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| From: | Presidency |
| To: | Delegations |
| No. prev. doc.: | 5816/24 |
| No. Cion doc.: | 14450/21 - COM(2021) 762 final |
| Subject: | Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work |

Based on the revised mandate the Presidency obtained on 26 January 2024 (5816/24 + COR1), it took up negotiations with the European Parliament. In the trilogue of 30 January, the Parliament's negotiation team rejected the revised mandate and proposed to work instead on an alternative text of the legal presumption, which would leave more margins for implementation to the Member States. The members of the technical level of the negotiation teams of Parliament and Council were tasked to come up with a *joint exploratory text* on the legal presumption, based on four commonly agreed principles, which should serve as a basis for a final agreement on the whole text of the directive to be reached in the trilogue scheduled for 8 February.

Delegations will find in Annex the c established by the technical level.

Changes compared with document 5816/24 are marked with **bold** and deletions by [...]. Change of numbering and place of text are not taken into account in these markings.

The joint exploratory text is limited to the operative part of Chapter II and to Article 27 paragraph 1 of the Directive and one related recital.

A draft agreement on the related remaining recitals and the few other points of divergence between the provisional agreement (16187/23 ADD1) and the revised mandate will also be prepared in view of the trilogue scheduled for 8 February 2024 in Strasbourg.

The main changes compared to the revised mandate (5816/24 + COR1) are the following:

1. Article 5 paragraph 1: Mechanism of the legal presumption

The reference to indicators and threshold in Article 5 paragraph 1 of the revised mandate has been replaced by a reference to “*facts indicating control and direction, according to national law, collective agreements or practice in force in the Member States and with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*” that are found.

In consequence, there are no harmonised conditions for the triggering of the legal presumption in the text of the Directive. It is for the Member States to determine what facts indicating control and direction are to be found for the purposes of triggering the legal presumption.

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

This is a new provision, which does not build on an existing text. It explicitly obliges Member States to establish an effective rebuttable legal presumption of employment in their national law.

In order to clearly set out the purpose of the presumption, it has been stipulated that this presumption shall constitute a procedural facilitation to the benefit of persons performing platform work, and should not lead to an increase of the burden of requirements on persons performing platform work in proceedings ascertaining their employment status.

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

This provision is mostly identical to Article 6 paragraph 1 of the revised mandate. It keeps the same ideas and objectives. The only adjustment made is the addition of the word “solely” in order to reflect the diversity across national systems. Indeed, in some Member States there exists proceedings, that serve multiple purposes aiming at defining the employment status for, for instance, both labour law and for other fields of law, such as social security law. The addition of “solely” leads to the application of the legal presumption in these proceedings with multiple purposes.

4. Article 5 paragraph 4: Proceedings initiated by persons performing platform work

This provision deals with the right of persons performing platform work and their representatives to initiate proceedings. It remained unchanged compared with Article 6 paragraph 2 second sentence of the revised mandate. In order to clarify that this provision does not affect existing national prerogatives of representatives, Article 27 paragraph 1 has been amended.

5. Article 5 paragraph 5: Measures to be taken by national authorities

This provision builds on Article 6 paragraph 2 first sentence of the revised mandate and deals with the measures to be taken by competent national authorities, when they consider that a person performing platform work might be wrongly classified. The discretion of national competent authorities to assess if a person performing platform work might be wrongly classified has been kept. We have specified that national authorities shall initiate not only appropriate actions but also proceedings, in accordance with national law and practice.

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

In this provision, corresponding to Article 7 paragraph 1 letter (c) of the revised mandate, adjustments were made. The discretion of Member States to assess the appropriateness of controls and inspections was kept.

CHAPTER II

EMPLOYMENT STATUS

Article 4

Correct determination of the employment status

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 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, including through the application of the presumption of an employment relationship in accordance with Article 5(2).
2. The determination of the existence of an employment relationship shall be guided primarily by the facts relating to the actual performance of work, including 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.
3. Where the existence of an employment relationship is established, the party or parties assuming the obligations of the employer shall be clearly identified in accordance with national legal systems.

Article 5

Legal presumption

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 [...]**.
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.
4. Persons performing platform work, and, in accordance with national law and practice, their representatives, shall have the right to initiate the proceedings referred to in paragraph 3 first subparagraph for ascertaining the correct employment status of the person performing platform work.

5. [...] **Where** a competent national authority considers that a person performing platform work might be wrongly classified, it shall **initiate** appropriate actions **and proceedings**, [...] in accordance with national law and practice, in order to ascertain the [...] employment status of that person.
6. With regard to contractual relationships entered into before and still ongoing on the date set out in Article 30(1), the legal presumption referred to in this Article shall only apply to the period starting from that date.

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:
 - (a) develop appropriate guidance, including in the form of concrete and practical recommendations, for digital labour platforms, persons performing platform work and the social partners to understand and implement the legal presumption including on the procedures for rebutting it;
 - (b) develop guidance and establish appropriate procedures in line with national law and practice for competent national authorities, including on the collaboration between different competent national authorities, to proactively identify, target and pursue digital labour platforms which do not comply with rules on correct determination of the employment status;

- (c) provide for effective controls and inspections conducted by national authorities, in line with national law or practice, and in particular provide [...], 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.
- (d) provide for appropriate training for competent national authorities and provide for the availability of technical expertise in the field of algorithmic management, to enable those authorities to carry out the tasks referred to under point (b).

Article 27

Non-regression and more favourable provisions

1. This Directive shall not constitute valid grounds for reducing the general level of protection already afforded to platform workers within Member States, including with regard to established procedures for the correct determination of the employment status of persons performing platform work **as well as existing prerogatives of their representatives.**

...

Recital

- (31a) Control and direction 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 persons 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 and, 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 persons performing platform work is an effective instrument which greatly contributes to the improvement of living and working conditions of platform workers.**
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