

**Aljoša POLAJŽAR**

*Analysis of the criteria for establishing the existence of an employment relationship of platform workers under the Platform Work Directive – high expectations and limited outcome?*

## Secção

# Investigação Científica / Scientific Research\*

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## Analysis of the criteria for establishing the existence of an employment relationship of platform workers under the Platform Work Directive – high expectations and limited outcome?

## Análise dos critérios para estabelecer a existência de uma relação de trabalho dos trabalhadores das plataformas ao abrigo da Diretiva relativa ao trabalho em plataforma – grandes expectativas e resultados limitados?

Aljoša POLAJŽAR<sup>1</sup>

**ABSTRACT:** In this paper, the author critically analyses and evaluates the content of the adopted Platform Work Directive from the perspective of the content of the criteria for the establishment of a presumption of an employment relationship. In doing so, the author also compares the content of the finally adopted Directive with the initial proposal of the Platform Work Directive in 2021. The author concludes that the criteria set out in the 2021 proposal represented a significant advance in the quantitative and qualitative evaluation of the criteria for establishing the existence of a presumption of an employment relationship of platform workers. However, due to the impossibility of reaching a political compromise, the criteria in question were dropped from the adopted version of the Directive in 2024, leaving only a more abstract and vague formulation for establishing the existence of a presumption of an employment relationship. It is thus left to the Member States to formulate more concretely the substantive criteria for the existence of a presumption of an employment relationship. Finally, the author elaborates on some of the advantages and disadvantages of the adopted content of the Platform Work Directive.

**KEYWORDS:** Platform Work; Employment Status; Platform Work Directive; Platform Workers; Presumption of an Employment Relationship; EU Labour Law.

**RESUMO:** Neste artigo, o autor analisa e avalia criticamente o conteúdo da diretiva relativa ao trabalho em plataforma adoptada, do ponto de vista do conteúdo dos critérios para o estabelecimento de uma presunção de relação de trabalho. Ao fazê-lo, o autor compara também o conteúdo da diretiva finalmente adoptada com a proposta inicial da diretiva relativa às plataformas de trabalho em 2021. O autor conclui que os critérios estabelecidos na proposta de 2021 representaram um avanço significativo na avaliação quantitativa e qualitativa dos critérios para estabelecer a presunção da existência de uma relação de trabalho dos trabalhadores das plataformas. No entanto, devido à impossibilidade de alcançar um compromisso político, os critérios em questão foram retirados da versão adoptada da diretiva em 2024, deixando apenas uma formulação mais abstrata e vaga para estabelecer a existência de uma presunção de uma relação de trabalho. Assim, cabe aos Estados-Membros formular de forma mais concreta os critérios materiais para a existência de uma presunção de relação de trabalho. Por último, o autor analisa algumas das vantagens e desvantagens do conteúdo adotado da diretiva relativa às plataformas de trabalho.

**PALAVRAS-CHAVE:** trabalho em plataformas; estatuto de emprego; diretiva relativa ao trabalho em plataformas; trabalhadores de plataformas; presunção de uma relação de emprego; direito do trabalho da UE.

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<sup>1</sup> Aljoša POLAJŽAR, Ph.D., Assistant Professor, University of Maribor Faculty of Law, Department for Labour Law, Maribor, Slovenia, e-mail: [aljosa.polajzar@um.si](mailto:aljosa.polajzar@um.si)  
ORCID author ID: <https://orcid.org/0000-0002-7778-2819>, Scopus author ID: 59235538600.

