

Delivery Platforms Europe Views on ST7491/23

As platforms, our overriding request continues to be for legislators to strive for maximum legal certainty in how the presumption will work in practice and ensure that those who are genuinely self-employed are not covered by the presumption. We welcome the Presidency's maintenance of provisions which limit the application of the presumption to proceedings where the employment status is at question (not in tax, criminal or social security proceedings). This provides greater legal certainty given the risk of contradictory decisions particularly when different definitions exist within even one Member State.

It is unfortunate however that some of the changes proposed by the Presidency would create greater uncertainty about how and when the presumption would apply. For example, what should happen in a potential contradiction between compliance with law, collective agreements and the criteria? Moving key aspects of the text from operative articles and into recitals leaves greater room for interpretation both in transposition and by authorities post-transposition and thus increases the risk of differing outcomes in different proceedings, even within the same Member State. This reduces legal certainty and is something we would advocate be avoided.

Any general approach reached by the Council will be only the starting point for negotiations with the Parliament on a final text. The position which was narrowly approved by the European Parliament contains significant ambiguity, introduces provisions which are unclear in their intent or effect and would, if implemented today, eradicate the legal certainty which has been building through jurisprudence and court decisions within every Member State.

A middle ground between the positions of the Parliament and Council presents the possibility of significant legal uncertainty and we would therefore urge the Council to strive for maximum clarity in the general approach to limit the inevitable ambiguity within a final text.

We believe that greater certainty can be introduced in the text by:

1. Clarifying that compliance with national law and collective agreements would not constitute meeting the criteria within the operative article.
2. Clarifying the wording of the criteria to avoid multiple criteria being triggered by one instance and ensuring that they focus on behaviours indicative of bogus self-employment.
3. Clarifying that where it is manifest that an individual is self-employed under national law, the presumption need not be applied.
4. Clarifying that attempts to prevent invasive data processing would not prevent necessary processing of data with legitimate safety grounds under GDPR.

We have provided specific comments and wording suggestions for the relevant articles below.

1. Clarifying that complying with national law and collective agreements would not constitute meeting the criteria

Delivery Platforms Europe understands that the intention of the Presidency is to clarify that the criteria in Article 4 should not be triggered where the “control and direction” exerted by the platform (as per the preamble to the proposal and the clarification contained in Recital 24). We welcome this intent.

However, in order for the content of Recital 24 to be justiciable and ensure legal certainty, its content should be re-inserted into the Articles and reworded. Inclusion of a provision within contractual terms does not indicate that it is unilaterally determined by the platform nor that it is not one required by law or collective agreements. The same can be said of a platform’s ‘practice’. As such, merely stating that trigger of the presumption should be on the basis of contractual terms of practice does not ensure that complying with national law or the provisions of a collective agreement would not risk meeting some of the criteria.

For example, the Greek Labour law¹ (passed in 2021) regulates health and safety conditions of service providers. The article states that platforms are responsible for the welfare, health and safety of any type of worker regardless of contract type.

Under this law, platforms are required to offer work equipment to freelancers, including protective helmets as well as corresponding clothing that meets the criteria suitable for the job such as, among others, waterproof protection, gloves and reflective vest. This risks platforms fulfilling control factors (b) and (c), and it is uncertain that an authority when examining this situation would be prevented from considering the criteria met because it was in order to comply with the law rather than because it was in the terms and conditions or practice of the platform.

Please find suggested wording below:

PRES TEXT 17/3	AMENDMENT
<p>Article 4 Legal presumption</p> <p>1. The relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship when</p>	<p>Article 4 Legal presumption</p> <p>3. The relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship when</p>

¹ <https://elinyae.gr/en/node/73590>

<p>the digital labour platform exerts control and direction over the performance of work by that person.</p> <p>2. For the purpose of the previous subparagraph, exerting control and direction shall be understood as fulfilling, either by virtue of its applicable terms and conditions or in practice, at least three of the criteria below:</p>	<p>the digital labour platform exerts control and direction over the performance of work by that person <u>beyond what is required by law or collective agreements.</u></p> <p>4. For the purpose of the previous subparagraph, exerting control and direction shall be understood as fulfilling, either by virtue of its applicable terms and conditions or in practice, <u>a majority</u> of the criteria below.</p> <p><u>Measures or rules which are required by law or collective agreements shall not be understood as fulfilling one or more criteria for triggering the legal presumption under this Directive:</u></p>
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2. Clarifying the wording of the criteria to avoid multiple criteria being triggered by one instance and ensuring that they focus on behaviours indicative of bogus self-employment.

