SQWP 05.09.2022 Proposal for a Directive on improving working conditions in platform work - DE comments and amendments

Here is our answer to question 1 from part 1 of the paper:

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

Germany agrees in large parts with the description of the functioning of the rebuttable presumption as laid out by the Czech Presidency. However, with regard to the following points Germany has a different understanding and/or sees a need for clarification:

1. In the second bullet point of part 1 the presidency paper makes the following statement (quote): „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 this context we support the understanding expressed in the paper that the application of the legal presumption to tax and criminal law lies solely in the competence of the member states.

As the legal presumption is tied to the employment status, Germany is of the view that the presumption should not only be applied and implemented in labour law, but also in social law.

In line with the positions expressed here, we would like to reaffirm the German proposal for an amendment to Article 4 (1) clause (2) which reads as follows:

"The legal presumption shall apply in all relevant administrative and legal proceedings. Tax and criminal law proceedings are not relevant proceedings within the meaning of this Directive. Any application of the legal presumption in tax and criminal law proceedings lies therefore solely in the competence of the Member States".

2. In bullet points 3 and 4 of part 1 the Czech Presidency paper sets out in what cases the courts and competent authorities should have a margin for manoeuvre in applying the legal presumption.

Our understanding of the Presidency paper is that the competent authorities do not have to apply the presumption if it is already clear from the outset of the proceedings that the subsequent examination of national law leads to a result that deviates from the legal presumption (quote: „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“). Germany is of the view, however, that courts and competent authorities *are not to* apply the presumption in this case - and only in this case - regardless of the question whether the competent authorities act ex officio or on the basis of an application by a person performing digital platform work. In all other cases the courts and competent authorities shall apply the presumption.

In line with this position we would like to reaffirm Germany's proposal for an amendment of Art. 4 (1) clause (2), which reads as follows:

"Competent authorities verifying compliance with or enforcing relevant legislation shall be able to rely on that presumption. If the legal presumption obviously leads to a result that differs from the subsequent investigation under national law, the legal presumption shall not be applied."

3. In bullet point 5 of part 1 of the paper the Council Presidency explains its understanding that the rebuttal, by definition, may happen only within the initial proceedings (Quote: "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.").

Regardless of the terminological questions, Germany points out that Art. 5 is also applicable if concluded administrative proceedings are followed by subsequent legal proceedings, and that therefore a rebuttal of the presumption in accordance with national procedural law should in principle be possible at all levels of jurisdiction.

Germany reaffirms its proposal for an amendment to Article 5 (1), which is worded more openly to take account of the different legal systems of the Member States. The proposal reads as follows:

"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. The rebuttal shall already be possible in the initial proceedings."

The status of a person performing platform work may only be relevant for future proceedings to the extent that the substantive legal power ("effect of res judicata") of the initial legal or administrative proceedings is sufficient under the law of the respective member state. If, for instance, essential circumstances are retroactively changed, the status has to be newly determined and it must be possible to rebut the legal presumption again. Therefore, Germany considers a clarification to be necessary.

Here is our answer to question 1 of part 2 of the paper:

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?

- We support the approach set out under B. which corresponds to the initial COM proposal.
- It is also our understanding that generally the national concept of worker should be decisive for the rebuttal of the legal presumption. Germany considers the taking into account of the ECJ case-law as a pure arbitrariness check.
- Is the case-law of the European Court of Justice also to be taken into account in the (prior) assessment of worker status where a person performing platform work invokes workers' protection rights which are governed solely by national law and not determined by European law? An example for this would be a legal dispute about the effectiveness of a dismissal, in which it is already questionable whether the person performing platform work who brought the action against the dismissal, is actually a worker. As this is a situation not subject to Union law, the question arises whether the case-law of the European Court of Justice must be taken into account or not for the determination of the worker status. In this regard, Germany requests the Commission's opinion.
- This understanding still needs to be clarified in the Directive. To this end we have already submitted proposals to adjust the recitals **(Annex 1).**

