



HOTREC views for a compromise

Proposal for a Directive on Platform Work

HOTREC, the European Association of Hotels, Restaurants and Cafés¹, takes note of both the European Parliament report on a proposal for a Directive on “*Improving Working Conditions in Platform Work*” (COD) approved in the February 2023 plenary session, as well as the Council General Approach (10 107/23) on the same topic, formally approved by the Employment and Social Affairs Council on 12 June 2023.

We take note of the European Commission’s objectives of improving working conditions in platform work and support the sustainable growth of digital labour platforms in the EU. We also understand that certain situations at national level need to be quickly addressed (e.g., **bogus self-employed should be treated as employees**).

After COVID, the hospitality sector faced a decrease in its labour force of between 10%-20%. The sector also faces a lack of skills for many years (digital, green, personal). The hospitality sector traditionally uses some of the services provided by platforms to perform a service to the client. HOTREC has concerns that in case the status of self-employed will change into employee status almost automatically, that there might be less people willing to provide platform services, **due to the decrease in the flexibility of work** (e.g., capacity to choose assignments or schedules). If this situation materialises, the hospitality sector might face an even more difficult position in terms of **staff shortage and skills**, in case there will not be enough platform workers to provide the needed services to the sector.

Therefore, we would like to stress some of our priorities:

- **Scope:** The directive should create obligations for digital labour platforms only. It should clearly leave other businesses out of the scope
- **Legal presumption:** Establish a robust EU criteria to trigger the legal presumption, that is easily applicable by the companies at national level. Avoid automatic reclassification and preserve the willingness of the truly self-employed to keep their status.
- **Suspensive effect:** Where a digital platform challenges an administrative and judicial decision determining the employment status of a person performing platform work, Member States may provide that such a proceeding shall not have a suspensive effect on that decision.

Scope and definitions – Article 1 and 2

¹ **HOTREC** is the umbrella association of Hotels, Restaurants, Bars and Cafés and similar establishments in Europe. It brings together 47 national associations in 36 European countries and serves as the voice of the European hospitality industry. HOTREC’s mission is to represent and champion the industry’s interests towards the EU and international institutions, foster knowledge sharing and best practices among its members to promote innovation and serve as an expert platform for the hospitality sector.

The **European hospitality industry** is a vital economic contributor, comprising over 1.8 million businesses and employing more than 9 million people. It plays a vital role in driving economic growth and job creation, contributing approximately 2-3% to the total EU GDP. The industry is characterized by a high level of entrepreneurship, with 99% of businesses classified as small and medium-sized enterprises (SMEs). These companies bring innovation, creativity, and a personal touch to the industry.

With regard to scope and definitions, we support the Council approach, as the proposal for a Directive creates **obligations for digital labour platforms** which provide their services through the use of automated monitoring or decision-making systems.

We consider that the definitions of platforms provided by the European Parliament, is broader (when compared to the Council) and that it includes many companies (e.g., micro-work-platforms or crowd-work). But it is positive that also the Parliament reiterates that the rules should apply to all digital labour platform, irrespective of their place of establishment and provided that the work is performed in the EU.

Justification

- The scope should cover those digital labour platforms that provide a commercial service as a digital intermediary between supply and demand.
- It is positive if the scope excludes enterprises, mostly SMEs, which use only very basic electronic means, such as a website, to conduct their business.

Legal presumption (Art 4)

HOTREC supports the Council's approach with regard to the legal presumption. The latter applies if **at least three out of the seven criteria** laid down in Art. 4/1 are fulfilled by virtue of the digital labour platform's unilaterally determined terms and conditions or its acting practice, thus indicating that the **digital labour platform exerts control or direction over the person performing platform work**. The person performing platform work is, therefore, **presumed to be in an employment relationship**. Criteria can include rules governing appearance or conduct; restriction of ability to turn down work; upper limits of the amount of money workers can receive.

We also agree with the Council, when it reiterates that the legal presumption shall apply in all relevant administrative and judicial proceedings, where the correct determination of the employment status is at stake. We welcome that there is no **obligation to apply the presumption in tax, criminal and social security proceedings** and that **Member States are free to decide to apply the legal presumption** in these proceedings as a matter **of national law (Art. 4a/1)**. We also agree that Member States have the possibility of not applying the presumption, if these authorities act on their own initiative and if it is **manifest that the concerned person is not a platform worker** (Art.4a/2).

