



HOTREC position on a proposal for a Directive on “Improving working conditions in platform work”

Executive summary

- HOTREC calls for a level playing field and fair competition in hospitality and tourism. Companies that do not comply with legislation are not legal.
- The hospitality sector works closely with different online platform (e.g. cleaning; food delivery services). During the COVID-19 crisis, food delivery services helped companies to remain open.
- The new employment model proposed will result in less services for customers and lower orders for restaurants.
- HOTREC would have preferred a Recommendation instead of a proposal of Directive on “Improving working conditions on platform work” – **(COM(2021) 762 final)**.
- The legal presumption of employee status will pre-empt flexibility for those who prefer to be treated as self-employed and therefore undermines truly self-employed status.
- The application of the uniform criteria might bring uncertainty when compared to the criteria established at national level with regard to the self-employed status.
- The rebuttable presumption goes against the individual’s choice of being self-employed.

HOTREC proposals of compromise

HOTREC option 1

In order to reach a compromise, and taking into account the impact that the proposal of Directive will have on the hospitality sector, HOTREC proposes to:

- **Broaden the legal basis of the Directive to appropriate single market articles. The advantages would be the following:**
 - ◇ Possibility for platform workers to be considered either employees or self-employed;
 - ◇ Respect for Member States’ national legislation;

- ◇ Respect for European Court of Justice rulings;
- ◇ Respect of national competences on the definition of employers and workers;
- ◇ EU criteria would serve as a **guidance** to Member States to set their national criteria, which would be based on the actual performance of work (it would not be made compulsory).
- **We would, therefore, ask that the Council legal services provides an opinion on the legal basis of the proposed Directive.**

This solution could reduce the risk of decreasing job opportunities for the truly self-employed, with the consequent decrease of business opportunities for companies.

HOTREC option 2

In case our preferred scenario does not apply, we propose the following:

- **Require a majority of criteria rather than two criteria for the legal presumption to have effect:** the presumption would be built on more solid grounds to establish a possible employment relationship and reduce the likelihood of very divergent outcomes on the basis of different interpretations of the text by Member States. At the same time, it would avoid lengthy procedures, especially when the status has already been tested at court at national level.
- **The legal presumption should have a suspensive effect while being rebutted.**

General remarks

HOTREC takes note of the European Commission proposal for a Directive on “Improving working conditions on platform work” – **(COM(2021) 762 final)**.

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 self-employed**).

HOTREC is the European Association of hotels, restaurants and cafés in Europe. We represent 2 million companies and, at least before the Covid-19 crisis, provided 12 million jobs. Overall, the hospitality sector has a close relation with platform work (e.g. food delivery services; cleaning). Especially during the COVID-19 crisis, restaurants in the hospitality sector were quite dependant from food delivery platforms, as a way to keep their businesses open (due to the different restrictions at national level, including general lockdowns). At the same time, some accommodation establishments use the services provided by platforms to provide the client a better service (e.g. cleaning platforms).

In 2019, HOTREC has developed with its trade union counterpart EFFAT, a **joint position paper**, asking for a level playing field and fair competition in hospitality and tourism. All hospitality businesses need to comply with legislation namely related with: food hygiene rules; licensing for serving alcohol; registration and permits for operation, safety and security, employees rights and protection, consumer rights, amongst others. Only in this way, **customers are protected; employees are treated fairly and entitled to their rights and responsible businesses enjoy a fair competitive environment/level playing field**. If companies do not comply with these rules, **they should not be considered legal**.

Nevertheless, if organised in a legal manner and in the respect of the EU, national and social partner competences, HOTREC supports platform work, as a way to create business opportunities, jobs, meet client’s expectations and accelerate the digital transformation.

In fact, legal platform work can be an efficient way to fight undeclared work, ensure that the state receives

its tax and social contributions and contribute to a level playing field in the hospitality sector.

HOTREC regrets the fact that the European Commission issued a proposal for a Directive, instead of a recommendation/guidelines or code of conduct. By and large, we disagree with a reputable presumption of employment – as several platform workers would prefer to be considered self-employed. The presumption can also hinder the development of a true self-employment status.

Above all, we consider that the Directive should respect the different national legislations in place, which also means that Member States should respect their own definitions of employment and self-employment.

In view of a possible compromise, we would envisage to broaden the scope of the proposed Directive to single market articles or to apply a majority of the criteria (three out of five elements), instead of two to activate the legal presumption of employment. In this case, we would also recommend that the rebuttable presumption has a suspensive effect.

