

HOTREC reply European Commission Second Stage Consultation under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work

September 2021

HOTREC in a nutshell

HOTREC is the umbrella Association of hotels, restaurants, bars and cafés in Europe, which brings together 45 national associations in 34 European countries and is the voice of the hospitality industry in Europe. Under usual circumstances, the industry contributes with 5% of the EU GDP to the EU economy and is composed of 2 million enterprises, 90% of which are micro-sized (i.e. employing less than 10 people).

The European hospitality sector counts with 12,5 million employees. It is to note that 30,2% of the workers in the sector are relatively unskilled, compared to 17,7% in the overall economy, meaning that the sector provides jobs to a broad range of profiles. In addition, 20,2% of the employees are aged under 25 years compared to 8,2% in the overall economy, therefore, fighting youth unemployment.

The sector also promotes gender balance: while in the overall economy 46% of people employed are women, in the sector the figure rises to 54,1%. The hospitality sector is, consequently, an entry door to the labour market and a facilitator in terms of social inclusion.

It is to take into account that the aforementioned statistics are pre-pandemic. The European Commission estimated during 2020 a possible loss of 6 million employees for the tourism sector¹.

It is also to take into account that some of HOTREC members **represent the self-employed**.

The hospitality sector and platform work

The hospitality sector has a close relation with platform work. 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).

It is to note that 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 costs and administrative obligations, namely: legislation; 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 and serious 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.

¹ COM Communication: [link](#) (page 10)

Finally, HOTREC also supports diverse and adaptable forms of work as a solution to those who prefer to have either part-time; fixed-term work and temporary agency work. The diversity of work arrangements in our sector allows companies to offer benefits to societies and employees that traditional full-time jobs cannot, namely:

- Strengthening social cohesion through better work-life balance
- Supporting career choices
- Fostering social inclusion
- Enabling personal choices

Link to [joint position paper](#) with other partners

HOTREC General remarks

- We welcome the Commission's initiative to ameliorate the working conditions of all types of work including self-employed that offer their services on platforms.
- 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;
- Legal platform work brings benefits to both the industry users, working individuals and consumers. Any EU solution 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 shows that delivery services saved 100,000 restaurant jobs. A report issued by Capital Economics showed 32% of employees in Deliveroo's partner restaurants said they 'continued to work' because of delivery services.
 - Advantages include:
 - Opportunities for consumers: more options of services, especially during the lockdowns
 - 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)
- A specific **employment model** would result in a **less service for customers** and **lower orders for restaurants**
- **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**
- Increased commission costs for restaurants would be more impactful for small family-owned restaurants than major international chains who, due to higher negotiating powers, may be able to see these reduced
- Larger international chains also have the possibility of setting up proprietary delivery services to ensure that they can still deliver to customers without facing higher delivery costs from delivery platforms but this option would be much more challenging for smaller, family-owned restaurants
- EU proposals should focus on ensuring that platform workers can be **provided with additional protections and benefits in a way that does not risk their reclassification** as employees in order to ensure that the hospitality sector - which continues to experience a period of difficulty which is unprecedented - does not face further challenges.

- Platform business models are evolving around the threat of reclassification. Any approach that pushes for an assumption of **an employment relationship**, or **reclassifies platform workers will be counter intuitive as platforms will likely do less to avoid being caught in the scope**
- Measures that would **reclassify platform** delivery workers as employees could result in a significant **economic cost to the hospitality industry** at a time when the industry is struggling
- A **rebuttable presumption of employment or a reversal of the burden of proof**, in particular, present higher risks of reclassification of platform workers as employees and should therefore be avoided. They would equally offer no improvement in the working conditions of platform workers that wish to remain self-employed
- For all these reasons, a **Directive would not be the right solution.**
- Alternatively, the Commission can **incentivise more measures for social protection, transparency, education, by removing the reclassification risk and by issuing recommendations; guidelines; codes of conduct.** This could be done via **dialogue/forum/self-regulatory approach** with social partners, Member States, platform representatives.

