation may not lead to expand opportunities set at the national level for the circumvention of the presumption set by EU law.

3. Article 3(1) and 4a(1),

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?

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?

The determination of the employment status generates consequences in terms of tax law, social security law, criminal law, labour law (and entails obligations in terms of safety, health and discrimination) and commercial law.

In Belgium, the determination of the employment status is regulated by the law on the determination of the labour status of 27 December 2006.

As soon as the employment status is established, there are consequences in terms of tax, social security, and social criminal law, because the employer can be exposed to criminal sanctions. Those rules are different from a self-employed status, and this is why the presumption should apply , in a consistent way, in tax and social security matters.

With regard to social security contributions, the question arises as to whether they are employee or self-employed contributions, and for this it is necessary to determine the nature of the employment relationship and the status of the worker.

This is why the presumption of the employment relationship provided in the proposal should also have legal effects on the procedures in social security, criminal law and taxation (instead of explicitly being excluded).

Comments from the BG delegation

1. <u>Article 4(1)</u>, *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.

<u>Questions</u>

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?

It is important for us that the criteria specified in Art. 4, par. 1 of the Directive, are clear and applicable in practice, in order to be able to easily distinguish the type of legal relationship of each person working through a platform. In this sense, we consider that the way the criteria are formulated in Art. 4, par. 1 are sufficient and the text proposed by the Czech Presidency in December finds the right balance of the presumption. Bulgaria believes that possible increase of the ambition of the text should be approached carefully, given the position of the Parliament, which completely removes the criteria from Art. 4.

In this respect, increasing the ambition of the Council's Common Approach will make it impossible to find the right balance in the negotiations with the European Parliament, which will lead to their blocking. We draw attention to the fact that Bulgaria also proposed the separation of the criterion in letter "b", as was done in letter "d", due to the fact that in practice there are three separate criteria in this letter.

Also, not everywhere in the Directive a clear distinction is made between platform workers and those working through digital labour platforms, i.e. between employees and self-employed persons, in view of the rights granted to them by the Directive. An example of this is Art. 17 and 18, where the protection against dismissal, which is relevant only for those working under employment relationship, is also associated with self-employed persons working through platforms.

---

1 In its version of document 15338/22 REV1

Bulgaria has repeatedly raised this issue, with specific proposals for editing the text, which it hopes will be reflected in the General Approach, as proposed in the room document distributed by the Czech Presidency during the December Council meeting.

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?

2. <u>Article 4(2a)</u>, *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.

<u>Questions</u>

a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

We have no such an examples.

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

b) Is this provision necessary? If so, could this issue be addressed in other ways in the directive?

It may be useful to have this provision as part of the recitals. At the same time, however, in view of the answer to the first question, related to Art. 4(1) - regarding the presumption, we believe that it should be clear when and under what conditions the provision of Art. 4(2a) is going to be applied, so as to ensure that there are clear and unambiguous criteria in the Directive regarding the presumption for determining the status of a person working through digital employment platforms, as well as a clear mechanism to trigger this presumption.

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 19[3] 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.

---

3 In their version of document 15338/22 REV1.

4 In its version of document 15338/22 REV1.

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.

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?

In Bulgaria, the presumption will not apply in all administrative and/or criminal proceedings. According to the current legislation, the Labour Inspectorate is the only competent authority that has the right to announce the existence of an employment relationship. In the event that the tax authorities have doubts about the correct classification of an individual, they refer it to the Labour Inspectorate. If the Labour Inspectorate declares the existence of an employment relationship, this fact should be accepted as such by the tax authorities.

In this regard, there is a definition of an employment relationship and its characteristic elements in the Bulgarian labour legislation. There is also a procedure for determining the status of the person when work is performed under an employment relationship without an employment contract (Article 405a of the Labour Code). Therefore, in our opinion, at the moment, the obligations in Art. 3, par. 1 in conjunction with recital 19 seem to be sufficient.

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.

No. There is a specific definition of the employment relationship for the purposes of the Personal Income Tax Act, which is much broader than that provided for in labour legislation and covers, in addition to workers, also civil servants, prosecutors and judges, relationships with employees in the Bulgarian Orthodox Church, etc. This definition originates from the principle of fiscal autonomy.

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?

There are no practical difficulties, since the definition of an employment relationship for the purposes of the Personal Income Tax Act also covers the employment relationship within the meaning of the Labour Code.

