

Comments by DK

For the sake of compromise, DK expects to be able to support a directive without harmonized conditions for the triggering of a legal presumption. However, for now we have a scrutiny reservation on the text.

For good order, please find below our main points from this morning:

Regarding Article 5.3, we would once again emphasize, that it must be possible for the Member States to decide not to apply the presumption rule in procedures relating to tax, social security, etc. If needed, we DK could as a compromise accept the insertion of "solely" in the current wording.

DK could support Article 5.5, assuming that the provision respects national systems, including systems, where there are no labor market inspectors who can initiate a procedure in the courts. It is important for DK that the directive does not require MS to establish new authorities or change the distribution of competences between existing authorities.

As raised by several MS in the SQWP this morning, we would prefer that "where appropriate" be reinstated in 6.1.c, so that it is clear that it is up to MS (when and if) to organise inspections. With the suggested wording in the PRES note we see a risk of moving the balance.

We took note of the PRES information that recitals 30-32a would be replaced by new 31a as part of the new approach – we support this.

Comments by EE

Following today's working party, please find below EE comments on the joint exploratory text (WK 1709/2024, 2 February 2024), as also raised and discussed in the WP:

1. **Art 5 (2).** We propose to **a)** delete the word „*effective*“ or alternatively clarify its meaning in the recitals; **b)** clarify in the recitals what is meant under the *increasing the burden of requirements*, including what requirements we are talking about and the reference point against which the increasing the burden of requirements must be compared. Otherwise, it remains legally uncertain what is meant by the additions of “*effective*” and “*increasing the burden of requirements*”.
2. **Art 5 (3).** The word “*solely*” should be deleted because it creates room for interpretation and brings legal uncertainty.
3. **Art 5 (5).** The paragraph refers to the need to initiate “*appropriate actions and proceedings*”, but it should be clarified that “*appropriate actions and, where appropriate, proceedings*” should be initiated. The current change made in compromise text is substantial, not merely technical.
4. **Art 6 (1) point c.** Regarding the reference to “*provide for appropriate controls*” we support the previous wording “*provide, where appropriate, for controls*”.
5. **Art 27 (2).** Because of changes made in Article 5 legal presumption, the last sentence in Article 27 paragraph 2 is not relevant anymore and should therefore be deleted: “*In particular, Article 5 paragraph 1 shall not affect national rules providing for a higher number of indicators or for reclassification procedures which are more favourable to platform workers.*”.

Comments by FI

Dear PCY, Finland shares many of the same concerns + justifications that have been presented already and would thus support both the SE comments and the EE comments, especially on Art 5.5. and Art 6.1c (see below):

1. To that effect, Member States shall establish ~~an effective~~ rebuttable legal presumption of employment that constitutes a procedural facilitation to the benefit of persons performing platform work, and Member States shall ensure that that legal presumption does not have the effect of increasing the burden of requirements on persons performing platform work, or their representatives, in proceedings ascertaining their employment status.
2. The legal presumption shall apply in all relevant administrative or judicial proceedings where the correct determination of the employment status of the person performing platform work is at stake.

The legal presumption shall not apply to proceedings which ~~solely~~ concern tax, criminal or social security matters. However, Member States may apply the legal presumption in those proceedings as a matter of national law.

3. **Art 5 (5).** The paragraph refers to the need to initiate “*appropriate actions and proceedings*”, but it should be clarified that “*appropriate actions and, where appropriate, proceedings*” should be initiated. The current change made in compromise text is substantial, not merely technical.
4. **Art 6 (1) point c.** Regarding the reference to “*provide for appropriate controls*” we support the previous wording “*provide, where appropriate, for controls*”.

