Options for Legal Presumptions and Burden of Proof reversals

This study provides an overview of European and national regulations on the presumption of employment relationships and the reversal of the burden of proof. Different approaches are assessed to propose the feasibility of the ETUC proposal to move from current situation where the most vulnerable in the relationship (workers) are forced to be self-employed without benefiting from the autonomy of this status, towards a presumption of employment status, complemented by a reversal of the burden of proof by platforms, which will have to provide sound evidence that no employment relationship exists between them and workers in their respective platforms.

The different legal avenues proposed provide sound evidence to the existence of legal base for undertaking European action to protect workers in platforms companies. ETUC will consider this legal report in its reply to the consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work.

Presumptions – key points

- There are different types of presumptions: absolute (i.e. non-rebuttable – very rare, but some examples exist including in the labour law domain) and relative/simple (i.e. rebuttable – more common). Some can be generic (e.g. a general presumption that work is generally provided through a standard contract of employment) or specific (e.g. a presumption that certain professions (e.g. journalism, modelling, work in the entertainment sector), or forms of work (e.g. homeworking) are typically performed by workers with a certain, protected, employment status.
- The primary effect of a rebuttable presumption is to establish that somebody (e.g. a worker) has a certain employment status until a different status is proven by the other party (e.g. the employer). The level of evidence expected by the employer to rebut the presumption can vary from system to system (it is not a rule of evidence after, but it can be strengthened through clear guidance in that respect).
- Typically, one of the incidental effects of a presumption is to shift the onus to prove that the worker is not a worker, away from the employed person and onto the employer. In most systems, this shift happens automatically as a consequence of the legal presumption (i.e. without the worker having to establish any particular facts) – a mere claim to being, say, an employee journalist on the basis of the presumption will normally suffice.
- Note that there are some legal systems (e.g. Belgium) where so called presumptions do not apply automatically but instead operate through a different mechanism requiring the claimant to go to court, present some facts to a judge and demand at least prima facie assessment that the reality of the work relationship matches a set of indicators or criteria prescribed by law. Upon finding that it does, then the judge will trigger the presumption

and it will be for the other party to rebut it (usually by discharging a fairly onerous burden of proof). In effect in these systems the presumptions operate de facto as 'reversal of the burden of proof mechanism': they require the claimant to establish, before a court, some facts (as an inference, but the onus could be higher) so that the court can presume a relationship and then shift the burden onto the defendant.

- Note that it is abstractly possible that the other party (i.e. the presumed employer) may not be able to prove that the worker is not a worker/employee, but may still be able to prove that it is not the employer of that worker (e.g. that he is just an intermediary entity, a client, even a service provider of that worker, whose putative employer is somebody else)

Presumption definition	Source	Pros	Cons
'a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period'	Article 11 (b) of the TPWCD ('Complementary measures for on-demand contracts')	A useful suggestion that could be replicated in an instrument on Platform Work	In the TPWC directive it is clear that it only covers 'workers' (including bogus-SE) under the national or CJEU definition, but not genuinely self-employed persons. Rather generic formulation. Says nothing about the burden of proof that an employer may be required to discharge in order to rebut it.
Article L7112-1 Toute convention par laquelle une entreprise de presse s'assure, moyennant rémunération, le concours d'un journaliste professionnel est présumée être un contrat de travail. Cette présomption subsiste quels que soient le mode et le montant de la rémunération ainsi que la qualification donnée à la convention par les parties. Article L7121-3	French Labour Code	Clear and Broad	CJEU has found similar presumptions to be in breach of Free movement principles in Case C-255/04 Commission v France , but France has amended the Code (see Article L7121-5) to limit it to 'cross-border' temporary service providers normally based in another MS as SE aritists.

Tout contrat par lequel une personne s'assure, moyennant rémunération, le concours d'un artiste du spectacle en vue de sa production, est présumé être un contrat de travail dès lors que cet artiste n'exerce pas l'activité qui fait l'objet de ce contrat dans des conditions impliquant son inscription au registre du commerce.			
'(i) a broad presumption that all relationships are of a subordinate nature and that a worker making a claim is not required to produce evidence supporting the allegation;'/ '(i) presuming that all relationships are employment relationships and shifting the burden to prove otherwise on the principal – the radical option'	Aloisi paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3556922	Does not require a worker to prove much Shifts the burden of proof as an incident of its application	Not clear what burden of proof the employer needs to discharge The ability of the employer to discharge is directly correlated to the narrowness of the 'worker' definition (the narrower the worker definition, the easier to discharge it)
'Existence of an employment relationship - rebuttable legal presumption (1) If platform-based work involves the provision of services, a rebuttable employment relationship with the platform shall be deemed to exist. This legal presumption may be rebutted by the platform.	'Schuster' Proposal https://www.joachim-schuster.eu/wp-content/uploads/2020/06/Draft_EU-Directive-on-Platform-Work_EN.pdf	Does not require a worker to prove much Makes it harder for employer to rebut the burden of proof as it would need to deny at least 6 (out of 8) criteria, whereas the worker only needs to establish 3	Some of the criteria are, effectively, different examples of the same 'employer function' (e.g. 1, 6, and 8): they stand together and they fall together, so all employers would need to do to defeat them is outsource them to a separate entity in charge of some of them (the client? A separate company with whom they may or may not have a relation of sorts)

