Global Workplace Law & Policy

An employment presumption for platform work – the Portuguese experience

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1. **Introduction: the need for a new employment presumption**

The Portuguese Labour Code was recently amended through Act 13/2023, of 3 April (known as the "Decent Work Agenda"), which entered into force on 1 May 2023. This reform was driven by several concerns, namely the precarious situation of platform workers. And, precisely, one of its innovative aspects was the introduction of an employment presumption specifically aiming at this reality, with the purpose of facilitating the acknowledgement of employment relations between platforms and their workers.

In fact, until now, the Portuguese legal system only possessed a traditional, "pre-digital" employment presumption (present in Article 12 of the Labour Code) that was hardly suitable to

frame these new ways of working (since it alludes to circumstances such as the activity being carried out in a place belonging or determined by the beneficiary or the compliance with a schedule determined by the latter, among others).

The new presumption (enshrined in Article 12-A of the Labour Code) was, therefore, a long-awaited development. And, despite its shortcomings – such as its complexity and length, as well as the use, at points, of an inadequate legal technique –, it is an advanced solution, given its wide field of application, since it potentially encompasses all kinds of platforms through which work is provided, both online and offline.

2. The presumption's outline

In order to activate the presumption, the claimant must prove the presence of, at least, two of the following characteristics:

1. *The digital platform determines the payment for the service that is provided through it, or establishes minimum and maximum limits for that effect;*
2. *The digital platform exercises directive power and determines specific rules, namely regarding the appearance of the service provider, their conduct before the service's user, or the performance of the activity;*
3. *The digital platform controls and supervises the performance of the activity, including in real time, or verifies the quality of the performed activity, namely through electronic means or algorithmic management;*
4. *The digital platform restricts the service provider's autonomy regarding the organization of work – particularly concerning the choice of the working schedule or of absence periods –, the possibility of accepting or refusing tasks, the use of subcontractors or substitutes, through the application of sanctions, the choice of clients or the ability to provide services to third parties through the platform;*
5. *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;*
6. *The work equipment and instruments belong to the digital platform or are explored by the latter through a lease contract.*

Even though there had already been discussions and proposals at national level, prior to the Commission's Proposal for a Platform Work Directive, it is quite clear that this document heavily inspired the final wording of the Portuguese presumption. However, the legal technique used in the national instrument was not exemplary. Particularly, this mechanism has been criticized for using expressions that are typical of the existence of an employment contract (such as directive power, employers' powers, disciplinary powers), whereas presumptions should refer to known facts that allow the establishment of unknown ones.

In addition, these powers, which are the most visible aspects of an employment contract, must still be invoked with at least another characteristic to activate a presumption that is, no less, rebuttable – similar criticism was already drawn regarding the indicators contained in the Commission's proposal.

It should also be noted that, ordinarily, if enacted (and not rebutted), an employment presumption leads to the application of the Labour Code to the employment relation at hand. However, the

Portuguese Legislator, invoking the specificities surrounding this way of working, determined the applicability of provisions that are compatible with the nature of the activity at stake (exemplifying domains where that is the case, such as accidents at work, contract termination, holidays, among others). This means that there will be a case-by-case assessment (with the associated legal insecurity) as well as the stipulation of fragmented statutes for these workers.

3. **Possibility of rebuttal**

If the presumption is activated, the burden of proof is transferred to the platform who will be able to rebut it, if it proves one of two things:

- That, despite the proved circumstances, the service provider works with effective autonomy, or
- That the work is provided not to the platform, but to another legal entity (an intermediary).

If the platform prevails on the existence of an intermediary, there are two safety features that can play a significant anti-fraud role. Firstly, it will be up to the courts to decide who is the employer. In addition, the potential intermediary will be jointly liable with the platform regarding the worker's claims arising from the employment contract (as well as from its infringement or termination), the corresponding social security contributions, and the payment of fines due to administrative offences, pertaining to the last three years.

4. **Ride hailing services**

Until now, the Portuguese legislator had only addressed ride hailing services, through Act 45/2018, of 10 August (often designated as the "Uber Law").

However, this regulation took a singular approach, determining that ride hailing service operations take place between four entities: the platform, the client, the driver, and the hailing service operator. The latter is the legal person that performs the transportation service through drivers hired for that effect. And, according to this diploma, the driver will only be legally bound to this operator, not to the platform itself.

This is an intricate and opaque solution that is generally considered to benefit platforms, rather than drivers, and that overlooks the powers that platforms hold over drivers. Furthermore, this diploma prevented drivers from working directly for platforms, as they had done until then, leading to the proliferation of companies functioning as intermediaries, without any added benefit.

This scenario became even blurrier with the approval of the new employment presumption for platform work, since it is expressly stated that this mechanism will also apply to ride hailing services (Article 12-A, no. 12). Given the peculiar legal configuration assumed by Act 45/2018, the question now is how the presumption will apply to these cases. Ideally, the Uber Law should be amended, allowing drivers to be directly at the service of the platform. However, given the current scenario of political instability in Portugal, this may not happen in the near future. In the meantime, one possible solution is to carry out a corrective reading of the Uber Law, allowing a new category of drivers, directly at the service of the platform (an avenue that, nevertheless, is not ideal, since it may lead to legal insecurity and to diverging court decisions).

5. **Platform reactions and first court cases**

Even before the entry into force of the new presumption, platforms announced adjustments to their model to bestow greater flexibility and autonomy to their partners (namely, by removing ratings based on satisfaction, acceptance or cancelation of services, or by allowing couriers to designate substitutes). The aim behind these changes seems to be to avoid the activation of the presumption. It is yet to be seen if such measures will be successful to that effect.

In the meantime, the first decision from Portuguese courts regarding platform work came out in early February 2024. The case was presented before the court by the Public Prosecution Service, following an inspection action from the Authority for Working Conditions. It concerned a courier working for Uber Eats and the court upheld the existence of an employment contract between both, based on the new presumption (the first five characteristics were considered proven). However, due to a procedural mistake (apparently, Glovo, rather than Uber Eats, was summoned to the process), the platform had already publicly stated that it will request the nullification of this decision. Even though there are other cases pending, the unfolding of this particular one is now uncertain, particularly because Uber Eats will now have the chance to present its arguments, which may otherwise convince the court.

In any case, while it is still soon to assess the efficacy of the new employment presumption, it is clear that this is neither a perfect nor a final solution. Nevertheless, it is an important first step towards a fairer regulation of platform work and it has decisively contributed to the modernization of Portuguese labour law, bringing it up to speed with the trends observed in other national legal orders, as well as at European/international level.

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