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European Commission's proposal for a directive on improving working conditions in platform work

IRU Position on the European Commission's proposal for the Platform Workers' Directive

I. IRU POSITION

The International Road Transport Union (IRU) appreciates the importance of the European Commission's (EC) initiative to address the misclassification of people working for digital labour platforms (DLPs). IRU fully supports workers' rights, fair working conditions, and access to necessary labour and social rights protections for all workers, including platform workers. As a responsible social partner for the road transport sector in the EU social dialogue committee for road transport, we recognise that the local nature of transport facilitated by platforms is an essential component of drivers' work, and is unlikely to change drastically in the future. Furthermore, according to the subsidiarity principle governing EU law making, decisions should be made at the level closest to the citizen. Therefore, IRU considers that the EC's proposal for a Directive on Improving Working Conditions in Platform Work (the Proposed Directive) is not an adequate legal instrument to address this issue. A non-binding recommendation, interpretation, or guidelines respecting the principle of subsidiarity would be a better approach to reflect the local nature of the majority of DLPs. IRU specifically calls for the following:

Rejection of the Proposed Directive and reconsideration of the Union tool to address this matter in a non-binding manner, taking into account the national competence on the definition of workers and employment.

Should the European Union choose the means of non-binding recommendations to guide the national choices for more specific rules, such guiding principles could depart from the text of the Proposed Directive but improve the content as follows:

– **A more accurate definition of DLPs and a narrower scope**. The Proposed Directive provides an excessively vague definition of the DLPs and a very broad scope, which disregards the differences that exist in the DLP market and the local nature of DLPs' activity. The one-size-fits-all approach that includes almost all DLPs in the market is not appropriate. More specifically, this should include:

- Specifying the volume of operations that the DLP has to conduct online in order to fall within the scope. In this respect, it is paramount to add "internet-based" to the definition to distinguish between companies that offer their commercial services primarily through the use of internet and web-based technologies, as opposed to regular brick and mortar companies such as commercial transport operators that merely use digital tools to facilitate and improve efficiency in their business operations.
- Adding the facilitation of online payment by the platform as an additional element to include a DLP within the scope.

- Making a distinction between large multinational companies and small locally operated companies and limit the scope to the former category (e.g. revenue, and number of customers).

– **Refined criteria to establish employment**. The Proposed Directive sets out imprecise criteria to establish the true nature of a labour relation. These criteria should be refined to become precise, predictable and enforceable in order to accommodate different scenarios in the market. Criteria as defined now cover the majority, if not all, employment relationships in the market, and do not account for the diversity that exists in the DLP market. More specifically, this should include:

- Replacing vague wording such as “effectively determining” or “effectively restricting” with precise references to what “effectively” means in this context.

- Increasing the number of criteria that must be met from 2 to 3 (out of a total of 5) to create the presumption of an employment relation to increase legal certainty.

– **Clarifying the role of social partners**. Any binding or nonbinding EU framework on platform workers should clearly define the role that the social partners will play in the future implementation or discussions on the topic.

II. ANALYSIS

1. Background

The Proposed Directive is a response to a surge in the number of court cases involving the misclassification of digital platform workers, i.e. people working for large, cross-border DLPs. According to the EC, the EU's DLP economy has grown exponentially in the last five years, with over 500 DLPs dealing with approximately 28 million workers, out of which an estimated 5.5 million are at risk of misclassification of their employment status[1]. Such misclassification impacts the ability of workers to access labour and social rights to which employees are normally entitled.

The Proposed Directive intends to:

– ensure that persons who work through DLPs obtain correct employment classification;

– govern algorithmic management of work regularly performed by DLPs; and

– improve platform transparency and traceability, including cross-border work.

2. The competence to legislate on the classification of employment status should remain national

Each EU Member State's labour markets, social security systems, and tax regulations are different. By proposing a directive to cover the employment status of platform workers, the EC overlooks the principle of subsidiarity which seeks to ensure that decisions are made as close to the citizen as possible, in light of the options available at the national, regional, or local level, prior to any action at the EU level.

A number of EU Member States have enacted legislation or issued court decisions defining employment criteria at the national level. For example, Greece set out criteria for the determination of self-employed status. Spain and Belgium have also decided on how to determine the employment status of platform workers. Therefore, such action should continue to be taken at the national level, which is the traditional scope of competence in employment affairs.

[1] See the Platform Workers Directive, *Explanatory Memorandum*, p.2

Consequently, **IRU calls for a rejection of the Proposed Directive** and reconsideration of the Union tool to address this matter in a non-binding manner. A non-binding recommendation, interpretation or guidelines respecting the principle of subsidiarity would be a better approach.

Whether the Proposed Directive is replaced by soft law incorporating the Proposed Directive's content, or EU legislators decide to proceed with a directive despite compelling arguments against it, the content of the Proposed Directive should be adjusted as follows.

3. The definition and scope of the Proposed Directive are too broad

According to research by the EC Joint Research Centre (JRC), conducting work through DLP includes: "*providing services via online platforms, where you and the client are matched digitally, and the payment is conducted digitally via the platform*[2]*".* However, this specification is not reflected in the text of the Proposed Directive.