Impact assessment

HOTREC takes note of the European Commission impact assessment¹. According to the latter, action to address the risk of misclassification could result in increased costs per year for platforms between EUR 1.9 billion and EUR 4.5 billion. Businesses relying on platforms (namely the hospitality sector) and consumers may be faced with part of these costs, depending on if and how platforms decide to pass them onto third parties. As a matter of fact, the Commission recognises that the Directive could lead to up to 40% of price increase for consumer related to employment costs alone. However, there is no assessment on the drastic impact a change like this would have to consumer demand and to restaurants growth – only the example of Spain is provided².

Overall, action to address the risk of misclassification will result in up to EUR 4 billion increased revenues per year for Member States (in the form of social protection and tax contributions)³.

But, the Commission impact assessment **recognises that it has been unable to assess the loss of revenue that the proposal will have on the hospitality sector** (a sector that contributes with 5% of GDP to the EU economy and represents 2 million companies (99% of which are SMEs, and 91% micro-entreprises)⁴.

The sector is vital to the economies of every single EU Member State, and is only now beginning to recover from the last two crippling years of COVID-19.

As we have highlighted in our replies to the European Commission consultation, the proposal should balance the **benefit of all sectors and acknowledge that rising costs will impact consumption and growth at a critical period, especially for restaurants.**

A recent study by Capital Economics shows that delivery services saved 100,000 restaurant jobs and that **32% of employees in Deliveroo's partner restaurants said they 'continued to work' because of delivery services**⁵.

The advantages included:

- Opportunity for people to work according to their needs, especially as layoffs might affect their primary earning opportunities;
- Opportunities to companies in the hospitality sector: which are able to provide a good service to the client (and during the pandemic was able to continue operating);
- Opportunities for consumers: more options of services, especially during the lockdowns.

¹ European Commission impact assessment – [Link](#).

² European Commission impact assessment page 79 – [Link](#).

³ European Commission impact assessment page 38 – [Link](#).

⁴ European Commission impact assessment page 79 – [Link](#).

⁵ Link to summary of Capital Economics study – [Link](#).

Overall, we fear that the proposed **employment model** will result in **less services for customers and lower orders for restaurants. In fact, increased costs to platforms** for employment risk resulting in **higher commission charges for restaurants or higher order costs for customers** resulting in **fewer orders for restaurants and eventually less earning opportunities for platform workers.**

At the same time, we consider that these increased commission costs will negatively impact the **small family-owned restaurants**, who will not be in the condition of setting up proprietary delivery services to ensure that they can still deliver to customers without facing higher delivery costs from delivery platforms.

Legal basis

The proposed Directive is based on Article 153/1/b of the Treaty on the Functioning of the European Union (TFEU) which allows the Union to support and complement activities of the Member States with the objective to improve working conditions.

In this sense, we ask that the legal basis is broadened to the appropriate **single market articles**. In this way, platform workers would be given the possibility of being considered either employees or self-employed. At the same time, national legislation, collective agreements, definitions of employer, worker, self-employed, as well as EU Court of Justice rulings would be respected. This would avoid the misclassifications. Overall, the EU criteria would serve as a guidance to Member States to set their national criteria based on the actual performance of work. **HOTREC asks that the Council legal services issues a legal opinion on the choice of the legal basis.**

Articles 3 & 4 – Correct the determination of the employment status & legal presumption

Article 4 provides a list of criteria to determine whether a digital labour platform exercises control over a person, and therefore whether the person should be presumed to be a worker. If at least two of the criteria are met, the presumption will apply.

HOTREC welcomes the fact that the proposal refers, in article 3, to employment relationships as defined by Law, collective agreements or practice in force in the Member States with consideration to the case-law of the Court of Justice. We also agree that art 3.2 mentions that an employment relationship is determined by the actual performance of the work.

Nevertheless, in our view, there might be **discrepancies in the application** of article 4 (**EU unilateral set of criteria**), **and the criteria used at national level by the different Member States** to determine the status of self-employed (e.g. Member States who have created a special regime for the self-employed, like France, or Greece)⁶. This would bring legal uncertainty to the application of EU and national legislation.

In any case, we consider that the national criteria should take precedence: the subsidiarity principle prevails. But the article needs to be amended accordingly.

We also consider that the **list of criteria is open to interpretation** and therefore does not bring the legal certainty that is needed.