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?

In our opinion, Art. 3, par. 1 is clear enough and, also in our opinion, this should be the final result of the application of the presumption, namely that the person who is reclassified as a worker should enjoy the rights and obligations provided for in the labour legislation for all workers.

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.

---

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

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?

The provision of Art. 4a, par. 2 defines the scenarios in which national authorities may not apply the presumption when it is obvious that it will be rebutted. In our opinion, this provision should be further considered in order not to allow different application in practice by different authorities.

Comments from EE delegation

Questions 1b), 2a) and 3c) have already been answered earlier but for the sake of clarity are also included here.

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?

No.

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.

In Estonia, there is no specific regulation for platform workers. According to the Employment Contracts Act, if a person does work for another person which, under the circumstances, can be expected to be done only for remuneration, it is presumed to be an employment contract. However, in case of doubt, the labour inspectorate will evaluate all circumstances together before issuing a precept ordering the company to fulfil employer´s obligations. Also, in case of a dispute, the labour dispute committee or court will assess the relationship between parties, taking into account all circumstances.

We consider it important that the criteria for the legal presumption of an employment contract in platform work characterize, as precisely as possible, the contractual employment relationship. Otherwise it is a high risk that we cover the majority of self-employed with legal presumption, which would cause legal uncertainty and create unnecessary burden for all parties.

We believe that some of the criteria, (the first three regarding pay, rules on appearance and some other aspects and quality of work) are also characteristic and common in case of genuine self-employment. Therefore, the threshold should be at least four out of seven.

In Estonia, taxi drivers usually work under their own company or are self-employed and use multiple platforms simultaneously. If they were considered as employees, it would be unclear which of the platforms would be their employer. It would also hinder their possibility to work for multiple platforms, which would decrease their income.

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?

During the negotiations, Estonia has made several alternative text proposals, we are willing to continue working with them. In principal, as pointed in the previous answer, we consider it important that the criteria for the legal presumption of an employment contract in platform work characterize, as precisely as possible, the contractual employment relationship. We believe that the first three criteria regarding pay, rules on appearance and some other aspects and quality of work are also characteristic and common in case of genuine self-employment. Therefore, we are still on the opinion that the criteria points a-c should be deleted or the threshold should be at least four out of seven.

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) 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?

We find it important to leave the principle of article 4(2a) in the operative part, since it is essential to reduce the risk that we would cover the majority of genuine self-employed with legal presumption. Below are some examples illustrating our position.

Firstly, regarding couriers and food safety, some food may need special temperature while transporting them (e.g. frozen products as well as warm foods that need certain internal temperature). The delivery of foods by a courier must be properly performed (e.g. using thermal transportation bags).

Furthermore, regarding drivers, our Road Traffic Act states that the driver of a motor vehicle must have a valid document certifying their right to drive. Vehicles are also subject to compulsory insurance and must pass the roadworthiness test. The Public Transport Act states requirements for Taxi Services according to which a person must have a vehicle card (certifying the right to use the specific vehicle for the provision of taxi services) and a service provider card (proving the right to work as a driver providing taxi services). Taxi drivers must fill these obligations.

Lastly, the Consumer Protection Act applies to the offering and sale of goods and services. For example, the Act states that consumers have the right to obtain information on the safety of goods and services offered as well as on aspects concerning protection of health, property and economic interests. Most of such information is usually available via the app, but consumers may still question the courier regarding product or delivery information etc. Also, consumers have the right to obtain goods and services which meet the requirements, are harmless to the life, health, and property of the consumers.

If a platform becomes aware that the service provider is not providing the service in a safe way, e.g driving under the influence, seriously infringing traffic rules or expressing predatory behaviors, then the platform must be able to eliminate that service provider from the platform for the safety of consumers.

It is important that services provided through platforms are high-quality and safe, therefore platforms may require the person performing platform work to respect specific rules concerning the performance of work and supervise compliance with mentioned requirements. At the same time, supervision of such requirements is characteristic to all contracts, regardless of whether the person performing platform work is an employee or a service provider.

b) Is this provision necessary? If so, could this issue be addressed in other ways in the directive?

Yes, we find this provision necessary. It is important to leave the principle of article 4(2a) in the operative part, since it is essential to reduce the risk that we would cover the majority of genuine self-employed with legal presumption.

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 19 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), 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.