## 1. Introduction

The wide-ranging technological developments have brought about new forms of work. Among these, platform work has received particular attention from legal scholarship and regulatory bodies (including at EU level). This is the emergence of so-called digital labour platforms (e.g. the Uber platform for the provision of transport services) through which (on the one hand) individuals and companies can express a demand for a specific job or service and (on the other hand) the individuals performing the job can accept the demand for the job and perform it via an app. In particular, the simplicity and massiveness of linking labour demand and labour supply made possible by smart apps should be highlighted.<sup>2</sup>

However, platform work represents a major scientific and regulatory challenge in the field of labour law. A number of authors have already addressed labour law issues, including, among others, the key question of whether platform workers are in fact quasi-self-employed and should in fact be employees.<sup>3</sup> The problematic nature of this issue has also been highlighted by the European Commission, which states that the courts rule on the issue of employment status differently from country to country, from instance to instance and from platform to platform (case to case). Platform workers are thus categorised as workers, self-employed or as intermediate categories on a case-by-case basis.<sup>4</sup> The European Commission thus explicitly points out that case law is far from consolidated (in many countries there is no case law at all) and that national courts take different approaches, which increases legal confusion for platforms and platform workers.<sup>5</sup>

Among other things, in order to address this issue, in December 2021 the

<sup>2</sup> See Todolí-Signes, 2017, p. 243; Ioannis, Countouris and De Stefano, 2019, p. 311. The latter cite the example of the ride-hailing platform Uber, which uses technology to connect customers (transport clients) with the people who do the work (platform workers). For more on the operation of the Uber platform, see Todolí-Signes, 2017, pp. 253-254. For more on the platform's work organisation see: Aloisi and De Stefano, 2022.

<sup>3</sup> See, inter alia, Todolí-Signes, 2017; De Stefano, 2016; Fusco 2020; Prassl, 2018; Hendrickx, 2018; Ales, 2019; Davidov, 2017; Adams-Prassl, Laulom and Maneiro Vázquez, 2022; Aloisi, 2022. Bjelinski Radić, 2022; Fita Ortega, 2021; Grubar-Risak, 2022; Davidov and Alon-Shenker, 2022; Katsabian and Davidov, 2023; Menegatti, 2022; De Stefano, et al. For a broader discussion of the issue of disguised employment relationships, see, inter alia, Senčur Peček and Franca, 2019. At the same time, a number of other issues remain open, including access to collective rights for platform workers, regardless of their employment status. For more on this, see Doherty and Franca, 2019; and Polajžar, 2024.

<sup>4</sup> See European Commission, 2021a, pp. 120-134.

<sup>5</sup> The European Commission reports, 2021b, p. 8 and 2021c, pp. 8-9, also point to the absence of effective mechanisms to determine employment status.

European Commission prepared a first proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work (hereinafter: the proposal for a Platform Work Directive 2021).<sup>6</sup> The Directive on improving working conditions in platform work was finally adopted (after a long trialogue between the European institutions) in October 2024<sup>7</sup> (hereinafter: the adopted Platform Work Directive 2024).

However, it was the content of the criteria for the presumption of an employment relationship that constituted the most difficult obstacle to the adoption of the Directive, and the area where the greatest divergences arose during the lengthy trialogue process. As a result, the content of the adopted Directive (2024) differs significantly from the proposal of the Directive in 2021 in the area of the criteria for the presumption of the existence of an employment relationship for platform workers.

In the light of all the above, the research aim of the present paper is to critically analyse and evaluate the content of the adopted Platform Work Directive in terms of the content of the criteria for establishing the presumption of an employment relationship. This will include a comparison of the content of the finally adopted Directive with the initial proposal for a Platform Work Directive in 2021. A key part of the paper will thus also be a detailed analysis of the criteria for establishing the existence of an employment relationship under the proposal for a Platform Work Directive in 2021. The latter will enable an evaluation of the content of the finally adopted Directive (in October 2024).

Methodologically, the paper will address the research objectives by using the basic normative-dogmatic method of legal science to analyse the relevant legal sources at EU level – focusing on the proposed (2021) and adopted (2024) versions of the Platform Work Directive. Chapter 2 will address the content of the criteria for establishing the presumption of the existence of an employment relationship under the proposed Platform Work Directive (2021). Chapter 3 will discuss the content of the criteria for establishing the presumption of an employment relationship of platform workers under the adopted Platform Work Directive in 2024. In Chapter 4, "Findings and Discussion" (which will be essential from the point of view of the author's

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<sup>6</sup> European Commission. Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work. COM(2021) 762 final, 2021/0414 (COD), 9 December 2021.

