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#### **MEETING DOCUMENT**

From:	Presidency
To:	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

Delegations will find attached a note from the Czech Presidency for the Social Questions Working Party meeting on 5 September.

**Note from the Czech Presidency**  
**Social Questions Working Party on 5 September 2022**  
**Targeted discussion on the legal presumption and Chapters V and VI**  
**of the Directive on improving working conditions in platform work**

On 5 September 2022, the CZ Presidency intends to hold a SQWP meeting on the proposal for a Directive on improving working conditions in platform work. The purpose of this meeting is to conduct a **targeted discussion on the concept of legal presumption in Articles 4 and 5** and to have an **in-depth discussion on Chapters V and VI** of the Directive.

The Presidency assumes that delegations widely support a legal presumption as a means to address the misclassification of platform workers. However, there are still open questions on the mechanism of this legal presumption, including its rebuttal and the criteria for triggering it.

**I. Mechanism of the rebuttable presumption**

The first question of particular relevance for Member States is how the rebuttable presumption will work and how it can be integrated into the Member States' national labour, administrative and civil procedure law.

Long discussions have been held in this regard under the FR Presidency. The Commission provided explanations and delivered a PowerPoint presentation on the envisaged functioning of Articles 4 and 5 of the draft Directive. Document ST 8584/22 partially reworked the Commission proposal in a first attempt to clarify the functioning of the presumption.

The CZ Presidency deems it important to continue this work to further clarify the functioning of the presumption and to clear out interpretative doubts that could lead to substantial differences in the understanding of the text and its application.

For this purpose, the CZ Presidency considers it important to present its understanding of the presumption mechanism within the proposed directive. Delegations will then be asked to take a position whether they share the same view and whether they can support the main features of such a mechanism. Based on the feedback received from MS, the CZ Presidency will in the next stage propose a redraft of Articles 4 and 5, if appropriate.

The CZ Presidency's understanding of the proposed legal presumption is following:

- The presumption would have the following legal effect on the status of persons performing platform work: if a digital labour platform fulfils at least two out of the five criteria, it would be legally presumed to be in an employment relationship with the person performing platform work.

*Where, in such cases, the digital labour platforms do not proactively adjust their business practices or, where necessary, do not reclassify persons performing platform work as workers, a decision of the court (or a competent administrative body, if*

*relevant in a given MS) is needed to correctly classify the contractual status of persons performing platform work.*

*To support the effective implementation of the legal presumption and to reduce the need for litigation or administrative procedures MS have to put in place a framework of measures.*

- The presumption finds application only in those proceedings where the question of the employment status is at stake. In any other proceedings (e.g. in tax, social security or criminal law), authorities are not bound by the presumption.

*In practice, it would thus concern individual reclassification claims proceedings and not all proceedings where the nature of the contractual relationship is somehow relevant. Tax, social security, etc. authorities may rely on such presumption if the applicable national law provides for it, however there is no obligation for the MS under this Directive to do so.*

- Enforcement authorities that act out of their own initiative would not have to apply the presumption if it is manifest that it would be rebutted.

*In practice, it would mean that when an authority acts *ex officio* in the exercise of its powers to verify compliance with labour laws (other than in cases where an individual requests the initiation of a proceeding to be classified as a platform worker) such enforcement authority has a margin of manoeuvre in deciding whether or not to initiate a reclassification proceeding. In taking this decision, the competent enforcement authority should take into consideration the presumption and assess the concrete possibilities that such a presumption may ultimately be rebutted in the course of the proceedings.*

- Competent administrative or judiciary authorities have to apply the presumption, which can be rebutted in the course of the same proceeding.

*In practice, it would mean that, once the person performing platform work demonstrates that two of the criteria in Article 4 are met, the competent courts (or competent administrative bodies, if a certain MS empowers them to deal with individual reclassification claims) have to rely on the presumption in their decision-making. In this way, the presumption facilitates the access to justice for persons performing platform work who claim to be in an employment relationship with the digital labour platform.*

- The presumption is always rebuttable in the course of such proceedings. The rebuttal will be based on the national criteria defining a worker (as laid out in Article 2(4) of the proposal) - with reference to CJEU case-law - and it is up to the digital labour platform to prove that the contractual relationship in question is not an employment relationship.

