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MEETING DOCUMENT

From: To:	General Secretariat of the Council 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

In view of the Social Question Working Party meeting of 13 February, delegations will find attached the contributions received from the CY, CZ, DK, EE, ES, FI, HR, HU, IT, LU, LV, NL, PL, RO and SI delegations.

Comments from the CY delegation

1. Article 4(1), *i.e.* the design of the criteria to trigger the presumption

Article 4(1)[1] sets out the criteria for triggering the legal presumption, which is construed as a means to facilitate the determination of the existence of an employment relationship between a digital labour platform and a person performing platform work. In order to find a compromise between delegations' diverging views, changes were made to the Commission proposal. Notably, the notion of "controlling the performance of work" as an "umbrella principle" has been deleted from the chapeau; criterion (d) was split into three separate criteria. Consequently, the threshold for fulfilling the criteria was raised from 2 out of 5 to 3 out of 7.

Questions

a) Do you consider that the criteria are now designed in a way that the right people, *i.e.* mostly the bogus self-employed, will be covered by the legal presumption?
Yes. We believe the bogus self-employed are covered.

b) If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.

Does not apply.

c) If you have answered "no" to question a), how could the criteria and the threshold be modified in order to target all bogus self-employed while excluding genuine self-employed?

Does not apply.

2. Article 4(2a), *i.e.* fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements

Article 4(2a)[2] takes inspiration from recital 25 of the Commission proposal. At delegations' request, the text of recital 25 was moved to the operative part and its wording has been clarified and amended to also cover legal obligations under collective agreements. While some delegations maintain that this provision is important as it prevents digital labour platforms from being wrongfully designated as employers, others worry it could create a loophole which digital labour platforms could exploit to escape taking on the responsibilities of an employer.

Questions

a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

No, according to our current state of Law we don't have any examples at this moment.

b) Is this provision necessary? If so, could this issue be addressed in other ways in the directive?

We could be flexible on this. It could also be addressed by MS nationally.

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[1] In its version of document 15338/22 REV1

[2] In its identical version of documents 14514/22 and 15338/22 REV1

3. **<u>Article 3(1) and 4a(1)</u>, *i.e.* the material effects of a reclassification and the application of the presumption in tax, criminal law and social security proceedings**

Article 3(1) and recital 19[3] set out *i.a.* <u>the material effects</u> of a reclassification, stating that Member States shall not only have national procedures in place for the correct and clear classification of the employment status of persons performing platform work, but also that they shall ensure that when an employment relationship is established, those persons enjoy the relevant rights deriving from Union and national law applicable to workers. Article 4a(1)[4], on the other hand, sets out the scope of application of the legal presumption, which is a <u>procedural instrument</u> to be applied within existing procedures in place in the Member States to facilitate the correct determination of his or her employment status.

At the request of some delegations, article 4a(1) 2nd subparagraph was introduced in order to exclude the use of the legal presumption in **tax, criminal and social security proceedings.** These delegations brought forward mainly two reasons. Firstly, they argued that excluding such fields from the scope of application of the legal presumption would safeguard Member States' competences in those areas. Secondly, they argued that in some Member States, the criteria for the existence of an employment relationship in a specific field of law might differ from another area of law, and that, therefore, the application of the legal presumption to these types of proceedings should be left to the discretion of Member States.

As mentioned above, the legal presumption is a way of easing the access for bogus self-employed to the correct classification of their employment status. As reclassification systems for bogus self-employed as workers likely exist already today in Member States' legal systems, the Presidency would like to understand how the different Member States deal with it today. Furthermore, the Presidency would also like to get the delegations' views on article 3(1) and the corresponding recital.

<u>Questions</u>

a) The legal presumption is to be applied in all relevant administrative and judicial proceedings where the correct determination of the employment status is at stake. In proceedings in which fields of law would the correct determination of the employment status currently be at stake in your Member State?

The Social Insurance Law. According to the practice followed we don't consider that the employment status currently will be at stake.

b) Is the notion of employment relationship the same in all these different fields of law? If not, please spell out in which fields of law these notions are different from each other.

Yes.

c) For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, *e.g.* tax, criminal and social security proceedings?

Does not apply.

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[3] In their version of document 15338/22 REV1.

[4] In its version of document 15338/22 REV1.

d) Do you consider that article 3(1), stating that the Member States shall ensure that platform workers enjoy the rights deriving from relevant Union law, nation law, collective agreements and practice applicable to workers, and the corresponding recital 19, are sufficiently clear or would the Directive benefit from clarifying the term "relevant" and, if so, how could this be done?

No, the term "relevant" is already well clarified.

4. Article 4a(2), *i.e.* the discretion not to apply the presumption in ex officio situations

Another question relates to the discretion of a competent national administrative authority, as laid down in Article 4a(2)[5], not to apply the presumption, if the double condition is fulfilled that 1) they verify compliance or enforce relevant legislation on their **own initiative** and 2) it is evident that the rebuttal would be successful. The rationale of this provision is to avoid unnecessary administrative burden. However, in proceedings initiated by persons performing platform work themselves in view of their reclassification as worker, the competent national administrative authority is obliged to apply the legal presumption.

Some Member States have requested the deletion of this provision, stating that the protection of persons performing platform work would be lowered if authorities are not in all instances obliged to apply the legal presumption.

Questions

a) Do you think that this provision could create a gap in the protection of persons performing platform work and if so, in what way?

No.

[5] In its version of documents 14514/22 to 15338/22 REV1.

Comments from the CZ delegation

1. Article 4(1), i.e. the design of the criteria to trigger the presumption

b) If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.

CZ Position

Most of the selected criteria, and in particular the criteria in letter a), b) and c), characterize the rational conditions for the relationship between any entrepreneurial subcontractor and the entrepreneurial subscriber as its business partner. In this respect, determining the upper limit of the service price, setting rules regarding the appearance, behaviour and performance of the work, as well as verifying the quality of the work performed, are important tools for ensuring customer protection and an acceptable standard of the services provided.

It is therefore possible that the rebuttable legal presumption set up in this way will subsequently be applied in relation to most platforms, which brings with it the potential problem that many workers who will be newly classified as employees will not actually perform dependent work.

It is essential to fulfil all the criteria of the law at the same time in order to assess whether the performance of work meets the conditions of dependent work in the Czech legal. This means that if the self-employed person were to perform work based on the platform, the criteria in letter a), b) and c) would be fulfilled and at the same time the signs of dependent work would not necessarily be fulfilled.

There is the increased risk related to that the reassessment of the status of a person working for the platform based on a rebuttable presumption will only be temporary, where the presumption will subsequently be rebutted, as it will not be dependent work within the meaning of section 2 of the Labour Code. Ultimately, such a construction may introduce a higher level of legal uncertainty into these relationships, which is certainly not desirable.

On the other hand, however, digital work platforms classify persons working through them as self-employed. In the Czech Republic, the vast majority of persons working for platforms are self-employed, although experience suggests that some platforms de facto manage, control and supervises the performance of workers. This is so-called false/bogus self-employment, which occurs when a person is declared self-employed while fulfilling the conditions characteristic of an employment relationship in order to avoid certain legal or tax obligations.

In a spirit of compromise, the Czech Republic is ready to accept above mentioned criteria, taking into account that the number of criteria for activating the legal presumption has increased.