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?

In Estonia, the legal presumption is used in labour law proceedings (by labour inspectorate, labour dispute commitees, courts). In theory, the tax authority could use the same legal presumption established in the Employment Contracts Act when requalifying contracts, but in practice they assess all aspects (see also answer to question 3c) before making the decision. That is also often the case for the labour inspectorate to avoid the state responsibility, should the use of legal presumption lead to wrong results.

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.

Yes, in Estonia, the notion of employment relationship is the same in all different fields of law.

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?

In Estonian legal system there is no different notions of employment relationship.

According to the Taxation Act, if it is evident from the content of a transaction or act that the transaction or act is performed for the purposes of tax evasion, conditions that correspond to the actual economic content of the transaction or act apply upon taxation. As the tax authority has the right to supervise tax transactions according to the actual economic content, the Supreme Court has found that the Tax and Customs Board can also requalify contracts formally concluded between two legal entities to be employment contracts. In these cases, the requalifying the contract is still based on the one notion of employment relationship provided in the labour law.

d) Do you consider that article 3(1), stating that the Member States shall ensure that platform workers enjoy the rights deriving from <u>relevant</u> 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?

We consider the provision clear.

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), 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.

Question

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?

We consider the provision to be reasonable and do not think that it would create a gap.

Comments from the EL delegation

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

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?**

We have expressed our doubts regarding the proportionality of criteria a, b and c of art 4 (1) of the Proposal as it appears on the Presidency Document of the 7th December 2022 because they are «triggered» in almost every case where ride hailing and delivery platforms are involved and thus they would not be *proportionate* according to the CJEU case-law.

Indeed, according to current practice, a lot of platforms in the above sectors would set upper limits of remuneration (criterion a) almost all would require the person performing through platforms to respect specific rules regarding appearance, conduct towards the client or performance of the work (criterion b) ex. wear clean clothes, address a client in a certain manner, make sure the client is safe, keep the food safe etc and supervise the work (criterion c), ex. whether the food was delivered in due time or at all.

This is because the above functions described in criteria a b and c are inherent to the nature of platform work and to the modus operandi of the digital labour platforms regardless of whether the person performing platform work is worker or self-employed. This is why, in our opinion, criteria a b and c are not pertinent to demonstrate the employment status.

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.**

Greece has in place a special law regarding platform work (which entered into force before the entry in force, or even the publication, of this Proposal). This law is based on the CJEU case law, particularly the Yodel Order *(case no. C-692/19, Yodel Delivery Network Ltd.)* i.e. it comprises the following criteria as per the determination of the employment status.

According to the Yodel case-law, a person working through platforms is considered to be self-employed if he/she:

a. can use subcontractors or substitutes to perform the service undertaken

b. can accept or not the various tasks offered by their putative employer or unilaterally set the maximum number of those tasks

c. provide services to any third party, including direct competitors of the putative employer

d. fix their own working hours within certain parameters and tailor their time to suit their personal convenience rather than solely the interests of the putative employee, provided that the independence of that person does not appear to be fictitious and it is not possible to establish the existence of a relationship of subordination between that person and his putative employer.

The Greek reform requires that all four above criteria cumulatively are met so that the person is presumed not to be a worker (and thus to be self-employed). Indeed, the existence of all four above criteria ensures in the eyes of the Greek legislator that the person in question enjoys the independence of the truly self-employed. This independence must be real and not fictitious.

However, the same person who would fulfill the above criteria and would be *a genuinely self-employed person*, under Greek law and under CJEU case-law, could be *presumed to be worker*, according to this Proposal, if the modus operandi of the digital labour platform fulfilled also criteria a, b and c which, as said, are «triggered» in most cases where ride hailing and delivery platforms are concerned.

In this case, a. a genuinely self-employed person would be wrongly affected by the legal presumption and b. the implementation of the criteria set in the proposed directive would lead to the exact opposite result than the one provided for by the CJEU case-law. To our knowledge, the Yodel Order is the only case law where the CJEU aims to determine the employment status in platform work for professionals i.e. for people who receive remuneration for their work and is also very recent.

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?

Since, in our opinion criteria a b and c are not adequate to determine the employment status, as explained above, the triggering of the legal presumption should not rely solely on these 3 criteria but one additional criterion of the remaining d da, db and e should be needed. Given that criteria d da, db and e are inspired by the Yodel case-law, in such a case, at least one "Yodel" criterion would have to be taken into consideration ensuring that the CJEU case-law is not disregarded.