(2) The legal presumption shall not be rebuttable if at least three of the criteria listed in Article 3(2) have been met'			
La loi des relations de travail (La loi-programme (I) du 27 décembre 2006) comprend des articles spécifiques sur la natures des relations de travail pour empêcher le phénomène des faux indépendants et des faux salariés. Cette loi prévoit quatre critères généraux pour déterminer si un travailleur est salarié ou indépendant, à savoir ▪ la volonté des parties ▪ la liberté d'organiser le travail ▪ la liberté d'organiser le temps de travail ▪ la possibilité d'exercer un contrôle hiérarchique Pour certains secteurs économiques un mécanisme de présomption est introduit, basé sur des critères spécifiques, énumérés dans la loi des relations de travail ou dans un arrêté royal particulier. Si plus de la moitié de ces critères ne sont pas remplis, une relation	Belgian Loi-programme (I) du 27 décembre 2006 concernant les relations de travail (Titre XIII) https://commissionrelationstravail.belgium.be/fr/legislation.htm	The burden of proof, once shifted, is understood to be fairly onerous to discharge (see M. Wouters https://journals.sagepub.com/doi/pdf/10.1177/2031952519864196)	Requires party to make a claim Requires the decision maker to verify a range of criteria (in reality is more a reversal of the BoP than a classic presumption)

de travail en tant qu'indépendant est présumée. Dans le cas inverse, une relation de travail en tant que salarié est présumée.			
'Se presume incluida en el ámbito de esta ley, salvo prueba en contra, la actividad de las personas que presten servicios retribuidos consistentes en el reparto o distribución de cualquier producto de consumo o mercancía a consumidores finales, por parte de empleadoras que ejercen las facultades empresariales de organización, dirección y control de forma indirecta o implícita, a través de una plataforma digital, mediante la gestión algorítmica del servicio o de las condiciones de trabajo'	Artículo único. Modificación del Texto Refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre Disposición adicional vigesimotercera. Presunción de laboralidad en el ámbito de las plataformas digitales de reparto: ejercicio implícito de las facultades empresariales	Straightforward and simple to operate for judges and labour inspectors	Sectoral. Unclear what burden of proof is needed to rebut it.
"A presumption of an employment status should be the starting point. A worker who performs work under the same conditions as "normal" workers should be classified as such according to the definitions used in the respective industrial relation systems."	ETUC resolution Nov 2020 https://www.etuc.org/en/document/etuc-resolution-protection-rights-non-standard-workers-and-workers-platform-companies	Does not require the introduction of a new EU worker definition, which may prove divisive.	CJEU could end up introducing a worker definition and it may not be up to the job. Seems to require a 'comparator' with a 'normal' work relationship, which could be problematic

"A presumption of an employment status should be the starting point… A worker who performs work under the same conditions as "normal" workers should be classified as such according to the definitions used in the respective industrial relation systems."	ETUC doc para 39	Does not require a unified 'worker' definition (though CJEU could impose one)	Appears to require the existence of 'normal' workers, which may or may not always be a given (especially if restricted to an undertaking rather than a sector – we have this problem with 'comparators' in equal pay cases) National definitions may be weak and force CJEU to intervene
"The presumption of employment relationship means that any natural or legal person (e.g. labour platform) who has responsibility for the undertaking and/or the establishment is considered to have an employment relationship with the worker. Under this condition, the labour platform shall grant its workers all the existing employment rights"	ETUC para 41	This is a presumption of 'employer' (more than one of 'employment relationship') and that's an important ingredient of the protective framework	'responsibility' for the undertaking/establishment works better in the physical world (less so in the digital one or in 'home working' contexts)
"a general presumption that "anyone providing their labour to another will be presumed to fall within the scope of" labour law "unless the other party to the arrangements establishes that the only possible construction of the engagement is that the individual was not providing labour as a 'worker'"	IER/Countouris/De Stefano https://www.etuc.org/sites/default/files/publication/file/2019-04/2019_new%20trade%20union%20strategies%20for%20new%20forms%20of%20employment_0.pdf	Broad formulation it extends the scope of labour law, rather than the scope of the worker concept (although 'anyone providing their labour' is de facto a worker definition) Introduces a necessity test ('only possible…') for rebutting the presumption (arguably the most difficult to discharge)	The principle of procedural autonomy in EU law will make it harder for a Directive to be too prescriptive on matters of evidence