<sup>7</sup> European Parliament and Council. Directive (EU) 2024/2831 of 23 October 2024 on improving working conditions in platform work. OJ L, 2024/2831, 11. November 2024.

contribution to legal scholarship), the content of the criteria for establishing the existence of a presumption of an employment relationship under the proposal and under the adopted Directive will be critically evaluated. The analysis will highlight the various positive and negative aspects of the final solution adopted (compared to the initial proposal of 2021). It should be stressed that the methodological analysis will be limited to an analysis of the content of the criteria for establishing the existence of a presumption of an employment relationship. There are other issues relevant to the subject of the presumption of an employment relationship which will not be addressed (the procedure for the presumption to be invoked, the role of the supervisory State authorities, etc.). These issues may be the subject of further research.

It is worth noting that the study addresses the most recent legal developments on the issue at EU level and, as a consequence, builds significantly on existing scholarly contributions that have addressed the issue of the content of the criteria for establishing the existence of an employment relationship of platform workers (see above, footnote 3). The topicality of the content of the article also makes it relevant for both legal scholarship and practice. All 27 EU Member States have time until December 2026 to implement the Directive. As a result, the content of the article at hand is highly relevant to the entire scientific and professional circle of (EU) Labour Law professionals across all EU Member States – and potentially more broadly at global level, as the issue of determining the correct employment status of platform workers is “borderless”.

## **2. Criteria for establishing the existence of a presumption of an employment relationship under the proposed Platform Work Directive (2021)**

The proposal for a Platform Work Directive (2021) focuses on the objective of correctly determining the employment status or the existence of an employment relationship (under national law), taking into account the case-law of the CJEU.<sup>8</sup>

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<sup>8</sup> See Article 3 of the proposal for a Platform Work Directive (2021). Furthermore, point 20 of the preamble to the proposal for a Platform Work Directive (2021) also states that the criteria for determining the status of a worker set out by the CJEU in its case-law must be taken into account when implementing the Directive. In this respect, the European Commission refers to cases including C-66/85 *Lawrie-Blum*, of 3 July 1986, ECLI:EU:C:1986:284; C-413/13, *FNV Kunsten Informatie en Media*, of 4 December 2014, ECLI:EU:C:2014:2411; C-229/14, *Balkaya*, of 9 July 2015, ECLI:EU:C:2015:455; and C-692/19, *Yodel Delivery Network Ltd*, of 22 April 2020, ECLI:EU:C:2020:288. We note that the above-mentioned judgments concern the interpretation of the concept of worker in the context of different areas of EU (labour) law, namely: the free movement of workers; the scope of competition law restrictions (the concept of undertaking) under Article 101(1)(b) of the EC Treaty; and the scope of competition law

Furthermore, Article 3 ("correct determination of employment status") provides that the existence of an employment relationship is to be determined primarily on the basis of the facts relating to the actual performance of the work, taking into account the use of algorithms in the organisation of platform work – regardless of how the relationship between the parties is defined in the contract.

Furthermore, the 2021 Directive proposal provides in Article 4 for a legal presumption of the existence of an employment relationship between the digital platform work and the person performing the platform work, provided that certain conditions are met. As set out in Article 4 of the Directive, it is essential for the existence of this presumption that the digital work platform is "*controlling the performance of work*". Furthermore, Article 4 of the proposed Directive (2021) provides that "*control over the performance of work*" shall be presumed to exist if at least two (2) out of the following five (5) criteria are met in a specific case:

- "(a) effectively determining, or setting upper limits for the level of remuneration;
- (b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
- (c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;
- (d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
- (e) effectively restricting the possibility to build a client base or to perform work for any third party."