2. Article 4(2a), *i.e.* fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements

a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

CZ Position

In relation to that provision, we do not have any specific examples of the obligations that the platform must comply with in order to meet the requirements of EU law or national law, and which could at the same time be considered as fulfilling the criteria set out in Article 4(1).

3. Article 3(1) and 4a(1), *i.e*. the material effects of a reclassification and the application of the presumption in tax, criminal law and social security proceedings

c) For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, e.g. tax, criminal and social security proceedings?

CZ Position

For most administrative and judicial proceedings, the definition of employee under the Labour Code is relevant in the Czech legal system. Proceedings that define the employee more broadly than the Labour Code do not affect the employee‘s status in other proceedings. In the area of social and health insurance, the definition of an employee for the purposes of Act No. 589/1992 Coll., on social security premiums and contribution to state employment policy, as amended, and Act No. 187/2006 Coll., on sickness insurance, as amended, is more broadly defined. Act No. 589/1992 Coll. considers as employees, in addition to employees in an employment relationship, also other persons, e.g. voluntary care service workers, persons serving a sentence of imprisonment assigned to work and persons caring for a child. While none of these categories of persons would fulfill the characteristics of an employee under the Labour Code. Similarly, in the case of Act No. 187/2006 Coll.

Comments from the DK delegation

1. Article 4(1), *i.e.* the design of the criteria to trigger the presumption

a) *Do you consider that the criteria are now designed in a way that the right people, i.e. mostly the bogus self-employed, will be covered by the legal presumption?*

DK prefers the Commission's proposal with five criteria, which we believe strikes the right balance and covers the right persons by the presumption. However, in order to reach a compromise DK could support the text as it was submitted to EPSCO. DK find it important to maintain a clear and effective legal presumption.

2. Article 4(2a), *i.e.* fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements

a) Can you provide examples when this provision would be applied in your Member State under the current legislation?
b) Is this provision necessary? If so, could this issue be addressed in other ways in the directive?

DK prefers to revert to the Commission's original proposal, in which measures or rules which are required by law or which are necessary to safeguard the health and safety of the recipients of the service should not be understood as controlling the performance of work.
The current article is much broader and concerns all union law, national law and collective agreements, which weakens the legal presumption.

3. Article 3(1) and 4a(1), *i.e*. the material effects of a reclassification and the application of the presumption in tax, criminal law and social security proceedings

a) *The legal presumption is to be applied in all relevant administrative and judicial proceedings where the correct determination of the employment status is at stake. In proceedings in which fields of law would the correct determination of the employment status currently be at stake in your Member State?*
b) *Is the notion of employment relationship the same in all these different fields of law? If not, please spell out in which fields of law these notions are different from each other.*
c) *For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, e.g. tax, criminal and social security proceedings?*
d) *Do you consider that article 3(1), stating that the Member States shall ensure that platform workers enjoy the rights deriving from relevant Union law, nation law, collective agreements and practice applicable to workers, and the corresponding recital 19, are sufficiently clear or would the Directive benefit from clarifying the term "relevant" and, if so, how could this be done?*

In Denmark, work is provided either in an employment relationship or as a self-employed person. If the work is delivered in an employment relationship, the ***labour law*** rules apply.
In Danish labour law, there is no cross-is cutting definition of who is considered an employee, as each individual law defines its individual scope. The definition can thus vary between the various labour laws. In addition, certain laws, e.g. the holiday law, is implementing EU regulation, and the definition of employee therefore reflects the concept that has been developed through the practice of the EU Court of Justice.

Finally, the laws allow - where relevant - to implement via collective agreement, after which the collective agreement becomes the legal basis for enforcement and interpretation that takes place in the industrial law system.
It is the Danish courts, the industrial law system, the Employment Committee of the Danish Appeals Board that assess the employment status in specific cases. The assessment of employment status is also different in labour law and ***tax law.*** This means that there may be situations where a person is considered an employee under labor law, but not under tax law (and vice versa).
The fact that the legal areas have different approaches and criteria for the concept of employee is justified by the fact that the rules pursue different objectives. However, the criteria for the concept of employee in terms of tax law and labor law are similar, and in both cases, emphasis will have to be placed on the actual circumstances.
If a person wants employment status clarified in terms of both tax law and labor law, the person must therefore test the employment status in both a tax law case and in a labor and labour law case.
The burden of proof differs between tax law and labor law. In a tax law case, the burden of proof is placed on the employer. In a labour law case it is on the self-employed.
The ***social security*** rules grant rights on the basis of work as both employed and self-employed. The rights are based on an accrual principle. Most social security rules use a concept of employee based on labour law, but when calculating hours and income, the rules refer to the income that is registered with the tax authorities.
It should also be noted that Denmark has broad protection as far as social security is concerned, and that the self-employed are also protected and can, for example, obtain the right to unemployment benefits.
DK finds the provision sufficiently clear.

4. Article 4a(2), *i.e.* the discretion not to apply the presumption in ex officio situations

a) *Do you think that this provision could create a gap in the protection of persons performing platform work and if so, in what way?*

DK supports art. 4a (2). We do not think that the discretion not to apply the presumption creates a gap. If the authorities do not intervene in a case, the platform worker will always have the opportunity to request application of the presumption rule.

Comments from the EE delegation

Answers by the Estonian delegation to the questions 1b), 2a) and 3c), 08.02.23

Presidency note 5273/23 of 1 February 2023 for preparing SQWP on 13 February 2023

1. Article 4(1), i.e. the design of the criteria to trigger the presumption

Questions

a) Do you consider that the criteria are now designed in a way that the right people, i.e. mostly the bogus self-employed, will be covered by the legal presumption?

b) If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.

In Estonia, there is no specific regulation for platform workers. According to the Employment Contracts Act, if a person does work for another person which, under the circumstances, can be expected to be done only for remuneration, it is presumed to be an employment contract. However, in case of doubt, the labour inspectorate will evaluate all circumstances together before issuing a precept ordering the company to fulfil employer´s obligations. Also, in case of a dispute, the labour dispute committee or court will assess the relationship between parties, taking into account all circumstances.

We consider it important that the criteria for the legal presumption of an employment contract in platform work characterize, as precisely as possible, the contractual employment relationship. Otherwise it is a high risk that we cover the majority of self-employed with legal presumption, which would cause legal uncertainty and create unnecessary burden for all parties.

We believe that some of the criteria, (the first three regarding pay, rules on appearance and some other aspects and quality of work) are also characteristic and common in case of genuine self-employment. Therefore, the threshold should be at least four out of seven.

In Estonia, taxi drivers usually work under their own company or are self-employed and use multiple platforms simultaneously. If they were considered as employees, it would be unclear which of the platforms would be their employer. It would also hinder their possibility to work for multiple platforms, which would decrease their income.

2. Article 4(2a), i.e. fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements.

Question

a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

We find it important to leave the principle of article 4(2a) in the operative part, since it is essential to reduce the risk that we would cover the majority of genuine self-employed with legal presumption. Below are some examples illustrating our position.

Firstly, regarding couriers and food safety, some food may need special temperature while transporting them (e.g. frozen products as well as warm foods that need certain internal temperature). The delivery of foods by a courier must be properly performed (e.g. using thermal transportation bags).