*In practice, it would mean that even if the criteria for triggering the presumption are met, the presumption can be rebutted if it is proved that the relationship does not fulfil*

*the national criteria defining a worker. Such rebuttal may happen only within the same proceeding as the reclassification claim. Any further action to challenge the outcome of such proceeding is not to be considered a rebuttal (rather an appeal, or equivalent).*

*When the rebuttal of the presumption is sought by the digital labour platform, the burden of proof falls on it. In this case, two scenarios are possible: a) the platform will not be able to prove the relationship is not an employment relationship (i.e. the court/relevant administrative body acting in accordance with the presumption will confirm the relationship to be an employment relationship) or b) the platform will be able to prove the relationship is not an employment relationship (i.e. it will be decided that the contractual relationship at issue is not an employment relationship, because the national criteria defining a worker have not been met ).*

Question:

- 1) Can delegations agree with the mechanism of the rebuttable presumptions as laid out above?

## **II. Criteria triggering the presumption**

The discussions so far in the SQWP and in the European Parliament suggest that there may be multiple approaches applicable to trigger the presumption. Some of these approaches are outlined below in a non-exhaustive manner.

- A. Presumption of worker status for all persons working for digital platforms (as proposed by the EP draft report)

The most far-reaching approach would be that all persons performing platform work are covered by the presumption. The consequence of this approach is that, as soon as it is established that a digital labour platform falls under the definition provided for in the directive, the contractual relationships with persons performing platform work through that platform shall be legally presumed to be an employment relationship. In case of legal disputes, it would thus spare authorities or person performing platform work the need to establish that at least two out of the five criteria provided for in Article 4 of the Commission proposal are fulfilled. On the other hand, this approach could raise proportionality concerns regarding the consequences for genuine self-employed.

- B. Union criteria to trigger the presumption, different from the criteria used for its rebuttal (as in the COM proposal)

In this approach, the presumption is triggered when a number of criteria established in the Directive are fulfilled and its effective implementation is ensured through a framework of measures put in place by the MS. The criteria triggering the presumption would be the

same throughout the Union. They may differ from the criteria identifying a “worker” at national level. This approach represents a harmonisation of minimum requirements throughout the EU as far as the triggering the presumption is concerned. However, because the rebuttal remains based on national criteria of a worker (with consideration of the case law of the ECJ), the final classification might still differ between MS in some individual cases, depending on the national law. The added value of this option is in the fact that uniformly applied criteria for triggering the presumption will improve the clarity of the legislation for the actors concerned across the EU and contribute to creating a more level playing field in all Member States.

#### C. Criteria to trigger the presumption defined at national level

According to this approach, preferred by some Member States, the concept of legal presumption would be preserved, but MS would define the criteria for triggering the rebuttable presumption in line with their national definition of worker (with consideration of the case law of the ECJ). MS would need to ensure that these criteria address the typical challenges of platform work and facilitate the access to justice for those persons performing platform work who are wrongly classified as self-employed. Guidance for the criteria to be established at national level could be provided in the recitals of the directive or the directive could offer a pool of different criteria for MS to choose from when transposing the instrument. While this solution relies on the primacy of the national definition of worker when setting both the criteria to trigger the presumption and the criteria used for the potential rebuttal, this approach might lead to substantial differences regarding the possibility to trigger the legal presumption across the EU and would not thus contribute to creating a level playing field among the MS.

#### Questions:

- 1) What are the preferences of the delegations related to the above-mentioned approaches A to C? If a delegation is not in favour of any of these approaches, which other approach would it support?
- 2) Do delegations consider the criteria proposed in the Commission proposal adequate or do they suggest any amendment? If they do not consider the wording of the criteria in the CION proposal adequate, PRES will appreciate concrete suggestions regarding their modification.

Following the exchange based on the questions under I. and II., the SQWP will continue with an in-depth **examination Article by Article** of Chapters V and VI. In case delegations do not agree with the Commission’s text, they will be invited to send in their **drafting suggestions** on those Chapters at the latest **after the meeting, no later than Friday, 9 September**.

Without prejudice to the interventions in the SQWP, the delegations are also encouraged to send in writing any **questions, comments and suggestions** they may already have regarding Chapters V and VI by **Monday, 29 August** to [REDACTED]

[REDACTED] so that the Presidency has sufficient time for analysing questions, comments and suggestions.