The EC states that 100 court cases and 15 administrative procedures have taken place over the past years, which triggered an intervention at the EU level. For example, a Spanish court has ruled that drivers for the food delivery company Glovo were employees. Consequently, the Madrid government has since announced legislation confirming the status of delivery riders as salaried employees[3]. A court in Belgium ruled that UberX could classify Belgian drivers as self-employed. These are just few examples to illustrate that the court cases dealing with platform workers typically deal with the business models of a new type of market entrants, namely large multinational companies. These multinationals tend to run their business via an app or website, and run it in a way that allows for the setting up of initiatives or the sending of nudges, shaping workers' behaviours without issuing mandatory orders (e.g. customer rating).

The business model, popularly referred to as the gig economy business model, in which a low-wage workforce performs low-skilled but highly flexible episodic jobs, has often harmed a large number of local market players, such as taxis, small cars-for-hire companies, dispatch centres, and even cities. Increasingly, authorities have expressed concerns regarding tax evasion and the exclusion of drivers working for gig economy companies from social security schemes.

IRU welcomes the EC's initiative to curb practices that are contrary to European values and Member States' well established taxation and social security systems. However, in this case, the scope is overly broad, all-encompassing, and based on a one-size-fits-all approach that ignores market differences.

The Proposed Directive vaguely and broadly defines DLP as "any natural and legal persons providing a commercial service, at least in part, through electronic means (e.g. website or a mobile application), at the request of the recipient of the service and involves the organisation of work performed by individuals". The suggested definition will create legal uncertainty and make it impossible for Member States to enforce the new rules.

IRU calls for:

a) Setting a more specific DLP definition:

- As some companies (such as taxi dispatch centres) carry out part of their activities online and part via other means (e.g. traditional phone calls), the text should specify the volume of DLP operations conducted online, in order to avoid ambiguity and quantify the amount of work that is organised electronically. In this respect, it is paramount to add "internet-based" to the definition to

[2] See Digital Labour Platforms in Europe: Numbers, Profiles, and Employment Status of Platform Workers, JRC, 2019, p.4

[3] In the Glovo case, the decision was largely based on the fact that Glovo issued invoices on behalf of the Glovo riders, the fees were set by Glovo, and Glovo limited delivery time (60 minutes) and controled activity of its riders by geolocation (Judgement N. 805/2020).

distinguish between companies that offer their commercial services primarily through the use of internet and web-based technologies, as opposed to regular brick and mortar companies that merely use digital tools to facilitate and improve efficiency in their business operations.

- Add the facilitation of online payment by the platform as an additional element to identify if an online platform falls within the scope, provided the online payment method is strictly required by the platform for the registration and the platform acts as an intermediate for the payment.

b) Making a distinction between large multinational companies and small locally operated companies, and limiting the scope to the former category. Such differentiation would limit the scope to only those DLPs that have a genuine impact on the internal market, while exempting small locally operated companies from a number of obligations, to minimise excessive administrative and procedural burdens, and avoid stifling local business innovation and development. Such limitation could be based on aggregated revenue, number of customers, and in particular number of operating countries. According to Art. 153 paragraph 2 (b) of Treaty on the Functioning of the European Union a Directive should avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

Clarifying the definition of companies in scope and out-of-scope through exemptions, as proposed by the IRU, would provide a better and more balanced approach to achieve the goal of regulating a truly unusual market distortion whilst protecting companies that operate locally. It would also enable more targeted enforcement on the real issue.

Furthermore, if the IRU's suggested exemptions were implemented, this method would be more in keeping with the subsidiarity concept, in which out-of-scope enterprises would be governed at the local or national level, which is closer to the citizens.

4. The list of criteria is too broad

Article 4 of the Proposed Directive includes a list of criteria for determining whether or not DLPs control the work performance, as follows:

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 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; and

e) effectively restricting the possibility to build a client base or to perform work for any third party.

The legal presumption of employment relationship would be applied if at least 2 out of the 5 criteria are fulfilled. In such a case the platform worker would be considered employee by default, with all accompanying labour rights and social benefits. The DLP can rebut this legal presumption, but it carries the burden of proof.

IRU calls for:

a) Improving the employment criteria to make them precise, predictable and enforceable in order to accommodate different scenarios that appear in the market. IRU considers the list of criteria to be far too broad and open to interpretation. Thus, it does not provide the necessary legal certainty and predictability. Wording like "effectively determining" or "effectively restricting" are

very broad concepts that covers a wide range of DLP behaviours. Furthermore, it is not clear to what extent would such criteria be applied in more regulated sectors (e.g. the taxi industry) which are obliged under the law to fulfil some of these criteria, frequently more than two, and as such would fall in scope by default.

b) Increasing the number of criteria that must be met, as it would result in a more balanced scenario that is not based on a catch-all approach (e.g. meeting 3 rather than 2 criteria for the legal presumption to take effect).

By using broad classification criteria, the EC risks not only legal uncertainty, but also stifling innovation, which is contrary to the EC's digital transition goals. There would be no incentive for new start-ups to enter the market, nor resources for existing start-ups to scale up and use innovative digital solutions. On the contrary, the EC would be incentivising service providers not to use digital tools to organise and manage their businesses.

5. Enforcement of the new rules and the role of social partners

Where social partners jointly request, Member States may entrust social partners with the implementation of the new rules. However, the proposal does not include a framework for such collaborative implementation.

IRU calls for:

Developing a framework for future involvement of social partners in the implementation of the new rules.

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