Furthermore, regarding drivers, our Road Traffic Act states that the driver of a motor vehicle must have a valid document certifying their right to drive. Vehicles are also subject to compulsory insurance and must pass the roadworthiness test. The Public Transport Act states requirements for Taxi Services according to which a person must have a vehicle card (certifying the right to use the specific vehicle for the provision of taxi services) and a service provider card (proving the right to work as a driver providing taxi services). Taxi drivers must fill these obligations.

Lastly, the Consumer Protection Act applies to the offering and sale of goods and services. For example, the Act states that consumers have the right to obtain information on the safety of goods and services offered as well as on aspects concerning protection of health, property and economic interests. Most of such information is usually available via the app, but consumers may still question the courier regarding product or delivery information etc. Also, consumers have the right to obtain goods and services which meet the requirements, are harmless to the life, health, and property of the consumers.

If a platform becomes aware that the service provider is not providing the service in a safe way, e.g driving under the influence, seriously infringing traffic rules or expressing predatory behaviors, then the platform must be able to eliminate that service provider from the platform for the safety of consumers.

It is important that services provided through platforms are high-quality and safe, therefore platforms may require the person performing platform work to respect specific rules concerning the performance of work and supervise compliance with mentioned requirements. At the same time, supervision of such requirements is characteristic to all contracts, regardless of whether the person performing platform work is an employee or a service provider.

3. Article 3(1) and 4a(1), i.e. the material effects of a reclassification and the application of the presumption in tax, criminal law and social security proceedings

<u>Question</u>

c) For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, e.g. tax, criminal and social security proceedings?

In Estonian legal system there is no different notions of employment relationship.

According to the Taxation Act, if it is evident from the content of a transaction or act that the transaction or act is performed for the purposes of tax evasion, conditions that correspond to the actual economic content of the transaction or act apply upon taxation. As the tax authority has the right to supervise tax transactions according to the actual economic content, the Supreme Court has found that the Tax and Customs Board can also requalify contracts formally concluded between two legal entities to be employment contracts. In these cases, the requalifying the contract is still based on the one notion of employment relationship provided in the labour law.

Comments from the ES delegation

1.Article 4(1), *i.e.* the design of the criteria to trigger the presumption

Question b If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.

Answer:

In our view, workers performing platform work under the control and direction of a digital labour platform should be more clearly covered by the legal presumption set out in article 4(1).

In its latest version, not all the criteria considered have the same relevance when it comes to support evidence of the existence of an employment relationship, resulting in an uneven basis.

Moreover, having raised the requirements from 2 out of 5 to 3 out of 7, might exclude cases where two conclusive indicators are present. For instance:

- Two essential elements of an employment relationship would not be considered sufficient to trigger the presumption as the determination of the level of remuneration or to limit the discretion to choose one's working hour (salary and working hours)
- Or instructions given during the performance of work and supervision of that performance by the digital labour platform would not be considered sufficient to trigger the presumption by itself.

The criterion c) is limited to the platform's supervision of the execution of the work and may restrict the application of the criterion with respect to the original wording proposed by COM.

Criterion d) is an open criterion that refers to the restriction of the worker's freedom to organize his or her own work on platforms in non-exhaustive terms. The criterion mention in particular three specific ways of restricting this freedom (which are three of the four criteria of the CJEU Case Yodel), but allowing that there may be other ways of restricting the freedom.

The Case Yodel establishes that a worker will be considered self-employed if he/she has four basic freedoms (the restriction of which would be included in criteria d) and e) of the Commission's proposal), provided that it is not possible to establish the existence of a subordinate relationship.

Therefore, according to this case, the restriction of any of these four freedoms means that the worker is not truly self-employed but an employee. If we were to apply this interpretation strictly the concurrence of one of the restrictions of criteria d) or e) would be sufficient to apply the presumption of employment. However, the Commission also wanted to include other criteria a), b) and c) that determine the company's control over the employee, since these criteria are also key part of the case law of the CJEU as regards the status of a worker.

We consider that this approach is adequate as it will allow the application of the labour presumption to a majority of bogus self-employed in line with the CJEU case law.

We must avoid the deviation from what is indicated in the Case Yodel, so that the concurrence of one of the criteria indicated therein does not require, cumulatively, a disproportionate number of circumstances to be present in order to be able to assess the labor nature of the case.

2.Article 4(2a), *i.e.* fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements

Question a): *Can you provide examples when this provision would be applied in your Member State under the current legislation?*

Answer:

This provision is utterly unnecessary. National authorities must consider the notion of 'controlling the performance of work' when applying the presumption, so they will analyse whether a certain fact evidences that the platform controls the performance of work. We do not deem that strict compliance with sectoral regulations to evidence per se such control.

For instance, a platform that verifies that a driver holds a valid driving licence would not 'restrict the freedom to accept tasks' for those without a license, nor would it be considered that criterion (da) has been met as a result. The opposite would be an absurd interpretation of the criteria.

The key to the interpretation of the criteria is the consideration of whether or not certain facts show that the platform is controlling and directing the provision of work. No labour authority or court is going to interpret the monitoring of strict compliance with the regulations, i.e. on rest periods in the transport sector as an indication of employment, because it does not derive from a company decision on how or when to work, but from the regulations governing the exercise of a given activity or road safety. In other words, because compliance with a rule does not imply control of work performance.

In the same way, a platform dedicated to offering the services of self-employed electricians will not be complying with criterion d (limiting the freedom to accept or reject tasks) when it refuses to offer the services of those who do not accredit compliance with the administrative requirements for low-voltage installation companies or, in the transport sector, when it does not offer dangerous goods transport tasks to those who do not accredit the necessary authorisation. Nor would the practice of withholding tax on account of personal income tax involve setting ceilings on remuneration (criterion a).

Criteria indicating that a digital labour platform controls the performance of work should be included in the Directive in order to make the legal presumption operational and facilitate the enforcement of workers' rights. Those criteria should be inspired by Union and national case law and take into account national concepts of the employment relationship. […] Measures or rules which are required by law or which are necessary to safeguard the health and safety of the recipients of the service should not be understood as controlling the performance of work.

We believe that this provision allows the application of the presumption to be circumvented. We find no explanation as to why rebuttal mechanisms are considered inadequate or insufficient and, thus, why this ex ante exclusion would be necessary.

Moreover, if the aim of mentioning collective agreements is to strengthen collective bargaining for the solo self-employed, it could be considered a much more effective measure to reinforce in Chapters III and IV the rights of information and consultation of the representatives of the self-employed, which have been eliminated in the latest versions of the text. It does not seem that a legal presumption intended to protect workers could be a threat to the promotion of collective bargaining by the solo self-employed as established on the "Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons"

3.Article 3(1) and 4a(1), *i.e.* the material effects of a reclassification and the application of the presumption in tax, criminal law and social security proceedings

Question c): *For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, e.g. tax, criminal and social security proceedings?*

Answer:

According to our legislation, the legal presumption will not be applicable in tax and social security proceedings, but will have effects therein according to the scope of their competences. The notion of employment relationship is the competence of the labor jurisdiction and is the same applicable to all legal fields.

The notion of employment relationship is the competence of the labor jurisdiction and is the same applicable to all legal fields. So, the legal presumption will have effects in tax and social security proceedings according to the scope of their competences.