The preamble to the 2021 Directive proposal also explains in more detail the rationale for adopting these criteria (which point to the supervision of the performance of the work by the platform). The criteria chosen (for assessing the existence of personal subordination) are based on the case law of national courts and the CJEU, and at the same time take into account national concepts of the employment relationship<sup>9</sup>. In this respect, *direction* and *control* (or subordination) are essential

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restrictions (the concept of undertaking) under Article 101(1)(c) of the EC Treaty. For more on the development of the concept of worker at EU level, see Countouris, 2018, p. 214; and Menegatti, 2022, p. 124; Ratti, 2021, p. 189; and Aloisi, 2020, pp. 76-78.

<sup>9</sup> At this point, it is interesting to highlight the example of Portugal, which adopted in May 2023 (after the

defining elements of the employment relationship in the Member States and in the case law of the CJEU. Thus, the legal presumption of an employment relationship (between the platform worker and the platform) should cover situations in which digital labour platforms exercise a certain degree of control over certain elements of the performance of the work.<sup>10</sup>

The criteria thus include concrete elements that show that, for example, the digital labour platform in practice determines rather than merely recommends working conditions or remuneration or both, instructs how the work is to be done, or prevents the person doing the work on the platform from working for potential clients. The supervision of the performance of the work is also considered to be a close check on

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adoption of the proposal for a Directive on platform work (2021)) *Lei n.º 13/2023, de 3 de abril, Altera o Código do Trabalho e legislação conexa, no âmbito da agenda do trabalho digno Diário da República n.º 66/2023, Série I de 2023-04-03, pp. 2-85*. This law was adopted in the framework of the so-called "Decent Work Agenda" (*Agenda do Trabalho Digno*), which, among other things, by means of a new Article 12a, regulated more concretely the criteria for the presumption of employment relationship within the scope of a digital platform (*Presunção de contrato de trabalho no âmbito de plataforma digital*). The purpose of this amendment was to improve the employment situation of platform workers (Ribeiro, 2023). The English translation (taken from Ribeiro 2024a) of the first paragraph of Article 12a (listing and describing the relevant criteria for establishing the existence of an employment relationship) as adopted reads as follows: "An employment relation, between the service provider and the digital platform, shall be presumed when some of the following characteristics occur: a) The digital platform determines the payment for the service that is provided through it, or establishes minimum and maximum limits for that effect; b) The digital platform exercises directive power and determines specific rules, namely, regarding the appearance of the service provider, his/her conduct concerning the service's user, or the performance of the service; c) The digital platform controls and supervises the performance of work, including in real time, or verifies the quality of the performance, namely through electronic means or algorithmic management; d) The digital platform restricts the service provider's autonomy regarding the organization of work, particularly concerning the choice of working or absence periods, regarding the possible acceptance or refusal of tasks, the utilization of subcontractors or substitutes, through the application of sanctions, concerning the choice of clients or the ability to provide services to third parties through the platform; e) The digital platform exercises employers' powers over the service provider, namely disciplinary powers, including the exclusion of future activities in the platform via account deactivation; f) The work equipment and instruments belong to the digital platform or are explored by it through a lease contract." And the relevant Para. 4 states that "The presumption may be rebutted if the platform demonstrates that the service provider performs with effective autonomy, without being subject to its control, power of direction, and disciplinary power." For more on the critical analysis (by the Portuguese legal doctrine) of the above-mentioned part of the adopted Portuguese reform in 2023, see, inter alia: Moreira 2024; Ribeiro 2024a; Ribeiro 2024b; Festi Colturato, Roque 2025; Amado, Moreira 2024). The mentioned doctrine also points out that the reform (enaction of criteria for activation of the employment relationship presumption) has already had an impact on case law, as the Labour Court in Lisbon (February 2024) confirmed the existence of an employment relationship in the case of a delivery driver working for the Uber Eats platform. Even otherwise, Portuguese legal doctrine (including prior to the reform adopted in 2023) has pointed to the lack of labour law protection for persons in precarious forms of employment (including platform workers, workers in tourism, etc.) and bogus self-employment problem in the Portuguese labour market - see, inter alia: Moreira 2022; Roque, do Carmo, Caleiras, de Assis, 2024; Arruda de Souza, 2023; Ribeiro 2022; Duarte, Contreiras, Seabra 2023; Roque, Boavida 2024; da Silva, Mendonça 2024. Lastly, the author would like to point out, for the sake of clarification, that the purpose of this article is not, of course, to discuss and analyse in detail the situation of platform workers in Portugal (the latter is only given as a brief example). For more on these issues in Portugal, see the above mentioned, as well as the rest of the relevant literature.