Here is our answer to question 2 of part 2 of the paper:

> *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.*

We generally welcome a legal presumption based on a catalogue of criteria. This catalogue of criteria should be designed in such a way that a "genuinely" self-employed person is not regularly presumed to be a worker. If the presumption is already triggered when two criteria are fulfilled, the individual criteria should not be worded too broadly. The following proposals to amend and supplement the catalogue of criteria are meant to help orient it more closely to the prerequisites of an employment relationship:

- We are in favour of adjusting criterion a). It should be clarified that the regulation means the determination of the remuneration per work assignment. We propose the following adjusted formulation:

  "a) effectively determining, or setting upper limits for the level of remuneration per work assignment".

- We are in favour of including the following <u>additional</u> criterion into the catalogue of criteria:

  "Making the persons performing platform work to accept a large number of similar work assignments on a continuous basis and over an extended period of time or making the person check the work assignments available on a continuous basis, in particular with the help of the remuneration model or with the help of gamification elements".

- From our view, the five criteria under para. 2 can be summarised under the term of "controlling" the performance of work, as it is used under Art. 4 (1) clause (1). Therefore we are against the amended wording of Art. 4 (1) clause (1) as set out in the compromise text.
  We think that it does not help to clarify the situation if only the term of "restricting the freedom to organise one's work" is transferred from criterion (d) to Art. 4 (1) and (2) (new).

Chapters V and VI:

Re. Art. 17:

- From a German point of view it could make sense to refer to the exercise of the rights provided for in this Directive in Art. 17, too, in the same way as in Art. 18 (2), and to place the upholding of the rights under the protection of this provision (and not only after a complaint has been raised or proceedings have been initiated).

Re. Art. 19:

- In our view, the powers of the data protection supervisory authorities should be fully applicable in order to avoid contradictions or gaps in protection.

Proposal for a supplement to Art. 22:

- We propose that the evaluation in Article 22 takes into account the dynamic developments observed in the field of the platform economy and, against this background, to examine in particular possible supplements and further developments to the regulations in Chapters II and III.
- We therefore propose to insert the following sentence at the end of the Article:

  “The Commission checks in particular whether - with a view to more recent actual developments - Chapters II and III require certain adjustments.”

Annexes:

1. Amendments re. Definition of employee

2. First Drafting Suggestions re. Chapter III, IV

Annex 1: Amendments / Definition of worker

a) Amendment of recital 16

This Directive should apply to persons performing platform work in the Union who have, or who, based on an assessment of facts, may be deemed to have an employment contract or 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 of the European Union **on ensuring the effectiveness of Directives which guarantee that Member States, within their scope of discretion, cannot arbitrarily exclude certain categories of workers from the scope of this Directive. This Directive** should include situations where the employment status of the person performing platform work is not clear, so as to allow correct determination of that status. The provisions on algorithmic management which are related to the processing of personal data should also apply to genuine self-employed and other persons performing platform work in the Union who do not have an employment relationship.

b) Amendment of recital 19

To combat false self-employment in platform work and to facilitate the correct determination of the employment status, Member States should have appropriate procedures in place to prevent and address misclassification of the employment status of persons performing platform work. The aim of those procedures should be to ascertain the existence of an employment relationship as defined by national law, collective agreements or practice with consideration to the case-law of the Court of Justice, **which is to be understood as a review for arbitrariness,** and, where such employment relationship exists, to ensure full compliance with Union law applicable to workers as well as national labour law, collective agreements and social protection rules. Where self-employment or an intermediate employment status – as defined at national level – is the correct employment status, rights and obligations pursuant to that status should apply.

c) Amendment of recital 20 and deletion of footnote 12

~~**In its case law, the Court of Justice has established criteria for determining the status of a worker[12]. The interpretation by the Court of Justice of those criteria should be taken into account in the implementation of this Directive.**~~ The abuse of the status of self-employed persons, as defined in national law, either at national level or in cross-border situations, is a form of falsely declared work that is frequently associated with undeclared work. False self-employment occurs when a person is declared to be self-employed while fulfilling the conditions characteristic of an employment relationship, in order to avoid certain legal or fiscal obligations.