Comments by HR

- In relation to the submitted text, given that the Republic of Croatia has already legally regulated the work performed via digital work platforms and that within the framework of this, it has not established a fixed minimum number of criteria that must be met in order to trigger the legal presumption, but has opted for an individual approach that will in each individual case, in the proceedings before the competent court, to assess whether the key elements of the employment relationship are present, we do not find the proposed article 5, paragraph 1, of the last text of the proposal of the directive unacceptable.
- In relation to paragraph 2 of the same article, we believe that it has no added value and that it is not clear what obligations arise from it. We point out again that we do not accept the extension of obligations by competent national authorities to carry out appropriate controls and inspections on certain digital work platforms where the existence of an employment relationship has already been established (Article 6, paragraph 1, point c).

Comments by HU

Our suggestions are listed in a descending hierarchical order, reflecting their perceived significance from our standpoint, as delineated below:

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

„5.(3) The legal presumption shall apply in all relevant administrative or judicial proceedings where the correct determination of the employment status of the person performing platform work is at stake.

The legal presumption shall not apply to proceedings which **solely** concern tax, criminal or social security matters. However, Member States may apply the legal presumption in those proceedings as a matter of national law.”

Rationale: The insertion of “solely” creates uncertainty in the interpretation of the provision by suggesting that multipurpose procedures, where the determination of the correct employment status is not at stake (i.e., procedures concerning both tax and social security matters), could fall within the obligatory application of the legal presumption. Otherwise, in the first sentence of the paragraph, it is clearly indicated that the legal presumption is applicable in all relevant proceedings, including any proceeding where the qualification of the employment status is assessed. Therefore, the insertion of “solely” is unnecessary and ambiguous.

2. Article 6 paragraph 1 (c): Controls and inspections in case of reclassification

“Article 6

Framework of supporting measures

1. Member States shall establish a framework of supporting measures in order to ensure the effective implementation of and compliance with the legal presumption. In particular, they shall:
(...)
- (c) provide for effective controls and inspections conducted by national authorities, in line with national law or practice, and in particular provide, **where appropriate[...]**, for **appropriate** controls and inspections on specific digital labour platforms where **the existence of an employment relationship** has been **ascertained by a [...]**competent national authority, while ensuring that such controls and inspections are proportionate and non-discriminatory.”

Rationale: We prefer the wording of the text of former Article 7 (1) c) in doc. 5816/24 submitted to COREPER on 26th January. The discretion of national authorities to initiate and conduct inspections belongs to the competence of Member States (in regulating the procedural aspects of labour inspections). We are suggesting to add “where appropriate” as indicated above in order to ensure the independence provided by the Treaties for national competent authorities (mainly labour inspectorates).

3. Article 5 paragraph 2: Obligation to create a legal presumption

- “5.(2) To that effect, Member States shall establish an **effective** rebuttable legal presumption of employment that constitutes a procedural facilitation to the benefit of persons performing platform work, and Member States shall ensure that that legal presumption does not have the effect of increasing the burden of requirements on persons performing platform work, or their representatives, in proceedings ascertaining their employment status.”

Rationale: Hungary considers that it is given that a transposition of the *acquis* must be *ipso iure* effective. Accordingly, using this adjective in this context is prone to create confusion and possible unnecessary disputes of interpretation in the future. For the sake of legal clarity and to prevent misinterpretation of the intention of the Council we would like to ask for the deletion of this adjective.

Comments by IE

IE Written Comments

Following Presidency request at the SQWP of 05 February 2024 for MS written comments on the joint exploratory text contained in doc 3104/24 of 03 February, please find Ireland written comments below, which relate to Article 5, paragraph 2.

Ireland thanks the Presidency for the continued efforts on this file, and hopes a satisfactory agreement can be found.

Article 5

Legal presumption

1.

2. **To that effect, Member States shall establish an effective rebuttable legal presumption of employment that constitutes a procedural facilitation that is fair to persons performing platform work, and Member States shall ensure that that legal presumption does not have the effect of increasing the burden of requirements on persons performing platform work, or their representatives, in proceedings ascertaining their employment status.**

Rationale:

The purpose of the provision is to assist with ensuring the correct determination of employment status of platform workers, when this is in doubt, and that platform workers are assisted and facilitated with appropriate processes and procedures to ensure the correct determination of their employment status.