The correct determination of the employment status is crucial in all fields where workers' rights are at stake. It includes not only labour law regulations but also other domains like social security, taxes, and even migration or criminal law.

The concept of employment relationship is determined according to the labour law regulations. In other domains, regulations refer to the same concept as established by labour law, keeping the legal system coherent.

Comments from the FI delegation

PLATFORM WORK DIRECTIVE

Finnish comments on the Presidency note 1.2.2023
in preparation of the meeting of the Social Questions Working Party on 13 February 2023

1. **Article 4(1), *i.e.* the design of the criteria to trigger the presumption**

Questions

a) **Do you consider that the criteria are now designed in a way that the right people, *i.e.* mostly the bogus self-employed, will be covered by the legal presumption?**

Finland could have accepted the formulation as in the EPSCO Council 08.12.2022 PRESIDENCY ROOM DOCUMENT. We are also ready to examine the issue further, taking better into account the criteria as defined by the ECJ in its case law.

b) **If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.**

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c) **If you have answered "no" to question a), how could the criteria and the threshold be modified in order to target all bogus self-employed while excluding genuine self-employed?**

2. **Article 4(2a), *i.e.* fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements**

Questions

a) **Can you provide examples when this provision would be applied in your Member State under the current legislation?**

The provision could cover for example requirements to guarantee the safety of customers such as food hygiene in food deliveries or traffic safety in taxi services.

b) **Is this provision necessary? If so, could this issue be addressed in other ways in the directive?**

We are in favour of the formulation (recital 25b) in the EPSCO Council 08.12. 2022 PRESIDENCY ROOM DOCUMENT. However, we would like to suggest a clarification to the formulation as follows:

(25b) When a digital labour platform fulfils any of the criteria referred solely as a result of its compliance with a legal obligation under Union law, national law, ***other than labour legislation****, or collective agreements of genuine solo self-employed, that criterion may not as such be understood as indicating that the criteria of the legal presumption are fulfilled within the meaning of this Directive.*

The aim of our proposal is to clarify that EU or national labour legislation can not be referred in this connection, since the application of those instruments would indicate the existence of an employment relationship.

3. <u>Article 3(1) and 4a(1)</u>, *i.e.* the material effects of a reclassification and the application of the presumption in tax, criminal law and social security proceedings

<u>Questions</u>

a) The legal presumption is to be applied in all relevant administrative and judicial proceedings where the correct determination of the employment status is at stake. In proceedings in which fields of law would the correct determination of the employment status currently be at stake in your Member State?

In Finland employment status is currently assessed in various fields, such as in the application of labour legislation, some social benefits and contributions for the funding of work pensions, in wage guarantee and work permit issues and also in criminal cases related to employment offences (for example violations of health and safety at work or discrimination in the workplace).

b) Is the notion of employment relationship the same in all these different fields of law? If not, please spell out in which fields of law these notions are different from each other.

In taxation there is a slightly different concept of employment relationship in use. Mostly the concept is based on the definition used in labour legislation.

We would like to add that we support the formulation as in the EPSCO Council 08.12.2022 PRESIDENCY ROOM DOCUMENT – which leaves room for manoeuvre for the Member States to decide that the legal presumption shall not apply in tax, criminal and social security proceedings.

We would however like to suggest that a reference to wage guarantee proceedings would be included in the article and/or the corresponding recital 25c as follows:

Member States may decide that the legal presumption shall not apply in tax, criminal, social security ***and wage guarantee*** *proceedings.*

(25c) In order to ensure access to Union law applicable to workers, the legal presumption should apply in all relevant administrative or judicial proceedings where the employment status of the person performing platform work is at stake. While this Directive does not impose any obligation on Member States to apply the legal presumption in tax, criminal and social security proceedings ***and in wage guarantee proceedings protected by the directive 2008/94/EC of the European Parliament and of the Council on the protection of employees in the event of the insolvency of their employer****, nothing in this Directive should prevent Member States, as a matter of national law, from applying that presumption in those or other administrative or judicial proceedings or from recognising the results of proceedings in which the presumption has been applied for the purposes of providing rights to reclassified workers under other areas of law.*

We consider it important that the directive does not set mandatory rules on other fields, such as taxation legislation, which at least in Finland includes a separate definition of employment relationship, as already explained above. Furthermore, we still have concerns that the formulation of article 4a (1) and the respective recital could imply that the legal presumption should be applied in wage guarantee proceedings protected by the directive 2008/94/EC of the European Parliament and of the Council on the protection of employees in the event of the insolvency of their employer. As we have commented before, we believe that wage guarantee proceedings are not intended to be that kind of proceedings where the person performing platform work can get his/hers employment status reclassified. On the other hand, wage guarantee may not necessarily be interpreted as social security proceedings, where the Member States would have the discretion not to apply the presumption.

c) For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, *e.g.* tax, criminal and social security proceedings?

In Finland the decisions of authorities on the classification as a worker are not binding on other authorities that make decisions based on their competence.

d) Do you consider that article 3(1), stating that the Member States shall ensure that platform workers enjoy the rights deriving from <u>relevant</u> Union law, nation law, collective agreements and practice applicable to workers, and the corresponding recital 19, are sufficiently clear or would the Directive benefit from clarifying the term "relevant" and, if so, how could this be done?

We think that the article 3(1) and the corresponding recital 19 are sufficiently clear.

4. <u>Article 4a(2)</u>, *i.e.* the discretion not to apply the presumption in ex officio situations

<u>Questions</u>

a) Do you think that this provision could create a gap in the protection of persons performing platform work and if so, in what way?

We support the broad scope of the presumption. However, as a compromise, we are ready to accept the previous formulation in document EPSCO Council 08.12. 2022 PRESIDENCY ROOM DOCUMENT: "*When verifying compliance with or enforcing relevant legislation on their own initiative, competent national administrative authorities shall enjoy a discretion not to apply the presumption, when it is manifest, in view of previous judicial and administrative decisions, that it would be successfully rebutted in accordance with paragraph 3*."

Comments from the HR delegation

HR ANSWERS – PWD for SQWP on February 13, 2023

1.b The proposed framework regulating the presumption of the existence of an employment relationship is clearly and meaningfully defined, in a way that will ensure its effective application in relation to the target group of people, i.e. bogus self-employed persons.

2.a No example in the national legislation.

3.c The Law on the Suppression of Undeclared Work (in force from 1st January 2023) prescribes what is considered undeclared work and regulates measures for the suppression of undeclared work. In the narrower sense, undeclared work is work that, given the nature and type of work and the authority of the employer, has the characteristics of an employment relationship, but is not legally contracted or does not have a valid legal basis, i.e. for which an appropriate application for mandatory insurance has not been established in accordance with special regulations.

When the competent inspector determines the existence of undeclared work in the process of inspection, it will be considered that the worker who performed such work was continuously in full-time employment with the employer for the duration of six months preceding the day on which the inspection was carried out and the fact of undeclared work established, unless the data clearly shows that the previous duration of employment was shorter or longer.

Regarding the social protection of workers, the competent inspector will, within eight days, order the employer to submit an application for mandatory pension insurance starting from the day that was determined as the start of work.