A modification of criteria a, b and c in a manner that would make them more suitable to platform work and thus, more proportionate, could also be considered.

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

Questions

a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

Taxi drivers working through platforms/apps fall within the scope of the proposed Directive, as previously explained by the Commission. Taxi drivers in Greece are offering a "public service", for example, under circumstances, they cannot refuse a drive and their profession is heavily regulated. There are rules regarding their conduct towards the customer, their health and safety, the health and safety of the customer. The same goes for restaurants (and subsequently delivery platforms) regarding food safety.

This is why the provision of article 4 2a is needed and should remain in the operative part of the text.

b) Is this provision necessary? If so, could this issue be addressed in other ways in the directive?

The scope of the provision could be limited, though, to issues dealing with the health and safety of the customer and of the person performing platform work, thus ensuring that the essence of this clause is safeguarded in the main text.

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

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?

The notion of the employment relationship is a labour law notion in the Greek legal order.

The inclusion of article 4a 1 2nd subparagraph excluding the use of the legal presumption in tax, criminal and social security proceedings is, in our view, necessary so that Member States' competences in these areas are secured. It is also essential so that bureaucratic chaos is avoided.

Furthermore, if we have understood correctly, the presence of this paragraph in the main text, according to the CLS, is important, where the political choice of not implicating the use of the legal presumption in tax, criminal and social proceedings is made.

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?

Some clarification of the term *relevant* would be welcome.

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

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?

We do not share this view. This provision can relieve unnecessary administrative burdens contributing to the efficacy of the Proposal.

Comments from the IE delegation

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

<u>Questions</u>

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?**

Ireland can accept the formulation as set out in the EPSCO Council 08.12.2022 PRESIDENCY ROOM DOCUMENT.

Irelands already has mechanisms for the determination of employment status. For the question to be examined all that needs to be stated is that there is a contract of employment/contract for service (i.e. a statable case). It then a matter for the relevant authorities to determine the question on the facts of each case. A full examination of the relationship will take place.

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?**

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

<u>Questions</u>

a) **Can you provide examples when this provision would be applied in your Member State under the current legislation?**

There is no statute law on the matter. The employment status tests rely on common law, that is, rules laid down by judges. In Ireland, the first test is known as the 'mutuality of obligation' test i.e. is there an obligation to offer work/to work. Then question such as integration, control, etc are considered. Each case must be determined on its own facts.

While there is a statutory obligation to provide terms and conditions of employment to an employee, Irish courts accept that a contract can also be oral.

b) Is this provision necessary? If so, could this issue be addressed in other ways in the directive?

It is not necessary.

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

<u>Questions</u>

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?

Tax law, social welfare law, labour law

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.

While the tests are applied in a similar manner in each area of law, tax rules differ from those applicable to labour and social welfare law.

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?

In Ireland, the decisions of authorities on the classification as a worker are not binding on other authorities that make decisions based on their competence.

d) Do you consider that article 3(1), stating that the Member States shall ensure that platform workers enjoy the rights deriving from <u>relevant</u> 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?

It is fine.

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

<u>Questions</u>

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?

Ireland can support the text as it is.

Comments from the LV delegation

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

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?

We look positively at the efforts to bring the legal presumption criteria closer to the findings/conclusions expressed in the ruling of the EU Court in case No. C-692/19 (Yodel Delivery Network Ltd. Case), as particularly important in distinguishing a worker from a self-employed considering the employer`s subordination/supervision.

However, we still consider that no significant changes have been made in the application of the legal presumption - even with the increased number of criteria, a minority of these criteria (3 out of 7) are still sufficient to apply the legal presumption and presume the employment relationship. It is important that the criteria provide greater legal certainty, reduce litigation costs and facilitate business planning in the work of the digital labour platform. The focus should also be on the protection of genuine self-employed in the way of fairness and proportionality.

This kind of approach for application of presumption when a minority of the criteria are sufficient can limit the existence of true self-employment and create a significant additional burden for merchants, while also limiting competition. The application of minority criteria can slow down the creation of new digital labour platforms, slowing down the economic growth of the overall platforms. Increasing the criteria for application of legal presumption would improve the labour market conditions for entrepreneurs, strengthening the ability of merchants to operate in an innovative and competitive business environment.

