

PWD- amendments art. 4 (BE, ES, LU, MT, NL, PT, RO and SI)

Article 4. Legal presumption.

1. The relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship when the digital labour platform controls or directs, through its terms and conditions or in practice, the performance of work.

2a. Controlling or directing the performance of work within the meaning of paragraph 1 shall be assessed by, notably, the following non-exhaustive list of criteria:

(a) The digital labour platform determines upper limits for the level of remuneration;

(b) The digital labour platform requires the person performing platform work to respect specific rules with regard to appearance, conduct towards the recipient of the service or performance of the work;

(c) The digital labour platform supervises the performance of work including by electronic means;

(d) The digital labour platform restricts or conditions the freedom, including through sanctions, to organise one's work by limiting the discretion to choose one's working hours or periods of absence;

(da) The digital labour platform restricts or conditions the freedom, including through sanctions, to organise one's work by limiting the discretion to accept or to refuse tasks;

(db) The digital labour platform restricts or conditions the freedom, including through sanctions, to organise one's work by limiting the discretion to use subcontractors or substitutes;

(e) The digital labour platform restricts the possibility to build a client base or to perform work for any third party.

2b. Notwithstanding paragraph 1, the contractual relationship between a digital labour platform and a person performing platform work through that platform shall, in any case, be legally presumed to be an employment relationship if at least three of the criteria under paragraph 2 are fulfilled.

JUSTIFICATION

Legal subordination, or direction and control, is the essential element of the definition of an employment relationship in the case law of the CJEU. The criteria laid down in Article 4 have been developed on the basis this "umbrella principle". We believe that the legal presumption should be aligned as closely as possible with the case-law of the CJEU and therefore propose to reintroduce this core notion in the first paragraph.

Throughout the negotiations, textual adjustments have been discussed to make the criteria clearer and easier to apply. These remain unchanged in our proposal. We also maintain the division of criterion (d). The key point of our proposal is the significant alteration of the mechanism for triggering the legal presumption.

The successive versions of the text were progressively narrowing down the concept of worker, either because the concepts of direction and control were not present, or because they were authentically interpreted as the sole concurrence of the criteria. This left outside the scope of the proposal other circumstances from which direction and control can arise, both currently or in future developments of an everchanging reality such as platform work.

This was a by-product of addressing the concept of platform worker and the minimum threshold together. Those two goals (namely to have an appropriate concept of worker as a basis for the presumption and to introduce a bare minimum that pushes national authorities to apply said presumption) are compatible, but should not be conflated, because it leads to incoherencies.

Thus, this twofold objective is clearly structured under this proposal:

a) Paragraph 1 provides a clear basis for the presumption, the concept of worker present in CJEU's case law, a concept that is completely respectful to national legal systems, and that does not limit the traditional scope of labour law.

The criteria are then introduced as circumstances that shall be considered when deciding whether or not the presumption applies, without prejudice to other elements that could be added legally or considered as well.

b) Having achieved that clear basis, the bare minimum protection is kept in a separate paragraph (Paragraph 2b), so the presumption shall always apply, specifically by administrative bodies, when a certain threshold is reached. This is one of the main goals of the COM's proposal.

The new threshold is acceptable only insofar the safeguard of Paragraph 1 is maintained. Given the new structure of this article, this bare minimum rule does not interfere in any way with the scope of national labour law and the concept of worker, so a three out of seven threshold is not concerning in that regard, as it was before.

All in all, this proposal establishes a minimum protection that does not constrain the capacity of national lawmakers, national courts or the CJEU to interpret what a worker is. Further protection can arise from transposition regulations or case law. Along with that, the other original objective of having a minimum common threshold is kept, but the aforementioned safeguards allow for a compromise regarding the threshold.

We believe this proposal is well aligned with the CJEU case-law and that it provides effective protection for the five and a half million of people who could be at risk of employment status misclassification. We are also confident that Member States who feared that the original presumption might be too rigid will be able to agree to it.