The employer is obliged to submit an application for mandatory pension insurance and pay the prescribed amount within three days from the date of delivery of the decision. The executive decision will be submitted to the competent body authorized to determine the right to pension insurance (Croatian Pension Insurance Institute), to the competent body authorized to determine the right to health insurance (Croatian Institute for Health Insurance) and to the competent body authorized for the calculation of taxes and contributions for mandatory insurance (Tax Administration) according to the employer's headquarters.

If the employer does not submit an application for mandatory pension insurance within the prescribed period, the Croatian Pension Insurance Institute, based on the submitted executive decision, will ex officio issue a decision on the recognition of the status of the insured, starting from the day specified as the start of work in the aforementioned decision.

If the employer fails to fulfil the obligation to calculate and pay public duties, the Tax Administration determines the total amount of the employer's obligation based on the submitted decision. The Tax Administration will inform the Central Register of Insured Persons and the Croatian Pension Insurance Institute about the determined and paid obligations based on the salary, according to the previously mentioned decision.

If, during the inspection, the competent inspector determines the existence of a contractual relationship between the client of the work and the executor of the work of a self-employed person, and there are circumstances that indicate the existence of a covert employment relationship, he will inform the Tax Administration.

Determining the characteristics of independent work for the purposes of the tax procedure:

In the event that the employer contracts other ways of performing work in order to use tax benefits contrary to the purpose of the law for work that has the characteristics of independent work (e.g. concealment of the employment relationship by the so-called lump sum trade institute), the Tax Administration will carry out a procedure in which it will determine the characteristics of independent work by collecting facts important for taxation and verification of the fulfilment of the elements of the criteria for the characteristics of independent work in accordance with tax regulations.

If it is established that in a certain case it is a covert employment relationship, the Tax Administration will issue a decision with the specified amount for receipts paid by the "employer", which is considered to be paid for non-independent work. Public duties will be charged on that amount as if the craftsman is in employment relationship.

Comments fro the HU delegation

Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work

Written comments from the Hungarian delegation (ST 2573/23)

1. Article 4(1), *i.e.* the design of the criteria to trigger the presumption

Article 4(1)[6] sets out the criteria for triggering the legal presumption, which is construed as a means to facilitate the determination of the existence of an employment relationship between a digital labour platform and a person performing platform work. In order to find a compromise between delegations' diverging views, changes were made to the Commission proposal. Notably, the notion of "controlling the performance of work" as an "umbrella principle" has been deleted from the chapeau; criterion (d) was split into three separate criteria. Consequently, the threshold for fulfilling the criteria was raised from 2 out of 5 to 3 out of 7.

Question:

b) If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.

The current threshold of 3/7 is still risks capturing the genuinely self-employed, especially as the three first criteria are inherent to many genuine self-employed relationships in accordance with national law. Increasing the threshold to a majority would require a sufficient threshold of evidence be met and would future proof transposition where additional criteria would be added by adjusting the threshold of evidence required as the criteria would increase.

Paragraph 1. point c) is still a matter of concern, because it is also specific for civil law contracts that the principal checks the quality of the work performed. ***The emphasis*** *of the distinction between the two kinds of legal relationships* ***is on the nature of the control****, which is* ***not currently included*** *in the point. The control is continuous, direct and detailed in the case of an employment relationship, while the principal occasionally checks the performance of the tasks and results subject to the assignment in case of a self-employed person.*

2. Article 4(2a), i.e. fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements

Article 4(2a)[7] takes inspiration from recital 25 of the Commission proposal. At delegations' request, the text of recital 25 was moved to the operative part and its wording has been clarified and amended to also cover legal obligations under collective agreements. While some delegations maintain that this provision is important as it prevents digital labour platforms from being wrongfully designated as employers, others worry it could create a loophole which digital labour platforms could exploit to escape taking on the responsibilities of an employer.

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6 In its version of document 15338/22 REV1

7 In its identical version of documents 14514/22 and 15338/22 REV1

Question:

a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

The provisions on health and safety including ensuring safety of others such as restaurants etc. and food safety provisions are obligations set by national legislation towards platform workers and not by the platform itself.

3. Article 3(1) and 4a(1), i.e. the material effects of a reclassification and the application of the presumption in *tax, criminal law and social security* proceedings

Article 3(1) and recital 19 set out i.a. the material effects of a reclassification, stating that Member States shall not only have national procedures in place for the correct and clear classification of the employment status of persons performing platform work, but also that they shall ensure that when an employment relationship is established, those persons enjoy the relevant rights deriving from Union and national law applicable to workers. Article 4a(1) , on the other hand, sets out the scope of application of the legal presumption, which is a procedural instrument to be applied within existing procedures in place in the Member States to facilitate the correct determination of his or her employment status.

At the request of some delegations, article 4a(1) 2nd subparagraph was introduced in order to exclude the use of the legal presumption in tax, criminal and social security proceedings. These delegations brought forward mainly two reasons. Firstly, they argued that excluding such fields from the scope of application of the legal presumption would safeguard Member States' competences in those areas. Secondly, they argued that in some Member States, the criteria for the existence of an employment relationship in a specific field of law might differ from another area of law, and that, therefore, the application of the legal presumption to these types of proceedings should be left to the discretion of Member States.

As mentioned above, the legal presumption is a way of easing the access for bogus self-employed to the correct classification of their employment status. As reclassification systems for bogus self-employed as workers likely exist already today in Member States' legal systems, the Presidency would like to understand how the different Member States deal with it today. Furthermore, the Presidency would also like to get the delegations' views on article 3(1) and the corresponding recital.

Question:

c) For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, e.g. tax, criminal and social security proceedings?

In Hungary, the investigation of various legal relationships and the remedying of practices resulting from improper exercise of rights are part of the activity both of the ***labour inspectorates and the tax authority.*** *Adminstrative procedures can be initiated ex-officio or upon complaint of the presumed platform worker. In addition to the above administrative procedures, court proceedings may also be initiated to establish the existence of an employment relationship.*

The material effects of a reclassification and the application of the presumption in tax proceedings

According to one of the general principles of Hungarian ***tax administration rules,*** *the tax authority shall qualify contracts or similar transactions according to their actual content in its procedures (authenticity clause – requirement of qualification of the contract according to its content – Section 2 of the Act CL of 2017 on the Rules of Taxation).*

Therefore, in cases when the tax or the labour authority qualifies the contract between the parties as an employment relationship, the public burdens arising from the employment contract (taxes and contributions) will be determined by the tax authority with retroactive effect within the statutory limitation period.

The material effects of a reclassification and the application of the presumption in social security proceedings

The legal presumption does not necessarily benefit the platform-worker in such cases where platform work is a complementary, secondary or marginal activity. This concerns the determination of the existence of an employment relationship based on the criteria set out in the proposal, which can have indirectly detrimental effects on flexible work arrangements.

The creation and organization of the social security system falls under the competence of the Member States (Article 153 of the Treaty on the Functioning of the European Union, TFEU). Therefore, it is up to the Member State to decide who can affiliate with its national social security system and under which criteria. To our understanding legal presumption interferes with this competence of the Member State, therefore we would like to see in the text of Directive, in Article 4a that "the legal presumption shall not apply to social security proceedings."