"it may be useful to introduce a legal presumption of employer status upon the entity, or entities 'substantially determining' the terms of engagement and employment of the worker. It is clear to us that where more than one party is so responsible (and regardless of whether one party is more responsible than the other, as long as both are 'substantially' responsible), the worker may address a claim against either or both putative employers"	IER/Countouris/De Stefano	Technically a presumption of 'employer' rather than a presumption of employment Introduces the possibility of joint liability if the employer function is split between different entities (both substantially…) Very broad (terms of engagement and employment)	

Reversing the Burden of Proof – key points

- At a basic level the reversal of the burden of proof operates by allowing a claimant to make a *basic inference* (i.e. provide basic facts that *may* suggest something, without necessarily proving it as such) so that the defendant *must* then prove (discharging a more substantial burden of proof) that the claim advanced by the claimant is incorrect. A typical example is the reversal of the burden of proof in discrimination cases (e.g. under Article 19 of Directive 2006/54, the 'Recast' Equality Dir. 'when persons who consider themselves wronged because the principle of equal treatment has not been applied to them *establish, before a court or other competent authority, facts from which it may be presumed* that there has been direct or indirect discrimination, it *shall* be for the respondent to prove that there has been no breach of the principle of equal treatment.)
- In this situation (unlike with a typical legal presumption) there is no ex ante presumption that, say, the employer has unlawfully discriminated somebody (or unlawfully misclassified their employment status). But if a prima facie case can be made by the claimant, then the burden to actually prove that this was not the case shifts to the employer and it is usually expected that he must prove conclusively the opposite.

- Again, note that the Belgian 'presumptions' referred above operate, de facto, as a mechanism for the reversal of the burden of proof as they do expect the claimant to establish some basic facts and the judge to make sure that those facts fit certain legal categories. In fact it could be claimed that it places a greater burden on workers than A. 19 of the Recast Directive actually does.

BoP reversal definition	Source	Pros	Cons
'(ii) a reversal or reduction in the distribution of the burden of proof for workers based on one or several factual indicators in a specific case, in line with ILO R198 according to which 'Members should […] consider the possibility of […] (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present'/'(ii) easing the burden of proof by selecting one or several criteria that prove the existence of an employment relationship in a case before tribunals, labour inspection authorities or tax collecting offices – the moderate option.'	Aloisi paper (similar to the Belgian law above)	Reverses BoP	It requires a party to make a claim either before an administrative or judicial body. It requires the party to establish some facts. The 'indicators' can provide opportunities for employers to escape their responsibilities. 'Easing' and 'reversing' are two different concepts in practice
(44) The burden of proof with regard to establishing that there has been no dismissal or equivalent detriment on the grounds that workers have exercised their rights provided for in this Directive, should fall on employers when workers establish, before a court or other competent authority or body, facts from which it may be presumed that they have been dismissed, or have	Preamble and A 18 of TPWC Directive	A useful tool if adapted to platform employers whose algorithms exclude workers with low ratings, refusing calls, etc… Allows MS to introduce rules of evidence that are even more stringent (clever way to deal with the principle of	Personal scope of Application of TPWCD is limited

been subject to measures with equivalent effect, on such grounds. Article 18 Protection from dismissal and burden of proof 1. Member States shall take the necessary measures to prohibit the dismissal or its equivalent and all preparations for dismissal of workers, on the grounds that they have exercised the rights provided for in this Directive. 2. Workers who consider that they have been dismissed, or have been subject to measures with equivalent effect, on the grounds that they have exercised the rights provided for in this Directive, may request the employer to provide duly substantiated grounds for the dismissal or the equivalent measures. The employer shall provide those grounds in writing. 3. Member States shall take the necessary measures to ensure that, when workers referred to in paragraph 2 establish, before a court or other competent authority or body, facts from which it may be presumed that there has been such a dismissal or equivalent measures, it shall be for the employer to prove that the dismissal was based on grounds other than those referred to in paragraph 1.		'procedural autonomy' in EU law)	

4. Paragraph 3 shall not prevent Member States from introducing rules of evidence which are more favourable to workers.			
"Based on this assumption a reversal of burden of proof is needed. Criteria should be based on ECJ decisions, or the California test or ILO conventions" "To combat bogus self-employment, the assumption that a platform worker is a worker should be the starting point and a reversal of the burden of proof should make it more difficult for platform companies to have workers been classified as self-employed."	ETUC Nov 2020 Resolution	BoP appears to be used to tighten the rule of evidence	Not clear how much tighter the rule of evidence should be. Not specific enough. May duplicate the reversal that already happens as a consequence of the presumption. May require workers to provide prima facie evidence which could be difficult for certain workers (esp. if expected to do so before a court of law)