HOTREC replies to the European Commission

Question 1 – What are your views on the specific objectives of possible EU action set out in Section 5.1?

We agree with the objectives put forward by the European Commission: people working in platforms should have access to decent working conditions and digital labour markets play a key role in the digital transition of the European economy.

Nevertheless, we have doubts on the proposals put forward by the European Commission:

- **Ensuring that people working through platforms have, or can obtain, the correct legal employment status in light of their relationship with the platform and gain access to associated labour and social protection rights**

This objective would lead to **re-classification of platform workers as employees**. This would not take into account that many self-employed would like to keep their flexibility. Riders should be allowed to choose when to work, how long to work for, which orders to accept and reject and to work for several platforms at the same time.

What is relevant is that those who provide platform work are correctly classified. But in this case subsidiarity prevails – classification needs to be done at national level, in respect of their criteria (Art. 1.2 Directive Transparent and Predictable Working conditions)

- **Ensure fairness, transparency and accountability in algorithmic management**

We agree with the objective. But robust framework around the use of algorithms is already in place via the GDPR and Platform to Business Regulation (2019/1150). The referred legislation protects individuals and undertakings.

HOTREC considers that the upcoming Regulation on Artificial Intelligence is the correct place to further legislate on the topic.

- **Enhance knowledge of developments in platform work and provide clarity on applicable rules for all people working through platforms operating across borders**

We agree on the willingness of bringing clarity to existing legislation – this would mean better enforcement of existing legislation. **Code of conduct / guidelines** on the topic put forward by platforms, in dialogue with Member States, platform workers, social partners and companies would be the best solution.

Question 2 – What are your views on the possible avenues for EU action set out in Section 5.2?

We agree with the Commission aim in designing an EU initiative that would fully respect national competences, the diversity of labour market traditions in Member States, and the autonomy of social partners.

Nevertheless, HOTREC has several strong concerns on the options put forward by the European Commission.

2.1 - Employment status

In our view, the concept of “platform worker” has no legal basis. Platform work can either integrate an employment relationship or a self-employed activity.

In case the self-employed have the characteristics of an employee, according with national legislation, then they are **bogus self-employed** and should be treated as **employees**.

There are several regional, national and EU court rulings that reached **different verdicts with regard to the classification of platform workers²**. This means that the **status of every platform worker cannot be solved by legislation (e.g. Directive) at EU level**. This can only be dealt with at **national level**, as **definitions of employee, self-employed; undertaking are very diverse at national level and continue evolving quickly**.

The **Geneva example** is the proof of a negative outcome of a switch in the employment model:

- A series of courriers in Geneva were prohibited from accessing the app as independent contractors due to court rulings. This transition had an immediate impact on the size of the market. 77% of courriers - 1,000 individuals - were put out of work;
- The combined effect of a lack of available courriers, increased delivery prices and degradation of the delivery experience led to a 30% reduction in orders in just three weeks, heavily impacting restaurants. According to Uber's White Paper: the severity of this impact is confirmed by the fall in the growth rate of the Uber Eats market in Geneva when compared to similar Swiss cities. While Geneva saw trip growth of just 8.5% between August 2020 and January 2021, Uber Eats trips in Lausanne - where courriers continue to operate as independent contractors - grew by 68.5%.

In fact, measures that would **reclassify platform delivery workers as employees** could results in a **significant economic cost to the hospitality industry** at a time when the industry is struggling.

a) Rebuttable presumption of employment

HOTREC strongly opposes the rebuttable presumption of employment (where platforms would have to prove in a legal procedure before court that the person is in fact self-employed) for the following reasons:

- It would not take into account the diversity of the situations at national level – there is diversity in in the criteria for classifying employment status, based on national systems and practices

² The 1st consultation document issued by the European Commission does not address the Yodel case, the only ECJ case on the matter so far where it was confirmed that a courier was correctly classified as self-employed.