Our reasoning is the following:

The situation is more complicated if the platform work is carried out across borders and the applicable legislations of more than one Member State are in conflict. In this sense, there is a particular concern on the conflict when the applicable labour law differs from the applicable social security law and as a result of the legal presumption stemming from the labour law it shall be determined where, in which country the platform worker shall be insured and pay social security contributions.

In the conflict of different legislations Regulation No. 883/2004 on the coordination of social security systems determines the applicable legislation (paying contributions, right to benefits) applying the general principle "lex loci laboris". However, there are many complementary measures (Art 13) in case of activities, which are pursued in two or more Member States (pluractivities).

In these cases the decisive element can be either the place of residence of the worker or the registered office or place of business of the undertaking/employer or the substantial part of the activity pursued. These measures can be in conflict with the legal presumption, which should be applied based on this Directive in all relevant administrative proceedings such as in the social security proceedings.

For example, what will happen when the person pursues the substantial part of his activity in a Member State other than the one in which the platform work is carried out and the applicable legislation to his case from the social security point of view shall be of the Member State where the registered office/place of business of the undertaking/employer is situated?

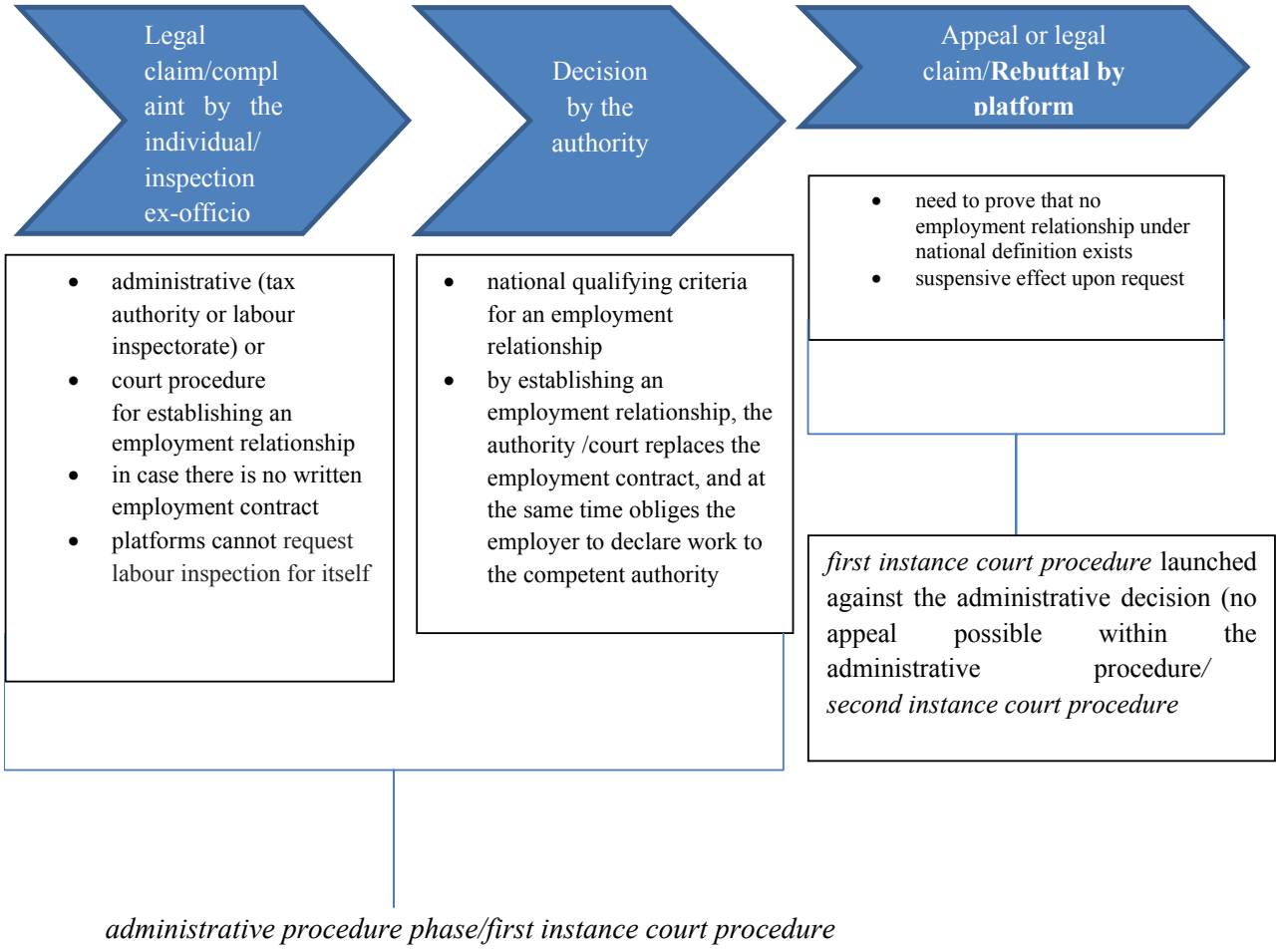
When there is a conflict between the Regulation and this Directive, we do not believe that Article 3(1), stating that the Member States shall ensure that platform workers enjoy the rights deriving from relevant Union law, national law, collective agreements and practice applicable to workers, are enough. In order to make a priority for the application of the Regulation No. 883/2004 in case of pluractivities, we have to be clear, precise and transparent. Therefore we recommend either to maintain in the text "the legal presumption shall not apply to social security proceedings" or to ensure expressis vebis that „The Regulation No. 883/2004 prevails over the provisions contained in this directive."

Otherwise, Hungary has a well-established system for classifying the contractual relationship as an employment relationship.
According to Hungarian labour law, the classification of an employment relationship requires a complex examination of the following aspects, in particular:

1) Primary qualifying criteria, which may be decisive in themselves for the classification of the employment relationship
a) ***subordinated relationship*** *between the parties, the employee performs his/her duties within the organisation of the employer, the so-called* ***work organisation dependence*** *is identifiable;*
b) the obligatory nature of performance of job-related tasks; continuous and regular working obligation;
(c) an obligation to perform ***work in person****, respecting the rules, regulations, instructions and customs applicable to the job. Additionally, the employee in an employment relationship is required to act in accordance with the trust necessary for the performance of his/her job, and to cooperate with his/her co-workers.*

2) Secondary criteria: they are not classifying the employment status in itself, but are appropriate for the classification of an employment relationship if additional primary or secondary criteria are also met indicating the existence of an employment relationship.
d) an employment obligation (providing tasks) on the part of the employer;
e) the employee is obliged to be at the disposal of the employer during his working hours, in an adequate condition of working capacity;
f) wide-ranging unilateral rights of the employer to control, direct, instruct and supervise the preformed working activity and its result: including place of work, working time, working time schedule and manner of work;
(g) the costs of the work shall be borne by the employer;
(h) the employment contract must, as a general rule, be in writing;
(i) the employer must create conditions for occupational safety and health requirements;
(j) the work is carried out with the employer's means.

Qualification and establishment of an employment relationship in Hungary



Comments from the IT delegation

5. Article 4(1), *i.e.* the design of the criteria to trigger the presumption

Questions

d) Do you consider that the criteria are now designed in a way that the right people, *i.e.* mostly the bogus self-employed, will be covered by the legal presumption?

e) If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.