<sup>10</sup> Platform Work Directive (2021) proposal Preamble, points 24 and 25.

the quality of the results (including by electronic means), which do not merely include the opinions or assessments of the recipients of the service.<sup>11</sup>

However, the criteria should not cover cases where the person is genuinely self-employed. The latter are characterised by: being responsible to their clients for how they carry out their work; being responsible for the quality of the results; being free to choose their own working hours or periods of absence; being able to refuse assignments; being able to use subcontractors or substitutes; and being able to work for any third party. Nevertheless, it is necessary to consider as controlling the performance of work the cases in which those rights (typical of the genuinely self-employed) are in fact restricted by a number of conditions or by a system of sanctions.<sup>12</sup>

### **Chapter 3: Criteria for establishing the existence of a presumption of an employment relationship under the adopted Platform Work Directive (2024)**

The analysed topic represents the largest and most important change in the adopted Platform Work Directive – compared to the proposal for a Platform Work Directive in 2021. The content of the criteria for the existence of a presumption of an employment relationship is no longer set out in the Platform Work Directive itself (as was suggested up to and including December 2023)<sup>13</sup>, but rather the more specific determination of the content of the presumption (criteria) is left to the Member States (subject to some basic starting points under the Platform Work Directive). It remains clear from Article 1 of the adopted Directive that the key purpose of the Directive is to

<sup>11</sup> As *Senatori* points out, *the* above criteria under the proposed Platform Work Directive (2021) are in line with the evolving case law of the CJEU on the concept of worker, which includes elements related to the performance of work under supervision/instruction, functional integration and the economic reality of the relationship. The concrete formulation of the criteria in the proposed Platform Work Directive has certainly been influenced by the jurisprudence of national courts in the field of platform work (*Senatori*, 2022, p. 80).

<sup>12</sup> Recital 25 of the preamble to the proposal Platform Work Directive (2021) proposal.

<sup>13</sup> It is worth noting that, it became clear at the end of December 2023 that the proposed Directive could not obtain sufficient political support from the representatives of the Member States in the Council of the EU. As a result, in January 2024, the Belgian Presidency of the Council of the EU started to search for a new compromise agreement that could obtain sufficient political support from the Member States. At practically the last moment (before the upcoming European Parliament elections), the (Member States') Employment and Social Affairs Ministers of the EU Council endorsed on 11 March 2024 the agreement reached (dated 8 February 2024) on the text of the Platform Work Directive by the Presidency of the EU Council and the negotiators of the European Parliament. The adopted proposal is the most limited in terms of the content of the criteria for establishing the presumption of an employment relationship of platform workers. See Council of the European Union, 2024.

improve working conditions and the protection of personal data in platform work, inter alia, by introducing measures to facilitate the determination of the correct employment status of persons performing platform work.