We also agree with Art. 4a on the application of the legal presumption and rebuttal of the Council's approach as it defends that the legal presumption can be rebutted by **any of the parties**. In case the platform rebuts, it needs to **prove that an employment relationship does not exist** according to national law and practice with consideration of the case law of the European Court of Justice. If it is the person performing the platform work who rebuts, the digital labour platform will be required to assist the proper resolution of the proceedings.

We agree with recital 24a of the Council approach as it states that when the digital labour platform complies with measures or rules **which are required by law or collective agreements, applicable to genuine solo self-employed**, this is not as such to be understood as fulfilling one or more criteria for triggering the legal presumption under this Directive.

HOTREC does not agree with the position of the European Parliament on the legal presumption. According to the latter the legal presumption of Art. 4 **does not include EU criteria to trigger the presumption**. And Amendment 84 mentions that "(...) *The contractual relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship and therefore **digital labour platforms shall be presumed to be employers***". On top, MEPs agreed that the employment status defined by the platform can be challenged by **the worker, a trade union or a national authority**.

Justification

- We take note of the EU's intention to combat false self-employment as it might lead to precarious conditions, lack of social protection and unfair competition.
- But in our view, the European Parliament's position as described above will lead to a situation where **every person working for a Digital Labour Platform** – including the genuinely self-employed, **is at risk of being presumed to be an employee** (despite the fact that the text specifies that there is no automatic presumption -

Amendment 86). We consider the current wording brings legal uncertainty and might lead to the **automatic legal presumption** of the employment status.

- An **assessment of the facts** should take place (e.g., how the individual works), before a presumption of employment is triggered.
- **Bogus self-employed should be considered employees. But the true self-employed should be able to keep their status if willing to.**
- Self-employment is a strong driver of economic development, innovation and prosperity.
- If self-employed working with the hospitality sector will decrease (e.g., food delivery services, cleaning services), the **hospitality sector might not be able to deliver as many services as desired by consumers**, due to the increases of labour and skills shortages.
- This would affect consumers and all sectors of the economy.
- It is to note that the European Commission recognised that out of the 28 million people working in platforms, **only 5.5 million** of them are likely to be at risk of misclassification.
- Tax, criminal and social law do not involve a mandatory activation of the legal presumption – the decision should be left to Member States to determine – **subsidiarity prevails**.
- If it is manifest that a person is not a platform worker, then it is logical that the legal presumption does not apply.
- The rebuttal, according with the Council’s approach, is balanced and proportionate.

Rebuttal (Art 5)

We agree with the Council’s approach, which has added Art. 4a on **the application of the legal presumption and rebuttal**. We fully support recital 38 of the Council’s approach: where a digital platform challenges an administrative and judicial decision determining the employment status of a person performing platform work, **Member States may provide that such a proceeding shall not have a suspensive effect on that decision**.

HOTREC does not agree with the European Parliament’s approach on Art. 5. In a nutshell, the Parliament has introduced a list of **non-mandatory criteria** to determine the **worker’s employment status**, such as a set salary, defined time schedule and working time, rating systems, tracking or supervision of a worker, rules regarding appearance or conduct, restricted options to work for any third-party restricted freedom to choose accident insurance or a pension scheme. Member States shall regularly review, access and complement EU and national criteria.

On the other hand, the European Parliament does not consider the **possibility of suspension of the effect of the legal presumption, if the determination of the employment status has been done and the platform appeals the decision**.

Justification

- The Parliament’s approach to determine the employment status does not bring legal certainty.
- We consider that this would interfere in the **national definitions of self-employed or employee** – which goes against the spirit of the legislator.
- Member States or judicial authorities shall have the possibility to decide on the **suspensive effect of a decision determining the legal presumption, in case the platform appeals**– subsidiarity shall prevail.

Nota bene:

With the aim of summarising as much as possible, HOTREC expressed only its main concerns. In case of any doubt please contact Marta Machado (marta.machado@hotrec.eu), HOTREC’s Deputy Director General.

HOTREC is willing to continue discussions with both co-legislators, in order to find a compromise that makes it feasible for companies, especially SME’s and microenterprises to comply with the upcoming Directive.