In general, Italy considers that the criteria, as defined in the last compromise texts, are sufficiently clear to detect bogus self-employed.

However, it should be also noted that those criteria are not always unambiguous, but they must be assessed on a case-by-case basis.

6. Article 4(2a), *i.e.* fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements

Questions

c) Can you provide examples when this provision would be applied in your Member State under the current legislation?

d) Is this provision necessary? If so, could this issue be addressed in other ways in the directive?

In general terms, in the Italian legal system the compliance of a regulatory provision, both at European and at national level, excludes the liability of the subject for breach of the law and, at the same time, it won't be considered as fulfilment of a criterion, sufficient to trigger the legal presumption.

For this reason, in our view, the introduction of the provision in art. 4(2a) may appear not strictly necessary as it is likely to create legal uncertainties without significant added value.

Comments from the LU delegation

1.Article 4(1), *i.e.* the design of the criteria to trigger the presumption

f) Do you consider that the criteria are now designed in a way that the right people, *i.e.* mostly the bogus self-employed, will be covered by the legal presumption?

YES – all the criteria foreseen by the proposal have been fully taken at this stage into account in our national draft legislation to be discussed by the national parliament in the coming months.

2.Article 4(2a), *i.e.* fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements

Questions

e) Can you provide examples when this provision would be applied in your Member State under the current legislation?

f) Is this provision necessary? If so, could this issue be addressed in other ways in the directive?

LU reiterates its strong misgivings on this paragraph, which represents a clear derogation with respect of the application of the legal presumption.
Collective agreements are freely negotiated by the social partners in LU. This means that the content of collective agreements differ from one sector to another, and sometimes from one company to another.
In addition, collective agreements often have provisions regarding the system of remuneration by fixing limits or how holidays and working hours are to be regulated. If one of the criteria of the legal presumption is fulfilled because it is bound to do so by a collective agreement, it would not be taken into account for the application of the presumption.
As described by ES, if the purpose of referring to collective agreements is to strengthen collective bargaining for the solo self-employed, a more effective approach is to reinforce the rights of information and consultation of the representatives of the self-employed in chapters III and IV, which were deleted in the latest iterations of the text.
In conclusion, and in light of the arguments exposed by ES, SI and NL, this derogation is not only unnecessary but may lead to amplify opportunities for the circumvention of the application of the legal presumption.

3.Article 3(1) and 4a(1), *i.e.* the material effects of a reclassification and the application of the presumption in tax, criminal law and social security proceedings

Questions

e) The legal presumption is to be applied in all relevant administrative and judicial proceedings where the correct determination of the employment status is at stake. In proceedings in which fields of law would the correct determination of the employment status currently be at stake in your Member State?

Today, the qualification or requalification of a normal contractual relationship to a working relationship only belongs to the labour courts. The same courts have built a whole jurisprudence in this area by having implemented different criteria that help to qualify such a contractual relationship.

f) Is the notion of employment relationship the same in all these different fields of law? If not, please spell out in which fields of law these notions are different from each other.

Yes – the notion of employment relationship is the same in all different fields.
LU national Jurisprudence has set out that a working relationship is underpinned by 3 elements:

- ***Provision of work;***
- ***Remuneration in return;***
- ***Relationship of subordination (the most representative character of the employment relationship)***

g) For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, e.g. tax, criminal and social security proceedings?

According to our legislation, the legal presumption will not be applicable in tax, criminal and social security proceedings as such, but will generate the required effects in these fields of law if a reclassification is enacted by labour courts, in order to ensure the coherence of our legal system. The notion of employment relationship is therefore applicable in all relevant legal fields. That being said, introducing an explicit exclusion of social security and tax proceedings from the application the legal presumption at EU level remains an unnecessarily restrictive approach.

Comments from the LV delegation

Answers of Latvia to the Note from the Presidency for Social Question Woking Party on 13 February 2023 (5273/23)

Questions

1b) If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.

We look positively at the efforts to bring the legal presumption criteria closer to the findings/conclusions expressed in the ruling of the EU Court in case No. C-692/19 (Yodel Delivery Network Ltd. Case), as particularly important in distinguishing a worker from a self-employed considering the employer`s subordination/supervision.

However, we still consider that no significant changes have been made in the application of the legal presumption - even with the increased number of criteria, a minority of these criteria (3 out of 7) are still sufficient to apply the legal presumption and presume the employment relationship.

This kind of approach for application of presumption when a minority of the criteria are sufficient can limit the existence of true self-employment and create a significant additional burden for merchants, while also limiting competition. Increasing the criteria for application of legal presumption would improve the labour market conditions for entrepreneurs, strengthening the ability of merchants to operate in an innovative and competitive business environment.

2a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

At the moment, such examples are not identified.

3c) For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, e.g. tax, criminal and social security proceedings?

Comments from the NL delegation

Answers to questions 1b), 2a) and 3c) of Presidency note 5273/23 of 1 February 2023

Contribution of The Netherlands – 7 February 2023

NB: All references to draft text pertain to document 15338/22 REV1.

1a)

Do you consider that the criteria are now designed in a way that the right people, i.e. mostly the bogus self-employed, will be covered by the legal presumption?

1b)

If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.

Answer

The Netherlands believes that a strong and effective rebuttable legal presumption will provide protection for a very vulnerable group of workers. As digital labour platforms are innovative and may easily adapt their business models, this requires legislation that is future proof. In our view, criteria (d), (da) and (db) do not meet this standard, while the original Commission proposal does. The criteria of the presumption proposed by the Commission, based on jurisprudence, reflect the control and direction that is generally exercised by digital labour platforms. Our assessment is that these criteria will cover mostly the bogus self-employed. Because of the characteristics of this particular group - i.e. workers subject to subordination and varying degrees of control by the digital labour platform they operate through - we expect that genuine self-employed are not likely to fall within the scope of the legal presumption.

2a)

Can you provide examples when this provision would be applied in your Member State under the current legislation?

Answer

Under Dutch law, social partners enjoy a great deal of freedom to close mutual agreements on terms and conditions of employment, which they lay down in a collective labour agreement. For example, it is not uncommon that a collective agreement contains a provision determining that a worker may not work for a third party. Collective agreements may also contain specific provisions regarding work and rest times. Given the breadth and reach of collective agreements in the Netherlands, an *a priori* exclusion of collective agreements from the scope of the legal presumption would preclude a proper assessment of the facts in many circumstances, thereby considerably weakening the effectiveness and usefulness of the presumption. It is also noteworthy that under Dutch law social partners do not have the freedom to establish whether or not an employment contract exists; they also may not deviate from mandatory legal stipulations regarding employment contracts. In this respect we see a fundamental difference with the text of the article 4 (2a).

3c)

For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, e.g. tax, criminal and social security proceedings?

Answer

If a person has been reclassified, for instance through a court ruling, then all relevant authorities will take notice of this and subsequently decide whether there are consequences within their respective area of competence.

Comments from the PL delegation

Answers to the questions 1b), 2a) and 3c) of the Note from the Presidency for Social Question Woking Party on 13 February 2023 (5273/23)

1. Article 4(1), i.e. the design of the criteria to trigger the presumption

Questions

b) If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.

In our view, if only criteria a), b) and e) referred to in Article 4 (1) are fulfilled, there is a high risk that the genuine self-employed would wrongly be affected by the legal presumption.