Article 4 ("correct determination of employment status") of the adopted Platform Work Directive requires Member States to have in place adequate and effective procedures to verify and ensure the correct determination of the employment status of persons performing platform work, in order to establish the existence of an employment relationship as defined in the law, collective agreements or practice in force in the Member States, taking into account the case-law of the CJEU. This includes the application of the presumption of the existence of an employment relationship (under Article 5 of the Platform Work Directive). In this respect, it further follows from Article 4 of the Platform Work Directive that the existence of an employment relationship shall be determined primarily on the basis of the facts relating to the actual performance of the work, including the use of automated monitoring or decision-making systems in the organisation of the platform work, irrespective of how the relationship is defined in any contractual agreement that may have been concluded between the parties involved.<sup>14</sup>

As regards the content of the legal presumption of an employment relationship, Article 5 of the Platform Work Directive merely states in more abstract terms (as opposed to the Platform Work Directive proposal (2021)) 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 where facts indicating direction and control, in accordance with national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice, are found"*.<sup>15</sup> If the platform wishes to challenge the legal presumption, it must prove *"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 States, with consideration to the case-law of the Court of*

<sup>14</sup> Moreover, it should be noted that the importance of taking into account the platforms' use of algorithms is also underlined in the preamble. As is clear from point 8 of the preamble to the Platform Work Directive, automated monitoring or decision-making systems driven by algorithms are increasingly replacing the managerial functions normally performed by managers in companies, e.g. assigning tasks, determining payment for individual tasks and work schedules, giving instructions, evaluating work, providing incentives or imposing sanctions. In particular, digital labour platforms use such algorithmic systems as a standard way of organising and managing platform work through their infrastructure.

<sup>15</sup> In this context, it is worth noting recital 31 of the Platform Work Directive, where it is pointed out that "control and direction" can take various concrete forms, as the platform economy model is constantly evolving. Thus, it is possible that the digital labour platform not only exercises direction and control by direct means, but also through the use of sanctions or other forms of harmful conduct or pressure.

*Justice*"<sup>16</sup>.

In the light of the above, Member States have a further obligation to establish to this end an effective rebuttable presumption of the existence of an employment relationship, which facilitates the procedure in favour of persons performing platform work. In this context, States must ensure that this legal presumption does not increase the burden of claims on platform workers (or their representatives) in proceedings to establish their employment status.<sup>17</sup>

#### **Chapter 4: Findings and discussion – Analysis of the criteria for establishing the existence of a presumption of an employment relationship under the proposed Directive (2021) and under the adopted Platform Work Directive (2024)**

This chapter will critically analyse and evaluate some of the similarities and differences between the proposed Directive (2021) and the adopted Platform Work Directive.

Common to the proposed and adopted Directive is that it is essential to establish that the platform directs and controls the performance of the work of the platform worker (the existence of the worker's subordination). However, the specificity of the proposed Directive (2021) is the further specification of the criteria for which the performance of work is deemed to be under the control and direction of the digital labour platform. And more importantly, the proposed Directive (2021) provided specific guidance on the quantitative and qualitative evaluation of those specific criteria.

The definition of the criteria for establishing the existence of an employment relationship (in the 2021 proposal) explicitly takes into account that the platform will often not give explicit instructions on how to organise the work, how to carry out the work, how to determine the level of remuneration, etc. As a consequence, the very wording of the criteria explicitly emphasises the importance of identifying the "real impact" of the platform's work. In the light of the criteria laid down (under points a, d

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<sup>16</sup> Article 5(1) of the Platform Work Directive.

<sup>17</sup> Article 5(2) of the Platform Work Directive. With regard to the specific procedures for implementing the legal presumption, the Directive sets out further guidelines to establish a framework of supporting measures to ensure effective enforcement and compliance with the legal presumption at national level (see Articles 5 and 6 of the Platform Work Directive).

and e), it is therefore to be determined whether the platform: effectively determines or sets upper limits on the level of remuneration; effectively restricts the freedom to organise work, including by means of sanctions, in particular as regards the choice of working hours or periods of absence, the acceptance or refusal of assignments, or the use of subcontractors or substitutes; effectively restricts the possibilities of building up a client base or of carrying out work for any third party.