It is imperative that all parties to any proceedings seeking to determine the correct employment status, whether through the legal presumption or rebuttal of same, are dealt with in a fair and consistent manner, and that the outcome of any such proceedings are not pre-empted or predetermined to ensure that they are *to the benefit* to any one party.

Comments by LT

Article 5

Legal presumption

5.1 The contractual relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship when **facts indicating control and direction, according to national law, collective agreements or practice in force in the Member States** ~~and with consideration to the case-law of the Court of Justice~~, are found. [...] Where the digital labour platform **seeks to rebut the legal presumption, it shall be for the digital labour platform to prove that the contractual relationship in question** is not an employment relationship as **defined by** the law, collective agreements or practice in force in the Member States, with consideration to the case-law of the Court of Justice [...].

Rationale: as noted in today's discussion at the working party ECJ decisions should not be linked to the establishment of criteria/indicators/facts for the presumption as there is no cases on it. ECJ decisions should be obligatory only during the rebuttal process when the legal status of the employment relationship is finally determined. For this reason, we propose deleting reference to the case law of the Court of Justice in the first part of 5.1 paragraph.

Comments by NL

we do offer the following concrete text suggestions for **recital 31a**.

(31a) Control and direction **is an essential element of the definition of an employment relationship in national law and in the case-law of the Court of Justice, and** can take different forms *in concreto*, considering that the platform economy model is constantly evolving.[...] **For** instance, the digital labour platform might exert direction and control not only by direct means, but also by applying sanctions or other forms of adverse treatment or pressure. In the context of platform work, it is often difficult for the person[...] performing platform work to have appropriate access to the tools and the information required to assert before a competent authority the actual nature of their contractual relationship and the rights derived therefrom. **Furthermore** [...], the management of persons performing platform work through automated monitoring and decision-making systems is characterised by an opaque flow of information from the digital labour platform. These features of platform work perpetuate the phenomenon of misclassification as false self-employment, thus hindering the correct determination of the employment status and the access to decent living and working conditions for platform workers. Member States should therefore lay down measures providing for an effective procedural facilitation for persons performing platform work when ascertaining the correct determination of their employment status. In this light, the presumption of an employment relationship in favour of [...] **the person** [...] performing platform work [...] **should be an effective instrument which genuinely contributes to establishing the correct determination of the employment status, thereby leading** [...] to the improvement of living and working conditions of platform workers.

Comments by SE

Please find below two proposals for deletion. Please note that SE may come back with further comments on the text.

Article 5

Legal presumption

(...)

2. **To that effect, Member States shall establish an ~~effective~~ rebuttable legal presumption of employment that constitutes a procedural facilitation to the benefit of persons performing platform work, and Member States shall ensure that that legal presumption does not have the effect of increasing the burden of requirements on persons performing platform work, or their representatives, in proceedings ascertaining their employment status.**
3. The legal presumption shall apply in all relevant administrative or judicial proceedings where the correct determination of the employment status of the person performing platform work is at stake.

The legal presumption shall not apply to proceedings which ~~solely~~ concern tax, criminal **or** social security matters. However, Member States may apply the legal presumption in those proceedings as a matter of national law.

(...)

Rationale:

- Delete **effective** as it is unclear what the legal value of this term might be and how it would be interpreted by the ECJ.
 - Delete **solely** as it is unclear and could imply that MS would be obliged to apply the presumption in other areas of law that are not covered by the legal basis. MS who, as a matter of national competence, would like to apply the presumption in those areas are, as stated already in the text, free to do so.
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Council of the European Union
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WORKING DOCUMENT

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 - MS Comments

Following the Social Questions Working Party meeting of 5th February 2024, delegations will find attached the contributions received from the DK, EE, FI, HR, HU, IE, LT, NL and SE.