

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (07.11.2022)

Proposal for a directive improving the working conditions of platform workers The Presidency Note (ST 14450 2021 INIT)

Finnish answers and comments

I. Mechanism of the rebuttable presumption

1. *Can delegations agree with the mechanism of the rebuttable presumption as laid out above (in the Presidency note ST 14450 2021 INIT)?*

To a large extent, Finland shares the same view as the Presidency on the mechanism of the rebuttable presumption as laid down in the Presidency note. There are, however, some remarks that we would like to make.

The first one is that even though Finland in many aspects accepts the Presidency's interpretation on the functioning of the presumption mechanism, this interpretation is not sufficiently conveyed from the text itself. This concerns, among other things, to the view presented by the Presidency that "*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*". Finland supports this Presidency's view but considers that the text should imply this matter clearer.

According to the Presidency note and the explanations from the Commission, there would be also differences in the competent authorities' margin of maneuver to decide whether or not to initiate a reclassification procedure depending on whether the authority acts *ex officio* or by a request of an individual (a person performing platform work). Also this interpretation is not very clearly to be understood from the text. However, we also wonder whether it is necessary to distinguish the margin of maneuver depending on who will start the procedure.

In the SQWP meeting on September 5th there was discussion held and questions raised concerning what effects the proposed directive – especially the rebuttable legal presumption – would have on member states' procedural legislation.

In Finland's opinion it would be important that the Directive would allow enough flexibility for the Member States to decide on procedural questions and legislation, since this belongs to the Member States' competence.

II. Criteria triggering the presumption

1) *What are the preferences of the delegations related to the abovementioned 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.*

Regarding approach A, Finland believes that this option would be too far-reaching. The general principles of procedural law usually require the plaintiff to present, in support of his or her claim, the facts on which the claim is based. Therefore, basing the presumption solely on an individual's claim on employment relationship and to the fact that the platform would meet the definition of a digital labour platform, cannot be considered as sufficient from this perspective.

Finland could support an approach where there would be an EU criteria to trigger the presumption (approach B). However, we would like to develop the presumption in such a way, that in addition to the criteria, it would be possible to take all aspects of the legal relationship into account as a whole.

In Finland's case law, in addition to the characteristics of an employment relationship, a so-called **overall assessment** has been used for decades to resolve cases where the legal status of a working contract is not clear.

We believe that if the competent national courts and/or authorities could take into account also other facts than just merely the five criteria when deciding on the presumption, it could prevent so called "false positives", meaning decisions where genuinely self-employed persons would be wrongly categorised as employees.

In practice, in a case where for instance two out five criteria seem to be fulfilled, in an overall assessment competent national courts and/or authorities could also take into account other facts than just merely the fulfillment of these two criteria and see whether these other facts point out to the same direction – meaning that the contractual status of a person performing platform work should be classified as a worker (employee).

However, if wanted by a Member State the assessment could also be used to another direction, meaning that through the assessment a Member State could decide that the presumption is triggered even though e.g. only one criteria would be fulfilled if other facts show that the contractual status between the platform and a person performing platform work is in fact an employment relationship. This is because article 20 of the proposed directive allows Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to platform workers.

The idea of and overall assessment could also get support from the Yodel-case (C-692/19) where, in addition to the criteria, the European Court of Justice also stated as follows: "*provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer.*" So also here, the Court of Justice required that some kind of overall assessment had to be made.

In the next page, we propose amendments to Article 4 including the idea of an overall assessment taking into account what the ECJ stated in the Yodel-case. In addition, we propose amendments to Article 5 regarding the suspensive effect of the decisions concerning the employment status of a platform worker.

Article 4

Legal presumption

1. The contractual relationship between a digital labour platform that controls, within the meaning of paragraph 2, the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship. To that effect, Member States shall establish a framework of measures, in accordance with their national legal and judicial systems.

Member States may decide to apply the legal presumption [...] in [...] relevant administrative and/or legal proceedings. Competent authorities verifying compliance with or enforcing relevant legislation [...] may be able to rely on that presumption. The legal presumption does not restrict the competence of Member States to decide on the definition of employment relationship applicable in various specific sectors, such as taxation, social security or criminal legislation.
2. Controlling the performance of work within the meaning of paragraph 1 shall be understood as fulfilling at least two of the following **provided also that dependence of the person performing platform work appears to be genuine and that it is possible to establish the existence of a relationship of subordination between that person and the digital labour platform:**
 - (a) effectively determining, or setting upper limits for the level of remuneration;
 - (b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
 - (c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;
 - (d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
 - (e) effectively restricting the possibility to build a client base or to perform work for any third party.
3. Member States shall take supporting measures to ensure the effective implementation of the legal presumption referred to in paragraph 1 while taking into account the impact on start-ups, avoiding capturing the genuine self-employed and supporting the sustainable growth of digital labour platforms. In particular they shall:
 - (a) ensure that information on the application of the legal presumption is made publicly available in a clear, comprehensive and easily accessible way;
 - (b) develop guidance for digital labour platforms, persons performing platform work and social partners to understand and implement the legal presumption including on the procedures for rebutting it in accordance with Article 5;

- (e) **in line with national law or practice** develop guidance for **national competent** authorities to proactively target and pursue non-compliant digital labour platforms;
- (d) **in line with national law or practice** strengthen the controls and field inspections conducted by labour inspectorates or the bodies responsible for the enforcement of labour law, while ensuring that such controls and inspections are proportionate and non-discriminatory.

4. With regard to contractual relationships entered into before and still ongoing on the date set out in Article 21(1), the legal presumption referred to in paragraph 1 shall only apply to the period starting from that date.

Article 5

Possibility to rebut the legal presumption

Member States shall ensure the possibility for any of the parties to rebut the legal presumption referred to in Article 4 in legal or administrative proceedings or both.

Where the digital labour platform argues 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 State in question, with consideration to the case-law of the Court of Justice, the burden of proof shall be on the digital labour platform. **Member States may decide that** such proceedings shall not have suspensive effect on the application of the legal presumption.

Where the person performing the platform work argues 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 State in question, with consideration to the case-law of the Court of Justice, the digital labour platform shall be required to assist the proper resolution of the proceedings, notably by providing all relevant information held by it.