Furthermore, the quantitative dimension of the evaluation of these criteria is also extremely important. The presumption of the existence of an employment relationship does not require cumulative fulfilment of all of the above criteria, but of (any) two of the five criteria. For example, it is not compulsory (or a necessary condition) for the existence of an employment relationship to be established that criterion (d), which relates to the issue of the free organisation of working time, is met.<sup>18</sup> This means that the 2021 proposal reflects very strongly the fact that the traditional criteria relating to the existence of subordination of the worker could be replaced by other criteria justifying the existence of an employment relationship. Such a criterion is, in particular, *"effectively determining, or setting upper limits for the level of remuneration"* (point a), which reflects the integration of the platform worker into the framework of the platform in a business sense<sup>19</sup>. However, the remaining criteria also take account of the fact that the attachment to instructions may also be linked to other aspects of the performance of the work (other than, for example, instructions to perform the work at certain time). This is reflected in particular in criterion (b): "requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work"<sup>20</sup>. Similarly, the criterion under point c (*"supervising the performance of work or verifying the quality of the results of the work including by electronic means"*) reflects the general context of the fact that the platform can also monitor the performance of the platform worker on a continuous basis in real time (e.g. via GPS). All the above criteria thus take into account the specific context of the platform work (or platform business model), which

<sup>18</sup> *De facto* restrictions on the freedom to organise work, including sanctions, in particular on the choice of working hours or periods of absence, the acceptance or refusal of assignments, or the use of subcontractors or substitutes.

<sup>19</sup> In light of the above, the platform worker is essentially not acting as an independent service provider in the market – or exercising control over key business decisions.

<sup>20</sup> It should be noted that point 25 of the preamble to the proposal for a Platform Work Directive (2021) explicitly states that measures or rules (instructions) *"required by law or necessary to protect the health and safety of the recipient of the service"* are not to be considered as supervision of the performance of the work.

is that the platform determines the content and the operational flow of the service provided by the platform worker.

We also note that, in order to establish the existence of subordination of the worker, it is not necessary that all the criteria justifying the existence of subordination (control and direction) are expressed – it is sufficient if some of them are expressed. The concept of the legal presumption essentially implies that all of the five criteria are treated as equivalent. None of them is of greater or lesser qualitative or quantitative weight in establishing the existence of an employment relationship. As is already apparent from the preceding paragraph, this takes account of the fact that the existence of subordination (work under direction and control) can be established by taking into account various circumstances and criteria.

Finally, it is worth pointing out that the adopted version of the Platform Work Directive is indeed different from the 2021 proposal analysed above. As explained in more detail in the previous chapter (3.), the final version of the adopted Directive omits the specific criteria which, if met (more precisely, at least two of the five criteria), give rise to a presumption of the existence of an employment relationship. The more specific content of the criteria for the existence of a presumption of an employment relationship is thus left to the Member States<sup>21</sup>. Nevertheless, the adopted version of the Platform Work Directive also starts from substantially similar substantive premises as the 2021 proposal. Also the adopted Directive highlights the importance of taking into account the use of automated monitoring and decision-making systems in platform work. As Article 4(2) of the Platform Work Directive provides, the existence of an employment relationship "shall be *guided primarily by the facts relating to the actual performance of work, including the use of automated monitoring systems or automated decision-making systems in the organisation of platform work, irrespective of how the relationship is designated in any contractual arrangement that may have been agreed between the parties involved.*"

In the light of the above, the author deduces (in the following paragraphs) some of the strengths and weaknesses of the content of the criteria for establishing the

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<sup>21</sup> Article 5 of the Platform Work Directive merely states in more abstract terms (as opposed to the proposal for a Platform Work Directive (2021)) that "*the contractual relationship between a digital work platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship if facts are established which show that there is control and direction in accordance with national law, collective agreements or practice in force in the Member States, taking into account the case-law of the Court of Justice of the EU*".

existence of a presumption of an employment relationship under the proposed Directive (2021) and under the adopted Platform Work Directive