Concretely, we consider that **art. 4.2, alíneas b and c** are quite subjective. Platforms should not interfere on the work developed by the self-employed. But a meal needs to be delivered to the customer; health and safety legislation needs to be complied with; customers receive a polite service. So one questions what is the margin and what are the limits for someone to be considered self-employed or not. In a nutshell the criteria should allow for a level of guidance by the platforms not only with regards to compliance with safety, anti-fraud rules and local legislation but also with regards to ensuring the provision of a reasonable consumer service.

Above all, the legal presumption **does not provide any flexibility to those who prefer to be treated as self-employed, and therefore undermines truly self-employment status. As a consequence, massive reclassification of work will take place, and most self-employed will be classified**

as employees⁷.

Concretely for the hospitality sector, we anticipate the following consequences for food delivery services:

- Higher costs of delivery due to increased inefficiencies of the new model (e.g. need to set minimum number of hours for an employee versus the greater flexibility of schedules allowed by the self-employment status);
- Possible fewer couriers available, as for many, this is a complementary activity and might be unable to engage in a working schedule that is set by an employer;
- This could lead to situations where during peak times there will not be enough couriers to attend the customer's requests;
- This might lead to restaurants reaching out to fewer new customers.

In consequence, restaurants will need to adapt to one of the two following options:

- Either continue the use of less efficient and less beneficial service with potential increased commission fees to cover the costs or;
- Creating their own delivery service and customer service team, which will increase immensely the costs for the companies.

Either of the above scenarios would be a true challenge for SME's. In Geneva, reclassification led to an estimated 42% reduction in demand for deliveries from local restaurants due to higher delivery fees and longer waiting times. This meant approximately a loss of €16 million in lost revenue.

Article 5 – Possibility to rebut the legal presumption

According to the proposal, platforms would have to propose in a legal procedure before the court that the person is self-employed. But, it is recognised by the European Commission that from the 28 million people working in platforms, only 5.5 million of them are probably at risk of misclassification⁸. Therefore, we consider that the rebuttable presumption is disproportionate, taking into account the reduced number of platform workers it would apply to, as well as the additional costs it will have on the hospitality sector.

Such a presumption **goes against the individual's choice of being a self-employed**, which jeopardizes the individual's flexibility of the self-employed.

In addition, the rebuttable presumption is not a mandatory action to be taken by Member States in the Transparent and Predictable Working Conditions Directive. Before making it a rule, it is better to take into account the results of the implementation of the Transparent and Predictable Working Conditions Directive.

It can also contradict the EU Fundamental Rights Charter (e.g. right to choose an occupation; freedom to conduct a business; right to engage in work).

The presumption will not be suspended while it is being rebutted. As the rebuttal will be judged with a different criteria (it will be rebutted against national criteria and not the EU uniform criteria), it is fairly possible that the presumption can be applied on a first moment, and subsequently rebutted successfully.

This would mean significant administrative and financial costs and disruptions for the hospitality sector (to those who have their own self-employed delivery services, as well as delivery platforms from which restaurants currently benefit). In fact, higher commission fees would be applied.

⁶ Greece followed the criteria to define self-employed status in accordance with the court ruling case C-692/19 – Yodel Delivery Network (e.g. possibility to accept/reject tasks; the ability to set working hours; possibility to work for different platforms). France has confirmed self-employed status of platform workers, if they follow certain conditions.

⁷ A [recent study by Copenhagen Economics](#) shows that flexibility is the main reason for working as a courier for 67% of respondents. recent study by Copenhagen Economics shows that flexibility is the main reason for working as a courier for 67% of respondents.

⁸ [Article](#) by Harry Elworthy, Economist and Alison Stein, Senior Economist.

⁹ European Commission impact assessment – page 1.

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- In case the legal basis is broadened, we would agree that the rebuttable presumption is kept
- Otherwise, we propose that the presumption of employment status is suspended will being rebutted.

Closing remarks

Overall, we welcome improvements in working conditions for platform work and increased certainty on the application of the legislation on the topic.

Nevertheless, we consider that the uniform criteria and rebuttable presumption of employment undermine the choice of the individuals to be self-employed and it leads to legal uncertainty.

The administrative and financial costs that the proposal will bring to the hospitality sector are very heavy. This at a time when the sector is starting to recover from the effects of the COVID-19 crisis.

In view of trying to reach a compromise, please see the section “**HOTREC’s proposal of compromise**”.

We remain open to improve the text in the course of the negotiations with the co-legislators (European Parliament and Council).