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.

Please see the answer to the previous question.

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?

In our opinion, it is necessary to use the approach of applying the majority of legal presumption criteria (at least 4 of 7). Moreover, the legal presumption criteria must be based on the digital labour platform`s as employer`s subordination/supervision over the employed person as the determining factor in order to presume an employment relationship.

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

Questions

a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

At the moment, such examples are not identified.

b) Is this provision necessary? If so, could this issue be addressed in other ways in the directive?

This provision can remain in the text of the directive.

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

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?

In LV the correct determination of the employment status is important in the fields of employment relationship, taxes and social security.

If employment legal relationship is identified, the legal enactments of employment relationship with the requirements specified therein are applied.

As regards social security, correct initial determination ensures that contributions are collected in right amounts (status change will include regress claims, possible penalties, additional payments on the part of employer and employee or returned contributions). Payment periods and rates differ for employees and self-employed.

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.

The same notion of employment relationship in the fields of employment relationship, taxes and social security. According to Labour Law of LV an employee is a natural person who, on the basis of an employment contract, performs specific work under the guidance of an employer for an agreed remuneration.

In addition, regarding taxes the law "On Personal Income Tax" provides for an anti-avoidance rule, which determines the features of work remuneration. Upon identification of these features, salary tax (personal income tax) and mandatory state social insurance mandatory contributions must be paid on such deemed work remuneration.

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?

A regulation that creates less room for interpretation is needed.

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

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?

We consider that the regulation should not create an excessive administrative burden for competent national administrative authorities.

Comments from the LT delegation

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

Article 4(1)[6] 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.

In LT Labour Code there is no specific regulation for platform workers or separate institution of legal presumption, which would determine employment status of person. At the same time we look very carefully for any proposals and measures which would change it substantially by creating discriminatory regulations for the persons who are in a similar situation or would be disproportionate.

*We do not think that the criteria, **especially the threshold**, are now designed in a way that the right people will be covered by the legal presumption. The threshold is too low and would wrongly affect genuine self-employed persons. The poss. example would be taxi driver who would fall under the proposed legal presumption, by triggering first three criteria (a, b and c) as he/she would have determined remuneration for provided services,*

---

6 In its version of document 15338/22 REV1

respect specific rules with regard of conduct towards the recipient (be on approximate time if decided to accept offer to provide services) and trip would be determined (approximately) according to the initial plan and for agreed price (supervises the performance). Similar examples would go for food or package deliveries.

On the other hand ***Member states who wish to lover the threshold or to have more criteria*** *are free to do so and will not have to change their existing legal regulations.*

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?

The threshold *should be increased at least up to 4 out of 7, to majority or that one of (d), (da), (db) or (e) always be triggered together with criteria (a), (b) and (c) or delete criteria (a), (b) and (c). At the same time we believe that criterion (c) and criterion (d) are overlapping. For this reason criterion (d) could be deleted or merged with criterion (b).*

Another possible solution for usage of the criteria is to take the idea from the EP's agreed mandate, which sets that all ***criteria should be taken in to consideration while evaluating employment status*** *but differently to the EP's proposal, to* ***delete legal presumption entirely****. This would bring closer the EP's and the Council's positions, ensure overall evaluation of employment status and would ensure that the measures at the EU level are proportional and correspond to* ***the minimum requirements for gradual implementation*** *according to the Art. 153.2 of the TFEU.*

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

Article 4(2a)[7] 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.

<u>Questions</u>

a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

*This provision was applied due to **COVID19 pandemic**, when not only workers but also service providers (self-employed) where required to take obligatory measures and which were out of scope of the OSH regulations. As for **OSH regulations**, currently in LT it is applicable only to workers, except for self-employed persons who provide independent activities on a construction site. For these self-employed persons OSH regulations applicable mutatis mutandis.*

*Another example would be from the COM's communication "**Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons**" which sets scope and examples of working conditions which could be agreed by the solo self-employed persons, "such as: **remuneration, rewards and bonuses, working time and working patterns, holiday, leave, physical spaces where work takes place, health and safety, insurance and social security, and conditions under which solo self-employed persons are entitled to cease providing their services or under which the counterparty is entitled to cease using their services**" (para 15).*

---

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

In case of collective agreement concluded according the COM's Guidelines and without explicitly stating in the Directive that the criteria shall not be deemed fulfilled in case of compliance with a collective agreements, ***it would automatically requalify person as a worker****, although collective agreement between platform and self-employed persons is concluded according to the COM's Guidelines. On other hand,* ***MS still be in the position to requalify person from self-employed status to employment relationship*** *according to 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 even when the collective agreement is concluded according to the COM's Guidelines.*

b) Is this provision necessary? If so, could this issue be addressed in other ways in the directive?