~~**[12] Judgments of the Court of Justice of 3 July 1986, Deborah Lawrie-Blum v Land Baden-Württemberg, C-66/85, ECLI:EU:C:1986:284; 14 October 2010, Union Syndicale Solidaires Isère v Premier ministre and Others, C-428/09,**~~

~~**ECLI:EU:C:2010:612; 4 December 2014, FNV Kunsten Informatie en Media v Staat der Nederlanden, C-413/13, ECLI:EU:C:2014:2411; 9 July 2015, Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH, C-229/14, ECLI:EU:C:2015:455; 17 November 2016, Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH, C-216/15, ECLI:EU:C:2016:883; 16 July 2020, UX v Governo della Repubblica italiana, C-658/18, ECLI:EU:C:2020:572; and order of the Court of Justice of 22 April 2020, B v Yodel Delivery Network Ltd, C-692/19, ECLI:EU:C:2020:288.**~~

d) Amendment of recital 28

The relationship between a person performing platform work and a digital labour platform may not meet the requirements of an employment relationship in accordance with the definition laid down in the law, collective agreements or practice in force of the respective Member State with consideration to the case-law of the Court of Justice, **which is to be understood as a review for arbitrariness,** even though the digital labour platform controls the performance of work on a given aspect. Member States should ensure the possibility to rebut the legal presumption in legal or administrative proceedings or both by proving, on the basis of the aforementioned definition, that the relationship in question is not an employment relationship. The shift in the burden of proof to digital labour platforms is justified by the fact that they have a complete overview of all factual elements determining the relationship, in particular the algorithms through which they manage their operations. Legal proceedings and administrative proceedings initiated by the digital labour platforms in order to rebut the legal presumption should not have a suspensive effect on the application of the legal presumption. A successful rebuttal of the presumption in administrative proceedings should not preclude the application of the presumption in subsequent judicial proceedings. When the person performing platform work who is the subject of the presumption seeks to rebut the legal presumption, the digital labour platform should be required to assist that person, notably by providing all relevant information held by the platform in respect of that person. Member States should provide the necessary guidance for procedures to rebut the legal presumption.

Annex 2: First Drafting Suggestions Chapter III, IV

- We believe it is right that the provisions in Chapters III and IV should protect both platform workers and other people who perform platform work.
- We think that the provisions in Chapter III and IV are sufficiently clear as far as the two-fold objective of the Draft Directive is concerned.
- We consider the provisions on algorithmic management and transparency important elements of the Draft Directive. We endorse the provisions on algorithmic management as an ambitious proposal of the Commission aimed at regulating the use of automated monitoring and decision-making systems in the field of work for the first time.
- We suggest the following amendments. At the same time, we reserve the right to submit further proposals for amendments in the course of consultations.

Art. 8 (3)

Current version:
Where the decision referred to in paragraph 1 infringes the platform worker's rights, the digital labour platform shall rectify that decision without delay or, where such rectification is not possible, offer adequate compensation.

Proposed amendment:
Where the decision referred to in paragraph 1 infringes the platform worker's rights, **the platform worker can request that the decision be rectified without delay or, where such rectification is not possible, compensation for the damage sustained**.

Art. 8 (2)

Current version:
Where platform workers are not satisfied with the explanation or the written statement of reasons obtained or consider that the decision referred to in paragraph 1 infringes their rights, they shall have the right to request the digital labour platform to review that decision. The digital labour platform shall respond to such request by providing the platform worker with a substantiated reply without undue delay and in any event within one week of receipt of the request.

Proposed amendment:
The digital labour platform shall respond to such request by providing the platform worker with a substantiated reply **in text form** without undue delay and in any event within one week of receipt of the request.