A significant advantage of the 2021 Directive proposal is that the concrete listed five criteria represent a significant advance in the quantitative and qualitative evaluation of the criteria for establishing the existence of an employment relationship of platform workers. The specific nature and organisation of the work that characterises platform work has also been taken into account in the formulation of the content of the criteria. Setting the content of the presumption at European level would also reduce the disparities between the situations in the different Member States. Nonetheless, according to the adopted Directive (2024) the Member States will have to determine the content of the presumption of an employment relationship by themselves. Yet, the criteria analysed and evaluated under the 2021 proposal are still relevant as a possible model for the national legislator (and for the national courts in the development of future case law in the field of platform work). It is through the criteria mentioned above that the existence of a sufficient degree of direction and control necessary to establish the existence of an employment relationship is established.

In addition to the advantages identified, it is also worth noting the disadvantages of such a legal presumption based on more specific criteria (along the lines of the 2021 Platform Work Directive proposal). The risk is that over time digital labour platforms may 'circumvent' the more specifically denoted criteria. Therefore, over time it may be justified to give a greater weight to other criteria justifying the existence of an employment relationship (or a sufficient degree of direction and control). Digital labour platforms may (again and again) change their business models and their rules and modes of cooperation with platform workers, and thus repeatedly 'escape' from the more specific criteria set out. If the criteria were precisely defined in the Directive, any changes would again require political consensus. The latter could be extremely difficult – taking into account all the different stakeholders' interests in the regulation of platform work.

Thus, on the other hand, a possible advantage of the content of the adopted Directive (2024) is precisely that it opens up other possibilities of adopting (combinations of) criteria for the fulfilment of the presumption of the existence of an employment relationship of platform workers. In any event, it must remain essential that the criteria mentioned justify the existence of a sufficient degree of subordination of the worker. It is therefore essential to ensure that technological changes alone,

which makes possible new ways of organising the work process, does not lead to the exclusion of (platform) workers from the system of labour law protection. These changes must be taken into account when interpreting fundamental labour law concepts.

On the other hand, it is questionable whether the provisions of the adopted Platform Work Directive (2024) will help to remove the ambiguity in determining the employment status of platform workers (which was one of the key objectives of the adoption of the Directive). The level of harmonisation is much looser than in the 2021 Directive proposal. It is to be expected that Member States will introduce very different legal solutions and that the content of the legal presumptions will differ. As a consequence, the situation of platform workers working for the same platform (e.g. Uber) may also differ from one Member State to another. Thus, from high initial expectations and ambitions (to clarify EU-wide the determination of the correct employment status of platform workers), only limited effects may be achieved in practice. The CJEU, which is competent to interpret the provisions of the Platform Work Directive, will certainly play an important role in the coming years. The national rules adopted will therefore in any event have to meet at least the minimum standards of the Directive.

Finally, to conclude, it is worth pointing out that it is premature to assess the concrete effects of the adopted Directive at national level (and in practice). Member States have time until 2 December 2026 to implement the Directive. Only then the legal presumption would be put into practice and the first potential litigations are to be expected. A step further ahead is the first preliminary ruling question to be referred to the CJEU by national courts. As a result, these developments will need to be monitored and further legal research will need to be carried out in the coming years. It will be important how national courts (and the CJEU) are going to take into account the specific technological changes in the world of work that are characteristic of platform work and interpret the relevant criteria for establishing a presumption of the employment relationship in platform work. Given the abstract content of the adopted Platform Work Directive, it seems that the courts will once again play a decisive role in assessing the criteria for establishing an employment relationship. After a lengthy trialogue, the EU institutions have not been able to reach a political compromise on the more concrete content of the criteria for establishing the presumption of the existence of an employment relationship, which would have already been defined at European

level. Thus, the more than 10-year-long saga of judicial decisions on the employment status of platform workers is expected to continue for a long time to come.

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**Universidade Portucalense Cooperativa de Ensino Superior, CRL**

Rua Dr. António Bernardino de Almeida, 541 - 4200-072 Porto

Email: [upt@upt.pt](mailto:upt@upt.pt)