- This is an option part of the of the Transparent and Predictable Working Conditions Directive to be taken by Member States (not an obligation)
- 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
- Such a presumption would contradict the EU Fundamental Rights Charter (e.g. right to choose an occupation; freedom to conduct a business; right to engage in work)
- It would go against the individual's choice of being a self-employed - this would jeopardize the individual's flexibility and would go against the Commission acknowledgement at the consultation that

b) Shift in the burden of proof

HOTREC also opposes a shift in the burden of proof, where the platform operator would need to prove that an individual providing services through platform is self-employed.

We understand that it might be useful to assess the criteria required for people working in platform work to determine their employment status in legal proceedings.

Nevertheless, art 18 of the Directive on Transparent and Predictable Working Conditions already foresees that workers have a right of redress (also applying to employees working in platforms). Therefore, we don't see the need of extra legislation.

HOTREC proposal on employment status

HOTREC would propose a **dialogue between the European Commission; Member States; social partners; platforms; companies; in order to develop guidance** on topics such as qualifications of status of workers and self-employed at national level; criteria used to qualify employment status across Member States; ECJ rulings on classification of employment status and application at national level; the proof required to show employment status in court cases; lessons learned from national administrative procedures.

Ahead of this dialogue, it would be positive if the Commission could map the different rules applicable at national level, as well as the different court rulings

2.2 – Algorithmic management

Please see our reply in question 1

2.3 – Tackling cross-border challenges

Cross-border work or service provision represent significant economic opportunities for citizens and the European economy.

Both Regulations (Brussels I and Rome I) and [Regulation 883/2004](#) on social security systems determine the choice of jurisdiction for the collection of taxes and payment of social security contributions.

HOTREC is of the opinion that no further legislation is needed. Guidance and recommendations on the implementation of the legislation are always welcome.

2.4 – Strengthening enforcement, collective representation and social dialogue

It is up to Member States to decide on how to cover representation of workers in different forms of work.

It is also up to social partners to decide to represent workers.

The situation is very **different from country to country**: there are systems where the self-employed cannot be represented by trade unions; other countries in which self-employed joined trade unions; situations where independent unions of platform workers gathered; situations where associations of self-employed were created; exemptions at national level to competition rules prohibiting cartels; co-operatives; platforms developing their own solutions.

For this reason, HOTREC believes that there is no need to change EU competition rules on the matter.

Collective agreements establish a type of price cartel for employees, by setting wages.

The self-employed are undertakings, and therefore are subject to the **rule of prohibition of price cartel**.

Any change in EU competition rules can lead to **changes in definitions at national level**. This is something that needs to be avoided, as every country has their own legislative specificities and traditions. Subsidiarity prevails.

Competition policy should not limit the freedom to form an association and to discuss trainings or working conditions. But prices, fees, wages should not be discussed by self-employed, otherwise the cartel rule would be broken.

Bogus self-employed should be treated as an employee.

Question 3 – What are your views on the possible legal instruments presented in Section 5.3?

HOTREC would welcome a Council Recommendation, which would provide policy guidance and a common policy framework, while not setting specific mandatory requirements.

We would strongly oppose a Directive for the reasons stated in the previous questions.

Question 4 - Are the European Social partners willing to enter into negotiations with a view to concluding an agreement under Article 155 TFEU with regard to any of the elements set out in Section 5.1?

HOTREC does not have the negotiation power to start negotiations with its trade union counterpart.

But we hope that negotiations will be put in place between the Commission, social partners, representatives of the self-employed, platform representatives and platform worker representatives. Only in this way a good solution can be found. More EU binding legislation would not sort out the problem.

Conclusion

EU legislation that changes the status of platform workers, including the self-employed, is not the solution. But a concerted dialogue to open access to benefits to all types of work would be positive.

We, therefore, propose discussions between platform representatives, platform worker representatives, social partners, representatives of the self-employed, Member States and the European Commission. This could provide support to platforms and platform workers to better understand rights and obligations in terms of access to social protection, labour law coverage or collective representation.