Moreover, we continue to believe that the best way to protect genuine self-employment is for the Directive to require that a majority of criteria be met in order to trigger the presumption, particularly in instances where the triggering of the presumption is possible absent the fulfillment of any of the *Yodel* criteria. In many instances, this would lead courts and labour authorities to apply the presumption in instances of genuine self employment without reference to either the facts or the law.

PRES TEXT 17/3	AMENDMENT
(b) The digital labour platform requires the person performing platform work to respect specific rules with regard to appearance, conduct towards the recipient of the service or performance of the work;	(b) The digital labour platform requires the person performing platform work to respect <u>extensive binding</u> rules with regard to appearance, conduct towards the recipient of the service or performance of the work;

(c) The digital labour platform supervises the performance of work including by electronic means;	(c) The digital labour platform <u>closely</u> supervises the performance of work including by electronic means <u>for purposes other than what is required for the essential functioning of the service;</u>
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3. Clarifying that where it is manifest that an individual is self-employed under national law, the presumption need not be applied.

We are concerned that the amendments to this Article, ensuring that only administrative authorities can choose to not apply the presumption in cases where it is clear an individual is self-employed, will simply lead to more spurious individual cases being taken in by the judicial system. As such, the Courts and any other relevant authorities should have the ability to not apply the presumption where it believes that the relationship in question is manifestly not an employment relationship. Because the intention is to minimise unnecessary litigation and procedures, the possibility to not apply the presumption should not be limited to instances where the enforcement is at the initiative of the authority but in all instances.

PRES TEXT 17/3	AMENDMENT
<p>Article 4a Application of the presumption and the rebuttal</p> <p>2. Member States may grant competent national administrative authorities a discretion not to apply the presumption, if:</p> <p>a) they are verifying compliance with or enforcing relevant legislation on their own initiative, and</p> <p>b) it is manifest that the contractual relationship in question is not an employment relationship as defined by the law, collective agreements or practice in force in the Member State in question, with consideration to the case-law of the Court of Justice.</p>	<p>Article 4a Application of the presumption and the rebuttal</p> <p>2. Member States <u>shall grant competent national authorities the</u> discretion not to apply the presumption, if:</p> <p>a) they are verifying compliance with or enforcing relevant legislation on their own initiative, and</p> <p>b) it is manifest that the contractual relationship in question is not an employment relationship as defined by the law, collective agreements or practice in force in the Member State in question, with consideration to the</p>

	case-law of the Court of Justice.
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4. Clarifying that attempts to prevent invasive data processing would not prevent necessary processing of data with legitimate grounds under GDPR.

The limitation of data processing to time periods when a person is using the platform risks legal uncertainty and unintended consequences for platforms, platform workers and consumers; particularly in relation to health and safety. Platforms are required to collect and process personal data from individuals in many instances where they are not offering or performing platform work:

- For onboarding, including right to work checks.
- For compliance with other laws e.g. EU DAC7 which requires collecting personal data from couriers, even those that are no longer working with the platform to provide to tax authorities.
- In response to a police request to cooperate with investigations.
- To resolve a complaint.
- To investigate an accident involving a member of the public.

These examples demonstrate legitimate reasons a platform would need to collect personal data from couriers while they are not actively offering or performing platform work but they risk being prevented from doing so by this text. By ensuring where the collection of such information is permitted under Articles 6 (1)b, c, d, e and 9 of GDPR, the examples above would continue to be permitted while still preventing platforms from seeking to collect data of no relevance or that is not necessary.

PRES TEXT 17/3	AMENDMENT
<p><i>Article 5a</i> <i>Limitations on processing of personal data by means of automated monitoring or decision-making systems</i></p> <p>1. Digital labour platforms shall not, by means of automated monitoring or decisionmaking systems:</p> <p>a) process any personal data on the emotional or psychological state of</p>	<p><i>Article 5a</i> <i>Limitations on processing of personal data by means of automated monitoring or decision-making systems</i></p> <p>2. Digital labour platforms shall not, by means of automated monitoring or decisionmaking systems:</p> <p>a) process any personal data on the emotional or psychological state of the person performing platform work;</p>

<p>the person performing platform work;</p> <p>b) [...]</p> <p>c. process any personal data in relation to private conversations; including exchanges with platform workers' representatives;</p> <p>d. collect any personal data while the person performing platform work is not offering or performing platform work</p>	<p>b) [...]</p> <p>c. process any personal data in relation to private conversations; including exchanges with platform workers' representatives;</p> <p>d. collect any personal data while the person performing platform work is not offering or performing platform work.</p> <p><u>This paragraph shall not affect the possibility for digital labour platforms to process personal data on the basis of points (b), (c), (d), (e) and (f) of Article 6(1) and Article 9 of Regulation (EU) 2016/679, or where it is in response to a request by the person performing platform work.</u></p>
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