Yes, this provision is necessary and should stay in the operative part.

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 19[8] 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)[9], 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.

---

8 In their version of document 15338/22 REV1.

9 In its version of document 15338/22 REV1.

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.

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?

The provisions of the Labor Code determine the characteristics of employees. Certain provisions of self-employed persons are in the Law on Employment as well. The provisions of these laws apply equally in all procedures. According to national law, it is important to apply the determination of employee status in procedures related to labour relations. In the event that a question arose regarding status determination, e.g. in the field of taxation, the question would be referred to the State Labour Inspectorate, which would apply the presumption.

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)[10], 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.

[10] In its version of documents 14514/22 to 15338/22 REV1.

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?

No, we don't. According to Art. 23 of LT Law on Courts the ***Supreme Court shall develop a uniform practice*** *of court of court of general jurisdiction in the interpretation and application of statutes and other legal acts. The* ***interpretations of the application of laws and other legal acts contained in the rulings of the Supreme Court shall be taken into account by the state and other institutions, as well as other persons*** *when applying the same laws and other legal acts. When developing and ensuring uniform interpretation and application of law in courts of general jurisdiction, the Supreme Court analyses the practice of national, European Union and international courts, other sources of law, prepares summaries of court practice, reviews, and publishes information on its activities.*

Thus, the State Labour Inspectorate ought to follow and take into account the interpretations of the application of laws, including regarding the interpretation of the Labour Code or the Law on Employment.

Comment from the PT delegation

1. <u>Article 4.1</u>, *i. e.* the design of the criteria to trigger the presumption

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?

Regarding the design of the criteria, some of the previous concerns remain:

i) the legal presumption should be simple and practical, understood and applied, so as to determine the employment status correctly. The more criteria are needed to be fulfilled, the more difficult it becomes to be established;

ii) Fulfilling the criteria to establish a legal presumption should not exclude the verification of juridical subordination: this is fundamental for PT to determine the existence of an employment relationship. All circumstances as a whole are verified on a case-by-case basis and subject to the *de facto principle;*

iii) Establishing the legal presumption through fulfilment of 3 out of 7 criteria would be a substantial modification for the PT Labour Code, namely in its article 12º which establishes 2 out of 5 criteria.

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

a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

Criteria mentioned in a), b), c), d), da), db), and e) refer to specificities of platform work. It seems admissible that some of these specificities will derive from collective bargaining amidst each sector. It is therefore not clear why such conformity should be regarded as excluding the validity of the criterion for the purposes of the presumption.

Such is the case where in collective agreements, e.g. a dress code, should be complied with (*see PT, clause 51, Collective Agreement between Associação Portuguesa de Facility Services, APFS and Cleaning and Domestic Services Union, STAD)*. Portuguese jurisprudence *acquis* considers for example this dress code criteria as insufficient to determine the existence of an employment relationship if it is not connected to a juridical subordination conceptual situation as a whole – this is, at the least, organising one's work, setting levels of remuneration, supervising the performance of work and/or verifying the quality and results of the work including by electronic means, effectively restricting the possibility to build a client base or to perform work for any third party, discretion to establish the working hours and periods of absence, to accept or to refuse tasks and to use subcontractors or substitutes.

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

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?

In our national legislation, the existence of an employment relationship will have effects in other areas such as tax and social security.

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

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?

In our legislation, determining the existence of an employment relationship is decurrent from a worker's claim or the labour inspective body initiative and discretion; both can proceed to Court.

Council of the European Union
General Secretariat

Interinstitutional files:
2021/0414 (COD)

Brussels, 13 February 2023

WK 1899/2023 ADD 1

LIMITE

SOC
EMPL
MI
DATAPROTECT
CODEC

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

MEETING DOCUMENT

From: To:	General Secretariat of the Council 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

In view of the Social Question Working Party meeting on 13 February, delegations will find attached the contributions received from the BE, BG, EE, EL, IE, LV, LI and PT delegations.