Examples:

A plumber works through platform X, which sets maximum rates, e.g. 299 PLN per hour (the minimum hourly rate in 2023 is PLN 22.80), but the actual price is determined each time by the plumber, depending on the service in question (not exceeding PLN 299 per hour of work though) [criterion a]; platform X requires the wearing of a helmet, jacket or bag with the platform logo for better identification, or provides a password randomly generated by the IT system when the plumber confirms acceptance of the service – to be presented while entering the customer's home for customer safety reasons, so as not to let the wrong person into customer's home [criterion b]; payments are made through the platform X, for the convenience and security of customers, to protect their personal data [criterion e], although the payment will be transferred in full to the plumber's account, and the plumber will only transfer a fixed monthly amount to the platform as a fee for being able to advertise and use the database of customers logged on the platform X. However, the platform will not interfere with the plumber's working hours or absences, influence the acceptance or rejection of jobs or restrict the use of substitutes or subcontractors. It appears that the prerequisites for the definition of a digital labour platform will then be met in practice (the payment intermediation will fulfill Article 2(1)(1)(c)), and criteria a, b and e will also be met.

The translator of an exotic language, works through platform Y, which sets maximum rates, significantly higher than the obligatory minimum hourly rate, but the translator will have the option to set a lower rate within this limit [criterion a]; the platform requires the translation file to include the platform's logo for better identification and promotion of the platform [criterion b]; the platform's regulations will impose a ban on working for other platforms providing translation services in the language in question [criterion e]. However, the platform does not verify the quality of the translations, the timing or place of the service, nor the use of subcontractors/substitutes. The deadlines for the translations are agreed on a case-by-case basis between the translator and the client - however, via the client's account logged in on the platform Y, as well as all correspondence, including the transmission of the text to be translated and the completed translation, must take place via the customer's account, also payments are made via the platform, albeit to the translator's sub-account (this intermediation appears to fulfill Article 2(1)(1)(c)).

In view of the lack of employer's direction at a place and time specified by the platform, and the remuneration beeing paid not by the platform, two aforementioned cases will not meet the national definition of an employment relationship.

2. Article 4(2a), i.e. fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements.

a) Can you provide examples when this provision would be applied in your Member State under the current legislation?

The Polish Labour Code provides for the obligations of employers, as well as of non-employers organising work, to protect health and life by providing safe and hygienic working conditions, to employees as well as to natural persons performing work on a basis other than employment relationship or self-employed. It also imposes occupational health and safety obligations on individuals performing work on a basis other than an employment relationship, to the extent determined by the employer or other entity organising the work.

3. Article 3(1) and 4a(1), i.e. the material effects of a reclassification and the application of the presumption in tax, criminal law and social security proceedings

c) For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, e.g. tax, criminal and social security proceedings?

In Poland there is no different notions of employment relationship.

However, circumstances arising from findings made by an labour inspector are not binding in the proceedings of the insurance authority for the determination of being subject to the obligation of employee social insurance, i.e. they do not constitute the basis for issuing a decision on social insurance coverage without carrying out checks or administrative proceedings establishing the obligation to be subject to social insurance.

Comments from the RO delegation

7. Article 4(1), *i.e.* the design of the criteria to trigger the presumption

Questions

b) If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.

In our legislation, currently there is no institution of legal presumption for establishing the existence of an employment relationship. Consequently, the determination of the existence of an employment relationship is based only on clear criteria established in the Labour Code, so it is not presumed. In this context, we appreciate that it is very important for this proposal to clearly define the conditions, criteria and practical application of the legal presumption regarding the professional status.

Thus, expectations remain linked to a clear regulation that ensures both the guarantee of decent working conditions and the protection of all workers on the platforms, as well as to avoid increasing legal uncertainty and to promote a correct classification of these persons.

In this regard, we consider that the content and threshold of the criteria initially proposed by COM would represent a more balanced approach, would ensure fair and transparent working conditions and would guarantee a healthy working environment for persons performing platform work, regardless of their professional status.

8. Article 4(2a), *i.e.* fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements

Questions

g) Can you provide examples when this provision would be applied in your Member State under the current legislation?

In RO there is no specific regulatory legal framework in the field of platform work. In the same time, according to our national practice, the employer is defined by law and the conditions for collective bargaining and application of collective agreements at the level of employers, as well as the conditions for extending the application of collective agreements to employers not represented in collective negotiations are also established by law.

Moreover, introducing in the text a reference to the collective agreements for the identification of the employer would generate interpretations in relation to the national practice and could induce a direct placement of the platform that has the status of an employer under the conditions of the collective agreements.

As such and bearing in mind the replies of ES and NL to this question, we consider that the current wording would give chance to platforms to find ways to circumvent the application of the legal presumption.

9. <u>Article 3(1) and 4a(1)</u>, *i.e.* the material effects of a reclassification and the application of the presumption in tax, criminal law and social security proceedings

<u>Questions</u>

c) For Member States which have different notions of employment relationship in different fields of law: how do you deal currently in practice with a person who has been reclassified as a worker based on the notion of employment relationship in one field of law in later proceedings concerning other fields of law, *e.g.* tax, criminal and social security proceedings?

Not applicable.

Comments by SI delegations

Reply by SI to the questions 1b), 2a) and 3c) of Presidency note 5273/23

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1. Article 4(1), *i.e.* the design of the criteria to trigger the presumption

Questions
a) Do you consider that the criteria are now designed in a way that the right people, *i.e.* mostly the bogus self-employed, will be covered by the legal presumption?
b) If not, please explain why and provide concrete examples, under the current national legislation, of bogus self-employed who would not benefit from the legal presumption or, alternatively, of genuine self-employed who would wrongly be affected by the legal presumption.
Slovenia believes that the criteria for triggering a legal presumption and their number represent a key element of the legal presumption mechanism. The mechanism should be strong and effective enabling reclassification to as many bogus self-employed as possible and avoiding misclassification of genuine self-employed.
*The criteria for triggering a legal presumption should be clear, based on jurisprudence and their number should be as small as possible. SI supports t**he Commission's original proposal.***
The last compromise proposal does not meet our expectations, in particular because the criterion (d) was split into three separate criteria in an arbitrary way with no evidence in jurisprudence.
We believe that the criteria as they stand now (3 out of 7) would make it more difficult for bogus self-employed to be properly reclassified as an employee, than in case of the original Commission's proposal (2 out of 5).

2. Article 4(2a), *i.e.* fulfilling the criteria of the presumption as a result of compliance with union law, national law or collective agreements

Questions

a) **Can you provide examples when this provision would be applied in your Member State under the current legislation?**

SI considers the question on national examples irrelevant for the negotiations since the legislation can be changed anytime. We should make a future proof legislation.
In our opinion this provision would devalue the directive as it enables member states (and social partners) to substantially change the criteria for triggering legal presumption, which would make the legal presumption mechanism (and consequently the directive) ineffective.
SI fully shares the opinion provided by ES on Art. 4(2a) as the reply to this PSY note.

3. Article 3(1) and 4a(1), *i.e.* the material effects of a reclassification and the application of the presumption in tax, criminal law and social security proceedings

In SI, there is no different notions of employment relationship.
